Neutral Citation Number: [2023] EWHC 2585 (Ch)

Case No: CR-2023-005314

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

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

Date: 19 October 2023

Before :

MR DAVID HALPERN KC SITTING AS A HIGH COURT JUDGE

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IN THE MATTER OF LYHFL LIMITED
AND IN THE MATTER OF THE INSOLVENCY ACT 1986
AND IN THE MATTER OF THE INSOLVENCY RULES 2016
Between :

ABIGAL BOURA — **Claimant**

- and –
LYHFL LIMITED

Defendant

- -
- -

Mr Geoffrey Zelin (instructed by **HCR Hewitsons**) for the Applicant
Mr James Knott (instructed by **PDT Solicitors LLP**) for Mr Leigh Harmer, a director of LYHFL Limited

Hearing date: 17 October 2023

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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.
This judgment was handed down remotely by circulation to the parties' representatives by email and release to the National Archives. The date and time for hand-down is deemed to be 10:30 am on 19 October 2023

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MR DAVID HALPERN KC SITTING AS A HIGH COURT JUDGE

Mr David Halpern KC :

1. This is an application by Ms Abigal Boura, a director of LYHFL Limited (the "**Company**"), seeking the appointment of an administrator in respect of the Company. She seeks the application as "*the director of the company under paragraph 12(1)(b) of Schedule B1*". The Company is not represented, but the application is opposed by Mr Leigh Harmer, the other director of the Company. He does so on two principal grounds, firstly that one of two directors has no standing to apply for an administrator and secondly that the Company is able to pay its debts and it not likely to become unable. I heard argument on the first issue alone because, if Mr Harmer is correct, then that would dispose of the application.

2. For the reasons set out below, I have concluded that one of two directors has no standing to apply to court for the appointment of an administrator in circumstances where there is no majority of the board and no valid resolution of the board in favour of the application.

3. As this is a decision on a point of law, I am able to state the relevant facts very briefly. Ms Boura and Mr Harmer are the sole directors and shareholders of the Company. They were also in a personal relationship which ended acrimoniously in around November 2021. Perhaps unsurprisingly, the relationship as directors has also become acrimonious. Each side says that the other has acted in breach of their fiduciary duties as a director. Ms Boura says that the Company is or is likely to become unable to pay its debts. Mr Harmer denies this and says that Ms Boura is attempting to use the application to engineer a quasi pre-pack without board approval.

4. It is unnecessary for me to make any findings of fact on any of these issues. I merely note that, in a case such as this, if one director has standing to apply to court for an administration order and the other director opposes the application, I can see the potential for each side to use this as a further weapon in their dispute.

5. The following paragraphs of Schedule B1 to the Insolvency Act 1986 are relevant:

   (1) Para.11:

   > "*The court may make an administration order in relation to a company only if satisfied –*
   >
   > *(a) that the company is or is likely to become unable to pay its debts; and*
   >
   > *(b) that the administration order is likely to achieve the purpose of administration*."

   (2) Para.12(1):

   > "*An application to the court for an administration order in respect of a company … may be made only by –*

(a) the company

(b) directors of the company"

There are three further categories of applicant listed in para.12(1).

(3) Para.22, dealing with appointments out of court, states:

> "*(1) A company may appoint an administrator.*
>
> *(2) The directors of a company may appoint an administrator.*"

(4) Para.105:

> "*A reference in this Schedule to something done by the directors of a company includes a reference to the same thing done by a majority of the directors of a company.*"

6. Mr James Knott, who appeared for Mr Harmer, submitted that "*the directors*" in para.12(1)(b) means all or a majority of the directors acting pursuant to a valid board resolution, and that the word "*only*" means that the court has no power to hear the application unless it is made by a person or persons who fall within one of the categories in para.12(1).

7. Mr Geoffrey Zelin, who appeared for Ms Boura, invited me to follow the decisions of Marcus Smith J in *Re Brickvest Ltd* [2019] EWHC 3084 (Ch) ("***Brickvest***"), which was itself followed by Fancourt J in *Re Nationwide Accident Repair Services Ltd* [2020] EWHC 2042 (Ch) ("***Nationwide***"). In both cases the court appointed administrators on the application of the sole director.

8. Mr Zelin submitted as follows:

(1) Subparas (a) and (b) of para.12(1) make it clear that "*the directors*" must mean something other than "*the company*". Building on this foundation, he submitted on the basis of the Interpretation Act 1978 that the plural includes the singular and hence that the phrase "*the directors*" includes one of two directors. He accepted that, if this was the case, then logically it is not limited to cases of deadlock but must also include one of three or more directors.

(2) As for the word "*only*", he relied on *Brickvest*, where it was held that para.12(1) does not create a jurisdictional barrier, the only jurisdictional threshold being in para.11.

(3) Any defect arising from the application being made by one of two directors could be cured by r.12.64 of the Insolvency Rules 2016, which states:

> "*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.*"

(4) He accepted that a narrow approach was needed in relation to appointments out of court, because these were not subject to the court's discretion to grant or refuse the order, but he submitted (again quoting *Brickvest*) that para.12 should be construed so as to enlarge, rather than constrain, the powers of the court in a case where it is satisfied that the criteria in para.11 are met.

9. Mr Knott met these detailed points as follows:

(1) His construction of para.12(1)(b) and para.105 was supported by the Insolvency Rules 2016:

(a) R.3.3(2)(b)(ii) requires the application to contain a statement as to whether it is being made by "*the directors of the company under paragraph 12(1)(b) of Schedule B1*".

(b) R.3.6(1)(b) states that, if the application is made by the directors, a witness statement must be made stating that it is made "*on behalf of the directors*". In the present case the witness statement

(2) If Mr Zelin was correct, then anybody could apply to court for the appointment of an administrator.

(3) He relied on *Re Equiticorp International plc* [1989] 1 WLR 1010, a decision of Millett J ("***Equiticorp***"), *Minmar (929) Ltd v Khalastchi* [2011] BCC 485, a decision of Morritt V-C ("***Minmar***") and *Re BW Estates Ltd (No 2)* [2018] Ch 511, a decision of the Court of Appeal ("***BW Estates***"). I will now look at these cases.

10. S.9 of the Insolvency Act 1986 as originally enacted (the predecessor to para.12) permitted "*the company, or the directors*" to petition the court for the appointment of an administrator. In *Equiticorp* a resolution to petition the court was passed by the board, but two of the seven directors were not present at the meeting. Millett J explained that in *Re Emmadart Ltd* [1979] Ch 540 Brightman J had held, contrary to what was previously thought, that the board of directors of a company had no power to authorise the presentation of a winding-up petition. In order to bring the law into line with the previous practice, s.124 of the 1986 Act empowered "*the company, or the directors*" (among others) to present a winding-up petition, and the same wording was used in s.9. (In my judgment this provides the historical explanation for the inclusion of "*the directors*" as well as the company in para.12(1) and provides no support for Mr Zelin's submission that the wording must have been intended to include a single director where the board is deadlocked.)

11. Millett J concluded as follows:

> "*I am perfectly prepared to read the words "the directors" in section 9 as meaning all the directors. Once a proper resolution of the board has been passed, however, it becomes the duty of all the directors, including those who took no part in the deliberations of the board and those who voted against the resolution, to implement it; and even in the absence of the specific authorisation to any and every director to take such steps as are necessary to implement it, which is contained in this particular resolution, that remains the legal position.*
>
> *In my judgment, therefore, once a resolution of properly convened board of directors to present an application under section 9 for the making of an administration order has been passed, any director has authority to make the application on behalf of all of them. Accordingly, in my judgment, this is a properly presented application, made on behalf of the directors, and the court has jurisdiction to entertain it*."

12. Thus *Equiticorp* decided in relation to s.9 that the phrase "*the directors*" does not require unanimity among the directors; nevertheless it is necessary to have a resolution passed by a majority at a properly constituted board meeting. Although para.12 is a new provision, it is modelled on s.9.

13. In *Minmar* the issue was whether an appointment out of court was valid in accordance with para.22 when there had not been a proper board meeting. At [43] Morritt V-C considered para.105 and noted that it applied to various paras in the Schedule, including para.12(1)(b) and para. 22(2). He continued at [44]:

> "*Plainly, in each of those cases the relevant operation may be performed if authorised by a majority of the board at a duly constituted directors' meeting. The question is whether they may be performed by a group of individuals who are in fact directors and together constitute a majority of the board but who have not complied with the provisions of the company's articles so as to have the authority of the company*."

He then referred to para.105 and considered a submission that this went further than *Equiticorp* by allowing a majority of directors to authorise an administration out of court without having had a formal board meeting. He rejected that submission on three grounds, including the following:

> "*50. Secondly, the terms of para.105 give to an act of the majority the same validity as would be accorded to an act of the directors as a whole but if the act in question must still be an act of the majority of such directors, I see no reason why the reduction in the requisite number of directors should also dispense with the usual rules of internal management. To do so appears to me to be giving greater effect to a provision of general application than is to be derived from either the words used or the context in Sch.B1 in which they are used or in the previous case law to which I have referred.*
>
> *51. Thirdly, in Re Equiticorp International Plc, Millett J. was at pains to point out that the observations of Mervyn Davies J. in Re Instrumentation Electrical Services Ltd were confined to a case in which the majority had failed to observe any of the usual formalities. Accordingly, his own decision is to be read in the context of a proper resolution of a majority of the board. Clearly, para.105 gives statutory force to that decision but I do not accept that it goes further. Had it been intended to do so, I would have expected some clear statement to that effect in the White Paper which preceded the Enterprise Act of which para.105 was originally enacted as para.103 or in the Explanatory Notes to that Act. There is none*."

14. I agree with Mr Knott that Morritt V-C's decision makes it clear, not only that a decision of the directors must be a decision of all or a majority or the board, but also that it must be at a properly convened board meeting. It is also clear that he regarded the position as being the same under para.12(1)(b) in this respect as it is under para.22(2).

15. The third decision on which Mr Knott relies is *BW Estates*. In this case the company's articles provided that a quorum of two directors was required for a board meeting, but there was only one director, who purported to appoint administrators under para.22(2). Vos C (with whom Underhill and Henderson LJJ agreed) said at [78]:

> "*In my judgment, the Joint Administrators are wrong to suggest that the provisions of paragraph 22(2) of Schedule B1 are sufficient to override these provisions of the Articles. ... Secondly, it is beyond doubt that either the company itself or the directors may appoint an administrator under paragraph 22 of Schedule B1, but there is nothing in Schedule B1 to suggest that either the company or the directors can act except in the manner set out in the articles of*

association under which the company was incorporated and by which the corporators agreed to be bound. ... . I respectfully find myself in agreement with the reasoning of Sir Andrew Morritt C in Minmar (1929) Ltd v Khalastchi [2012] 1 BCLC 798, paras 49-52 to the effect that there is no notion of informality in the provision allowing the directors of a company to appoint an administrator. This approach seems to me to be consistent with the decision of Millett J in In re Equiticorp International plc [1989] 1 WLR 1010, and also with the general requirement of company law that the provisions of the articles of association cannot be ignored."

16. Although *BW Estates* is a decision on para.22(2), it expressly approves the reasoning in *Minmar* which makes it clear that the same approach applied in the case of para.12(1)(b), and it also applies the reasoning in *Equiticorp*.

17. I now turn to *Brickvest*. This was an urgent unopposed application for an administrator. The company's articles required there to be at least three directors, but there was in fact only one. Marcus Smith J said at [10]:

> "*The point of difficulty which I must refer to is this. Mr Lumineau is presently the only director of BrickVest Limited, which, as I have said, is the ultimate parent of the group. By Rule 12(1)(b) of Schedule B1 to the Insolvency Act 1986, an application to the court for an administration order in respect of a company may only be made by one of five designated classes of person, one of which is the directors of the company in question. It is clear law that in the case of the appointment of administrators out of court, such an appointment is only regular if the internal rules regarding the company's internal management are properly followed. That, one might think, is self-evidently the case: there must be some form of binary control where the court is not involved in the making of an appointment. Either the resolution appointing the administrator is valid or it is not. If it is valid, then the appointment can take effect. If it is not, then there is an irregularity that must be cured. The authority that stands for this proposition is Re BW Estate Limited (No.2), [2017] EWCA Civ 1201*."

18. This was the only reference to *BW Estates* and there was no reference to *Equiticorp* or *Minmar*. With respect, it is not clear to me what the judge meant when he referred to *BW Estates* as authority for the proposition that the invalidity of a board resolution was an "*irregularity*" that could be cured. Nor can I see anything in *BW Estates* that will enable any irregularity to be cured in the case of an application to the court which could not be cured in the case of an appointment out of court. The judge continued as follows:

> "*17. ... My view is that it is hard to read Article 11.2 as entitling Mr Lumineau properly to act on his own, when the Articles require (as they do, in the present circumstances) a minimum of three directors.*
>
> *18. The question goes to the standing of Mr Lumineau under Rule 12(1)(b) of Schedule B1 to the Insolvency Act 1986 to make the application for BrickVest Limited. Given that administration orders are made – as here – in circumstances of urgency – it seems to me inapt to engage in detailed analysis of the internal operations of a company or to delay an order that otherwise ought to be made whilst an irregular position is being rectified. Delay might cause a company to be at risk of trading insolvently; and the purpose of an administration order being thwarted. As I have already found, it seems there is real benefit in the making of an administration order in the case of BrickVest Limited.*

19. In a case such as this, where there is a question – indeed, a serious question over a director's standing to make an application for an administration order, the court should approach the matter as essentially a discretionary one, taking full account of the question as to standing, but not allowing the point to be automatically determinative against the application. I note that the question of standing in Rule 12(1)(b) of Schedule B1 to the Insolvency Act 1986 is not framed as a jurisdictional questions as to which the court must be satisfied. That is the manner in which I intend to proceed in this instance.

20. Here there is a situation where, through no fault of his own and, more importantly, through no fault of BrickVest Limited, Mr Lumineau is left on his own, the two other directors having recently resigned. In these circumstances, it seems to me that it would be conduct capable of grave injustice were I to refuse to make the orders that are being sought. Accordingly, notwithstanding the issues regarding the BrickVest Limited resolution being by only one director, the jurisdictional requirements in paragraph 11 to Schedule B1 to the Insolvency Act 1986 being met, I should make the administration orders sought.

21. I conclude with one further thought as to how potential irregularities, like that described in paragraphs 9ff above, can be dealt with. Having reached the view that an application for an administration order without notice to all interested parties is an inappropriate forum to deal conclusively with such matters, it seems to me that the proper course in terms of dealing with potential irregularities in appointment is under Rule 12.64 of the 2016 Rules which provides:

> *"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 the injustice cannot be varied by any order of the court."*

22. It seems to me that that is a matter for the future, if it arises at all, and I should simply make clear that nothing that I have said in this ruling is intended to confine the discretion of any Judge dealing with any application that may or may not be made in future under Rule 12.64."

19. I make the following observations on this judgment:

    (1) Although he did not decide the point, the judge proceeded on the assumption that the articles did not permit an application to court to be made by the director where there was only one director.

    (2) He proceeded on the basis that failure to comply with the company's articles was a mere irregularity, which engaged the court's discretion but did not amount to a jurisdictional threshold.

    (3) He relied on r.12.64 as a means of correcting any formal defect.

20. As I have said, this was a decision on an urgent and unopposed application. The judge was referred to *BW Estates* but it does not appear that his attention was drawn to the passages which I have quoted above, nor to *Equiticorp* or *Minmar*. It may be that *Brickinvest* can be distinguished on the basis that it is dealing with a different issue, the issue being whether "*the directors*" includes the sole director where there is only one director, in breach of the quorum provision in the articles. However, if it cannot be distinguished, then I am satisfied that this is one of those rare cases in which I should

depart from that decision (see *Colchester Estates (Cardiff) Ltd v Carlton Industries plc* [1986] Ch 80 at 84-85, Nourse J). I do so for the following reasons:

(1) The plain meaning of para.12(1), read with para.105, is that the application to court requires the authorisation of at least a majority of the board.

(2) The language is identical in this respect to that in para.22(2) and there is no basis for treating the requirements differently.

(3) Although not strictly binding (because they are not decisions on para.12(1)), the decisions in *Equiticorp*, *Minmar* and *BW Estates* provide clear support for the plain meaning of para.12(1) and para.105 and do not appear to have been sufficiently drawn to Marcus Smith J's attention.

(4) The court has no power to appoint administrators of its own motion. It may do so only upon application by one of the permitted categories.

(5) R.12.64 is designed to cure irregularities after the event. I cannot read it as a warrant for the court to dispense in advance with jurisdictional requirements.

21. *Nationwide* was another case in the sole director of the company applied to court for the appointment of administrators. Once again, it was arguable that the articles required there to be at least two directors. Fancourt J said:

> "*15. I am however persuaded that, on the strength of the decision in Re Brickvest Limited [2019] EWHC 3084 (Ch), in particular at paras 13-21, and as a matter of principle, that is not an impediment to a single director making an application to the court as "the directors of the company", under para 12(1)(b) of Schedule B1 to the Insolvency Act 1986, where he is the sole director, or an impediment to the court making an order where it is otherwise appropriate to do so. The plural form in para 12(1)(b) will include the singular, by virtue of section 6 of the Interpretation Act 1978. Each director of a company, including a single director, has a duty owed to the company and its creditors to cause a company to cease trading where it is clearly insolvent and to instigate an appropriate insolvency process. Where a better result for a company's creditors will be achieved by an administration, a director must be entitled – if not bound – to apply to the court for that relief, if an administrator cannot be appointed out of court or for some other reason it is necessary or appropriate to apply to the court. If the application is made in circumstances in which the board of the company could not resolve to appoint an administrator, that is a matter that the court can take into account in the exercise of its discretion, though it is likely to be outweighed by other relevant considerations in many cases, particularly where, as here, an administration order will result in a better return for creditors and there is no other realistic alternative to a winding up.*
>
> *16. It seems to me that is a case in which a director is the sole appointed director of a company, and that director has standing to apply to the court for an administration order by virtue of para 12(1)(b) of Schedule B1, even if under the internal governance of the company he could not alone pass a resolution of the company to make such an application. The Court will then exercise its discretion, taking into account all relevant circumstances, which may include the reasons why there is a sole director and the effect of the company's articles as to the relevant powers of its board.*"

22. I make the following observations on *Nationwide*:

(1) Once again, this was an urgent unopposed application. It appears that the only authority cited was *Brickvest*.

(2) The judgment was expressly framed on very narrow grounds. It was limited to the case of a sole director. In that context the reference to the Interpretation Act was, with respect, apposite. That is to be contrasted with the present case where the Interpretation Act is excluded by para.105.

23. For these reasons, I have concluded that one of two directors has no power to apply to court under para.12(1)(b) for an administration order without the approval of the majority of the directors and without a valid board resolution.

24. I therefore dismiss the application with costs, which I summarily assess at £45,000 (including VAT).