Neutral Citation Number: [2021] EWHC 386 (Ch)

Case No: CR-2021-LDS-000065

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

1 Oxford Row, Leeds, LS1 3G

Date: 23/02/2021

IN THE MATTER OF MEDERCO (CARDIFF) LTD (09477164)
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Before :

HH JUDGE DAVIS-WHITE QC
(SITTING AS A JUDGE OF THE HIGH COURT)

- -

Between :

(1) PHILIP FRANCIS DUFFY
(2) STEVEN MUNCASTER

Applicants

- and –

MEDERCO (CARDIFF) LTD **Respondent**

- -
- -

Miss Georgia Purnell (instructed by **Walker Morris LLP**) for the Applicants
The Respondent did not appear and was not represented.

Hearing date: 15 February 2020

- -

Approved Judgment

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

.....

HH JUDGE DAVIS-WHITE QC (SITTING AS A JUDGE OF THE HIGH COURT)

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email and by release to BAILII. The date and time for hand-down is deemed to be 02:00pm on 23 February 2021

HH Judge Davis-White QC :

Introduction

1. This is another case dealing with the court's ability to take steps, in effect, to rectify procedural defects in the appointment, or continued appointment, of administrators. The particular potential defect in this case is not on initial appointment but on a purported extension to the term of office of administrators and thus to the administration.

2. In simple terms, administrators were validly appointed in relation to Mederco (Cardiff) Ltd (the "Company") by the holder of a qualifying floating charge on 17 January 2019. They are the applicants before me (the "Administrators"). Without any more, and in the ordinary course, their term of office would have come to an end on 16 January 2020, being the expiry of the period of 12 months beginning with the date of their appointment.[1] However, the administration regime permits creditors to extend the initial 12 month period by a further period of up to 12 months.[2] That was purportedly done, so that the administration would apparently have ended on 16 January 2021. However, it has subsequently emerged that the procedure adopted to extend may not have been effective. If ineffective, this would be because certain secured creditors, whose consent to an extension was required, were not recognised at the time as being such. Their consent was neither sought nor obtained.

3. In November 2020, an order of the court was obtained purportedly further extending the end date of administration to 17 January 2022. This order was made in ignorance of possible defects in the prior extension purportedly effected pursuant to creditor consent.

[1] See para. 76 Sch B1 Insolvency Act 1986 ("IA 1986").
[2] See paras. 76 and 78 IA 1986.

4. After November 2020, the Administrators, on behalf of the Company, accepted an offer to purchase the Company's main asset, land and buildings in Mynachdy, Cardiff (the "Property") for a sum of just over £1.5 million. That sale has yet to be completed. The hoped for disposal of the Property was the main reason for the further extension to the administration period ordered by the court in November 2020.

5. In connection with a different administration, the status of certain creditors in a similar situation to creditors in this case as potential secured creditors, and the impact of that on the purported extension of the administration in this case, to January 2021, came to the Administrators' attention. That resulted in the current application before me.

6. The application was originally before HH Judge Claire Jackson on 12 February 2021 but was adjourned to enable Miss Purnell to address further an issue regarding the EU Regulation. On 15 February, I adjourned the matter to enable Miss Purnell to take instructions on the question of whether the Administrators wished the court to deal with the substantive question of the validity of the extension to the administration effected by the creditors.

7. As I shall explain, the main issues that arise before me are as follows:

   (1) Can the Court make a retrospective administration order?

   (2) Can the court extend the period of administration with retrospective effect, either from January 2020 or from January 2021?

   (3) If not, can the court now make two administration orders with retrospective effect, one to take effect in January 2020 and one from 17 January 2021?

(4) If not, can and should the court now make a retrospective administration order to take effect at a date no earlier than a year before the date of any order now made?

(5) If the Court should make an administration order with retrospective effect, what are the appropriate recitals to any order given that the United Kingdom has now left the European Union and the relevant transitional period has passed?

The Facts

8. I take the facts largely from the Skeleton argument of Miss Purnell, Counsel for the Applicants which reflect the evidence before me. I am grateful to her for the clarity and precision of her presentation and submissions to the court.

9. In her skeleton argument, Miss Purnell accurately sets out the position as follows. Any additions or comments by me are contained in plain text in the body of her text. I have not included her references to the hearing bundle nor certain of her footnotes.

"*[4] The Company was incorporated on 9 March 2015 as a special purpose vehicle to own and develop five blocks of student accommodation incorporating 350 self-contained studio style apartments, and a community centre/boxing club on a valuable area of development land located at Mynachdy Road, Mynachdy, Cardiff, CP14 3HN (''the Property'').*

[5] To raise funding for the development, the Company, inter alia:

(i) Invited a number of investors to buy long leasehold interests in the apartments off-plan at a discount to market value and took a sizeable deposit (25-75% of the

purchase price) from the investors upon exchange of the agreements for lease; and

(ii) Acquired a loan facility taken from Lendy Limited ("Lendy"). This discharged previous secured lending obtained by the Company. As security for the loan, the Company granted a fixed charge over the Property and floating charges over all of its other assets and undertakings. Saving Stream Security Holding Limited ("Saving Stream") acted as security trustee for Lendy for the purpose of holding the security on trust for Lendy. The fixed and floating charges were all registered in the name of Saving Stream

[6] In respect of the funding obtained by the investors:

(i) Between May and September 2016, the Company exchanged contracts with a number of investors in relation to approximately 60 flats. Unilateral notices in relation to the same are noted on the charges register for the Property.

(ii) Between September 2016 and July 2018, the Company exchanged contracts with investors in relation to a further 90 flats. Unilateral notices in relation to such contracts are also noted on the charges register for the Property.

(iii) The investors who [have the benefit] of the notices detailed above shall be collectively referred to herein as ("the Investors").

[7] Despite the funding, it became apparent that …funds had been misapplied and the construction and development of the Property was significantly behind schedule.

The …appointment

[8] As a consequence and increasing pressure from the Company's creditors, Stewart Paul Day ("the Director"), the sole director of the Company, invited Lendy to appoint

the Applicants as joint administrators pursuant to paragraph 14 of Schedule B1 as a qualifying floating charge holder. [3]

[9] On the instruction of Lendy, Saving Stream, as the registered holder of a fixed charge over the Property and floating charges over all of the Company's other assets on trust for Lendy, swore a notice of appointment on 16 January 2019 ("the NOA") and the Applicants were appointed as joint administrators of the Company at 12.15pm on 17 January 2019 ("the Prior Administration")….

[10] Pursuant to paragraph 76(1) of Schedule B1, the administration would come automatically to an end on 16 January 2020. During this initial 12-month period of the Prior Administration, the Applicants marketed the Property (being the Company's sole asset of any material value), but no offers were received. Accordingly, the Applicants as joint administrators sought an extension by consent of the secured creditors.

[11] The Applicants obtained the consent of the administrators of Lendy to extend the term of the administration to 17 January 2021. At the time, the Applicants believed Lendy to be the only "secured creditor" whose consent was required for the purposes of paragraphs 76 and 78. At that stage, therefore it was assumed that the appointment was valid and the relevant statutory requirements had been met. The Applicants therefore proceeded in the belief that the administration and their appointment continued to exist.

[I should explain that, normally, consent of all creditors to effect an extension to an administration is required. However, in the case of unsecured and preferential creditors such consent may be given by a "decision" of over 50 per cent in value of such creditors. Where, however, the administrator has included in his proposals, as in this case, a statement under para 52(1)(b) of Sched. B1 IA 1986 to the effect that he thinks that the company has insufficient property to enable a distribution to be made to unsecured creditors, the need for consent of such unsecured creditors is dispensed with. In such circumstances consent of preferential creditors is only required where he thinks that there will be a distribution to such preferential creditors. In this case, the

[3] *The Director had sought to appoint administrators under para 22(2) but was unable to do so due to an extant winding up petition: paragraph 25(1) of Schedule B1.*

administrators did not consider that there would be such a distribution. Accordingly, the only consent required was of secured creditors As regards secured creditors, consent of each secured creditor is required. A majority decision process is not available.]

Application to extend the administration

[12] As the Applicants believed that the term of the administration was due to end on 17 January 2021, on 6 November 2020 the Applicants (believing themselves to be administrators) made an application to the Court for an extension.

[13] By order dated 1 December 2020, the Court granted the application on paper and ordered that the term of the administration be extended by a period of 12 months until 17 January 2022.

[14] Following that extension, believing they continued to act, the Applicants accepted an offer of £1,550,000 for the purchase of the Property from the Welsh Government and have been in the process of finalising the sale of the Property.

Realisation that the extension may be defective

[15] By operation of law (explained more fully below), the Applicants believe the Investors may hold an equitable lien over the part of the Property to which their contract relates to the value of their deposits.

[16] However, it was only after the application to the Court for an extension having taken advice on a similar but unconnected matter and considered s.248 of the Act that the Applicants realised that the Investors, as lien holders, are and should have been treated as "secured creditors". It was not a conscious decision not to seek the Investors' consent and the Applicants now understand and appreciate they possibly should have been treated as secured creditors and their consent obtained. The Applicants therefore consider that the term of the administration may have ended on 17

January 2020[4] *and the consent procedure may have been defective, and possibly invalid, and make these applications to the Court accordingly."*

Analysis and discussion: preliminary matters

10. On the evidence before me, I am satisfied that the initial appointment of the Administrators was valid.

11. As regards the purported extension from 17 January 2020, I am satisfied that there is at the least an arguable case that the extension was invalid because the consent of all the secured creditors was not obtained.

12. In this respect, I assume that the Lendy/Saving Stream consent was effective. However, it appears that the consent of relevant investors who held protected liens should also have been obtained. I have assumed that registration of relevant notices on the Land Register was sufficient to protect the liens and that there are no relevant Companies Act registration requirements, or if there were they were met. The analysis is helpfully set out by Miss Purnell in her skeleton argument, to which I return:

"[27] …

(iii) A secured creditor includes a creditor who holds a security over property of the Company, security including "any mortgage charge, lien or other security": s.248 of the Act.

(iv) A purchaser who has entered into a contract to buy land and has paid some or all of the purchase price to the vendor will have an equitable lien

[4] I interpose, technically, 16 February 2020.

> *over the property to secure repayment of that amount, if the contract remains uncompleted through no fault of the buyer and even if the subject matter of the contract has yet to be constructed.*
>
> *(v) Each of the investors entered into a sales agreement for the purchase of long leasehold interests in apartments at the Property which would be built and developed. The Company took 25-75% of the purchase price as deposit on exchange. The contracts remain uncompleted. The Applicants accept, therefore, that the Investors may have equitable purchasers' liens attaching to the subject matter of the contract and, accordingly, may be secured creditors of the Company within the meaning of s.248.*
>
> *(vi) The Investors' consent to the extension of the administration to 17 January 2021 was not obtained at the time*."

13. The reason that I refer to "arguable case" is because Miss Purnell invited me to make retrospective appointments/extensions on a "worst case" scenario, that the creditor extension was invalid, without determining the issue of whether as a matter of law the extension in this case was, or was not, valid and effective.

14. In inviting the court to take this approach she was, in effect, inviting the court to take the approach in *Petit v Bradford Bulls (Northern) Limited* [2016] EWHC 3557 (Ch) at paragraphs [9] to [13] where, as Miss Purnell summarised it:

> "*it was held that it would be unsatisfactory to determine the validity of an appointment where (a) submissions would take a significant period of time to be heard (b) only one side of the argument would be fully presented, although counsel had a duty to put any counter-points. Nevertheless, counterpoints would not be fully argued. As held in that case, even if the appointment were valid the*

> *Court would nonetheless have jurisdiction to remove and re-appoint the administrations by the retrospective orders sought and pursuant to paragraph 79 of Schedule B1 – the order could provide for this eventuality, insofar as is necessary.*"

15. In *Gregory v A.R.G. (Mansfield) Limited* [2020] EWHC 1133 (Ch) this was the third of a number of approaches which I identified as being open to the court when considering invalidity of appointment (or, I would add, extension of appointment) (paragraph 54).

16. However, in this case, Miss Purnell specifically reserved the right to apply to the court again, were the court not minded to bring about a position where there was no gap in the office of the administrators. On such application the question of the validity of the purported extension by creditors of the administration to January 2021 could be considered. The reason that this was a possibility was because, as I shall explain, there is authority that a court can not extend, with retrospective effect, an administration after it has expired and that it cannot backdate the making of an administration order for more than 364 days. If I found that my powers were so limited then there would be a short period (between January 2020 and February 2020) when the administrators would not have been in office and when they might be forced to seek to rely upon paragraph 104 Sch B1 IA 1986 and/or the position in equity as regards their own remuneration during that period and/or that statutory provision and the doctrine of apparent authority as regards transactions with third parties. There would also be the question of the appropriate filings to mark the end of one administration and the start of another one.

17. Other than an indication on instructions that not much had happened in the administration in the potential "gap period", I had no evidence as to what activity had in fact taken place in that period.

18. I was not content that the court should face multiple applications and deal with the matter piecemeal. I therefore adjourned the matter for a short while for Miss Purnell to take instructions as to whether the administrators wished to bring forward that application. (I should add that I also appreciated that that might require notice to be given to secured Investors). A few days later, Miss Purnell indicated that they did not wish to do so. As I have said, my understanding had been that there had been little activity in the relevant period January to February 2020. In any event, as Miss Purnell informed me, it seemed unlikely that the administrators could establish that each and every Investor apparently with the benefit of a lien did not in fact have such benefit. If that were so, any submission would be on the basis that the failure to obtain consent of the relevant Investors was not a fatal flaw to the extension and that it was validated by what is now r12.65 IR 2016. Such a submission would be a bold one. In my judgment, there are serious problems in saying that the flaw was a mere procedural "formal defect or ..irregularity" and, even if I am wrong about that, it is difficult to see that it would be just to validate the extension despite non-consent of a large body of secured creditors. Technically, I do not have to rule upon the issues. However, I am satisfied for the purposes of applying the approach in *Bradford Bulls,* of not determining the point, that the argument that the purported creditors' extension was invalid is one that has a real prospect of success.

Analysis and discussion: retrospective administration orders and extensions

19. In this case, Miss Purnell's starting point is that the Court has power, in circumstances such as are presented to me, to make a retrospective administration order. I considered the authorities on this issue in *Gregory v A.R.G. (Mansfield) Limited* at paragraph [122] where, having considered the authorities, I said:

> *"[122] As regards the question of the appointment being retrospective: the jurisdiction to make a retrospective appointment, though it has been questioned has now been relied upon (and exercised) consistently for many years. I agree with Mann J in the Bradford Bulls case that that if there is to be a challenge to the existence of that jurisdiction, such challenge should now be raised in the Court of Appeal*."

Accordingly, I act on that basis.

20. The next stage in Miss Purnell's argument, is that the Court can retrospectively extend a period of administration, even once it has expired. Thus, she says, were I to make an administration order with retrospective effect to take effect after midnight on 16 January 2020, the fact that such an administration would by now, in February 2021, have expired (in January 2021) would be no impediment to my extending the administration from 17 January 2021 to now (and thereafter for a further period). It seems to me that if she is correct, then I would have power to extend the administration from January 2020 when it expired.

21. However, it seems clear to me (as the Court has held on a number of occasions) that the wording of para. 77 Sch B1 prevents a retrospective extension of time by court order once the administration has expired. Para 77 Sch B1 provides, so far as relevant, that:

"*77.*

(1) *An Order of the court under paragraph 76* [extending an administrators term of office]-

(a)…

(b) may not be made after the expiry of the administrator's term of office".

22. Miss Purnell submits, as set out in her skeleton argument, that:

> *"[39] The use of the word "may" in paragraph 77(1)(b) is directory and permissive, but it is not mandatory. As a matter of statutory construction, therefore, it is submitted that it is not mandatory for an order extending the term of office must be made within that term and could be made, if the Court considered appropriate, after that date.*
>
> *[40] In the alternative, it is submitted that a retrospective order backdating the extension of a term of office does comply with the requirements of paragraph 77(1)(b) as it would take effect within the term of the administration and thus be, in reality, made in that time. This is consistent with both the wording of the statute and in line with the wide jurisdiction of the Court under paragraph 13 to make a retrospective administration order generally."*

23. With respect, I reject both submissions. Here, whether looking at the position on (assumed) expiry of office in January 2020 or assuming a retrospective order expiring in January 2021, it is, in my judgment, clear that the term of office has now expired.

24. I do not regard the words of paragraph 77(1)(b) as providing a discretion to the court. It is clearly mandatory and clearly limits the court's jurisdiction. As regards Miss Purnell's first argument I understand her to rely upon the principles that I referred to in the *A.R.G. (Mansfield)* case as follows:

> *"[42] The general position regarding the consequence of breach of statutory requirements where that is not expressly set out in the provisions themselves is now, and for present purposes, most conveniently found in the trilogy of cases: London & Clydeside Estates Ltd v Aberdeen District Council [1980] 1 WLR 182 ; R v Secretary of State for the Home Department, Ex p Jeyeanthan [2000] 1 WLR 354 and R v Soneji [2005] UKHL 49; [2006] 1 AC 340 .*
>
> *[43] In short, the old distinction between "mandatory" and "directory" provisions has been abandoned. Instead, the focus as a matter of statutory interpretation is an inquiry as to the consequences Parliament intended to follow if the (mandatory) requirement was not followed*."

25. In this case, I do not regard para. 77(|1)(b|) as containing a mandatory requirement of the exercise of jurisdiction. Rather, it limits the jurisdiction itself. However, even if I am wrong about that, in my judgment Parliament clearly intended that if the power was purportedly exercised outside the relevant period, such exercise would be invalid.

26. I also reject the submission that a retrospective extension would comply with paragraph 76(1)(b) because of its very retrospectivity. The paragraph focusses on the time at which the order is made, not upon the date when it is deemed to have effect. The difference between the time at which an administration order takes effect and that when it is made is clearly encapsulated in paragraph 13(2)(b) Sch B1 IA 1986. In my judgment the same analysis applies to an order of extension.

27. There is a further difficulty about retrospective extensions of office by the court. Such orders are made on applications by administrators (see para 76(2)(b) Sch B1 IA 1986), but if their term of office has expired the former administrators are no longer administrators with standing to apply.

28. It also follows therefore that the court should not make an retrospective administration order further back than 364 days, (at least as a generality where the administration is sought to be continued on more than a year after the date from which the order takes effect). This is because the period of office would have expired by the time of the making of the order and there would be no ability to extend the term of office from its expiry under the (retrospective) court order.

29. That leaves the fall back position of Miss Purnell, which is that the court should make two retrospective administration orders. In this case, one to take effect from 17 January 2020 and one to take effect from 17 January 2021. In my judgment as a

matter of discretion, even if not of jurisdiction, the court should not take this approach. As has been said in other cases, such would simply subvert the clear rule limiting the court's jurisdiction encompassed by r77(1)(b) Sch B1 IA 1986.

30. Miss Purnell submits that if the Court can make a retrospective administration order after expiry of an administration effected by a valid initial appointment, then there is no reason why the court cannot make successive administration orders in a situation where the original valid administration period has expired. In my judgment, the distinction is that in a case where there is no administration in place (whether because of expiry of a valid administration or because the original purported appointment was invalid), then the court can make a retrospective administration order (subject to standing and appropriate grounds being established). However, that retrospective administration cannot be "extended" by the device of a further retrospective administration order. The Court is making an administration order with retrospective effect because an administration is justified, in the absence of an administration. It is not as such extending an earlier administration under another guise. In this case, although the effect of any retrospective administration order may be said to be to extend the earlier valid administration an extension is not what the court is effecting. Rather it is deciding that in the absence of any administration at the relevant time it is right to back date the effect of the administration order.

31. I turn to the authorities.

32. In *Re TT Industries Ltd* [2006] B.C.C 372, HHJ Norris QC (as he then was), sitting as a Judge of the High Court, held that an extension could be granted where the application for extension had been made pre expiry of the administration and the

delay in getting the matter before the |Judge had (at least in part) been due to the manner in which the application had been handled by court staff. He said that:

> " *[6] I do not consider that any of the relevant provisions about extending time can assist in the answer to this question.*
> *(1) Paragraph 107 of Sch.B1 relates to "[provisions] which provide that a period may be varied in accordance with [that] paragraph". By para.107(2) a time period may be extended in respect of a company under that paragraph "after expiry". But para.76 is not one of those paragraphs (like para.49(8), 50(1) and 52(4)) which refer to para.107 .*
> *(2) Section 376 of the Insolvency Act 1986 provides for extensions of time even after the relevant period has expired, but this provision relates only to individual insolvencies.*
> *(3) Rule 12.9(2) of the Insolvency Rules 1986 (SI 1986/1925)* [see now para 3 of Sch 5 to the IR 2016[5]] *provides that the provisions of the CPR ("CPRs") shall apply so as to enable the court to extend or shorten the time for compliance with "anything required or authorised to be done by the Rules": but the relevant provisions to be complied with is to be found in Sch.B1 , not the Rules.*
> *To meet the difficulty, what has to be extended is the original period of administration if the literal meaning of para.77 is its true meaning: and in the instant cases periods of administration determined out of court. The problem it seems to me is one of jurisdiction, rather than one of procedural compliance.* (emphasis supplied)
>
> *[7] Nor can any solution be found in provisions relating to the dating of court orders. The provisions of Rules of the Supreme Court, O.42 have now been replaced by those in CPR, r.40.7 which now provide that an order takes effect from the date when it is given or made "or such a later date as the court may specify". But even if the former power to antedate orders remained in existence, it could not properly be exercised to confer a jurisdiction if none otherwise existed.*
>
> *[8] ……Mr Willetts pressed the argument as far as he reasonably could on this material, resisting the conclusion that the administration order could not be extended simply because Mr Fender's application had not been heard during the subsistence of the administration. Recognising that he might need some ultimate fall back position, Mr Willetts submitted that the solution was perhaps to be found in the making of a fresh administration order. I do not consider that this is a proper solution. First, the issues with which the court is concerned when considering the grant of an extension are different from those with which the court is concerned when deciding whether to make an administration order in the first place. Secondly, the grant of a fresh administration order will not bridge the gap created by the lapse of the original administration and the commencement of the new administration, so as, for example, to validate the sale of TT's premises.*

[5] The Insolvency (England and Wales) Rules 2016 (the "IR").

33. HHJ Norris was able to extend the period of administration based upon the principle explained in paragraph [10] of his judgment:

> *"[10] In my judgment the principle is that found set out in Re Keystone Knitting Mills' Trade Mark [1929] Ch. 92 , and there expressed in the Latin maxim "actus curiae neminem gravabit", which in the present context means that the rights of the parties should not be determined by the vagaries of the court's case handling and listing procedures."*

34. I should add that in my judgment this case is different to that identified by Judge Norris. Here, there is evidence going to the making of an administration order. Further, there is some point to making such an order with retrospective effect (and one with prospective effect) because it would validate the contract of sale of the Property in this case. As regards a prospective extension, that would enable the sale to be completed and the administration process to be utilised to full effect.

35. In *Re G-Tech Construction Limited* [2007] BPIR 1275, Hart J decided that he had jurisdiction to make an administration order with retrospective effect, in circumstances where the original appointment was found to be defective and a nullity. However, he was not prepared to backdate the effect of the order by more than a year. In paragraph [19] he said:

> "*[19] The order which I am asked to make on that application is an order appointing Mr Clarke as administrator and directing, under paragraph 13(1) of Schedule B1 , that the appointment of the administrator should take effect from 30 September 2004. The magic of 30 September as opposed to 14 September is that were the appointment to be made to take effect from 14 September — assuming that such an appointment can be made at all — it would have already expired as of today's date, as the … is disabled by the provisions of Schedule B1 from extending a period of administration after it has expired. Accordingly, the date of 30 September has been selected, it happily being the case that no substantive acts of Mr Clarke as purported administrator took place between 14 and 30*

> *September. The question then is whether the court order can be made retrospectively in the manner suggested. The statute does not say that it cannot be done, and the wording is certainly, in my judgment, wide enough to give the court jurisdiction, both to order there is a proper case, although it is a jurisdiction to be exercised in relation to administration orders with extreme caution, given the effect it may have."*

36. In *Taylor Made Foods plc* (unrep, 28 February 2010) Henderson J allowed an extension application to be made (and granted) on a Monday when the administration had terminated at the weekend. Monday was the next day that the court office was open. I did not have a copy of the judgment before me but this appears to be an application of a well-established but specific principle of statutory interpretation (in this case see *Pritam Kaur v S Russell and Sons Limited [1973] QB 336*) rather than a holding that, in general, retrospective extensions are possible.

37. In R*e Kaupthing Capital Partners II Master LP Inc, Pillar Securitisation S.a.r.l & Ors v Spicer & Shinners* [2010] EWHC 836 (Ch), Proudman J found that a purported appointment of administrators in 2008 was invalid. She then went onto consider what the court could do to rectify the position:

> "*[58] Mr Todd submitted that if the appointment were invalid, I could and should cure the invalidity by making a fresh appointment dating back to October 2008. It appears to be within the jurisdiction of the Court to make an administration order dating back to a time before the date of the order: see the wording of Schedule B1 paragraph 13(2)(a) . However, by Schedule B1 paragraph 76(1) the appointment of an administrator automatically ceases to have effect at the end of a period of one year beginning with the date on which it takes effect. An appointment made today dating back to October 2008 would already have been deemed to have terminated. Although paragraph 76(2) confers power on the Court to extend the term on the application of the administrator, paragraph 77(1)(b) provides that such an order may not be made after expiry of the administrator's term of office. It is not therefore open to the court to make a fresh appointment starting in October 2008 and continuing down to today or some later date.*
>
> *[59] Mr Todd QC sought to get round this by submitting that the court could and should make two administration orders, one following immediately upon the other. If Mr Todd QC's submission were correct, this device could be deployed in every case to get round the prohibition in paragraph 77(1)(b) against extending the term. The submission must be wrong and I reject it.*

> *[60] An alternative would be to do what Hart J did in G-Tech and make an administration order dating back only 364 days so that paragraph 77(1)(b) is not engaged. However, Mr Todd QC faces a difficulty in that administrators have no standing to seek an administration order: see Schedule B1, paragraph 12(1) . ….*
>
> *[61] It seems to me that the issue of a 364-day appointment, the ramifications of such an appointment and of the application itself ought to be left over, if necessary, for mature consideration and further argument on another day…."*

38. This case too is therefore authority, judgment having followed contested argument, that retrospective extensions are not possible under paragraph 76 of Sched B1 and that this impediment cannot be avoided by making two successive retrospective administration orders.

39. In *Re Frontsouth (Witham) Ltd (In Administration) and Bridge Hospital (Witham) Limited (In Administration)* [2011] EWHC 1668 (Ch), Henderson J was, in the case of one company, dealing with a situation close to that faced by me. An administration had been validly commenced in January 2009. However, an extension by creditors for a further period, to July 2010, had not been validly effected, though it was assumed that it had been (the Creditor Extension Period). A court extension for a 12 month period commencing on expiry of the Creditor Extension Period had been granted by the Court in June 2010, the defect not having been brought to its attention. In June 2011, the application for a further extension came before Henderson J.

40. In paragraph [27] of his judgment, he said (so far as immediately relevant):

> "*[27] With some ingenuity, the courts have devised a partial solution to the problem in cases of the present type by acceding to an application for the re-appointment of the same persons as administrators and then back-dating the appointment so that it takes effect 364 days before the date of the order. It has been held that the jurisdiction to back-date the appointment in this way is provided by paragraph 13(2) of Schedule B1, which provides that an appointment of an administrator by the court takes effect:*
>
> *"(a) at a time appointed by the order, or*
> *(b) where no time is appointed by the order, when the order is made."*

> *The appointment cannot be back-dated for more than a year, because in that case the maximum period of one year for an initial appointment of administrators would already have expired. If, on the other hand, the appointment is back-dated for 364 days, the longest possible period of retrospective validation is obtained, and the court can immediately make a further order pursuant to paragraph 76(2) extending the administrators' term of office for a specified future period."*

41. He then went on to say:

> "*[29] One thing that clearly cannot be done, however, is to make successive retrospective appointments for more than one period of 364 days. This possibility was canvassed before Proudman J in Kaupthing, where she was invited to make two successive administration orders in order to validate the acts of the administrators since their original purported appointment in October 2008. Proudman J had no difficulty in rejecting this submission*".

He then cited part of paragraph [59] of her judgment (cited above) and went on to say:

> "*I respectfully agree; and although Mr Atkins told me that he had at one stage contemplated making such an application in the present case, he had wisely thought better of it, and in the event he sought only a single order back-dated for 364 days. This would have the effect of leaving a relatively short period of a few months during which the acts of the administrators could not be validated, but fortunately only three or four of the relevant disposals of flats took place during that period and the inconvenience of taking steps to regularise the position with the affected purchasers would not be too great. Accordingly, having heard argument on 23 June I indicated that I was provisionally minded to make such an order."*

42. In *Re Synergi Partners Ltd* [2015] EWHC 964 (Ch). HH Judge Hodge QC (sitting as a Judge of the High Court) was dealing with a situation where a validly commenced administration had expired before the administrators purportedly placed the company into liquidation. He was asked to make a retrospective administration order. Having considered the authorities regarding the jurisdiction to make an administration order with retrospective effect, he moved on to consider the question of whether such an order could be made to a date dating back more than 364 days from the order:-

> "….*Mr Doyle accepts that in G-Tech , at paragraph [19], the appearance in the draft judgment is that Mr Justice Hart would not have been prepared to make a retrospective administration order which "cast back" more than one year. The difference between G-Tech and the present case, however, is said by Mr Doyle to be that G-Tech involved a retrospective order where the appointment of an administrator, albeit invalid, had already been made. In the present case the court is being asked to effect an appointment on a retrospective basis where there has been no purported appointment of an administrator. I must confess that I find difficulty in identifying that as a valid point of distinction.*

> *21. In my judgment, the real difficulty in the present case is presented by paragraph 76(1) of Schedule B1 . That provides that the appointment of an administrator shall cease to have effect at the end of the period of one year beginning with the date on which it takes effect. That difficulty was adverted to by Mr Justice Hart at paragraph 19 of his judgment in G-Tech (previously cited). That difficulty was also recognised by Mr Justice Henderson in Frontsouth . There it was held, on the basis of a practice which was said by now to be fairly well established, that an alternative solution could be provided by making a fresh appointment by order and retrospectively back-dating that order for a maximum of 364 days. In that case it was said that that would leave the administrators with only a few months in which they had had no authority to act."*

43. Having considered the possibility of two successive administration orders and the *Kaupthing* and *Frontsouth* judgments on that issue, Judge Hodge went on to consider the options open to him and considered whether to make an order with retrospective effect to a date more than a year before:

> "*The first is to make an administration order retrospective to the date sought in the application of 23 November 2010. The first difficulty with that approach is that such an administration order would automatically have come to an end (by paragraph 76(1) of Schedule B1) 12 months thereafter, and thus on 23 November 2011. It is difficult to see what would be achieved by making such an order*."

In any event he did not consider that, on the facts, the making of such an order would further the statutory purposes of administration. This case may identify a theoretical possibility of a factual situation where an administration order made with retrospective effect more than a year before the making of the order may be justified but it again confirms the problem of making such an order where the desire is to continue its effect beyond a year after the date when it takes retrospective effect.

44. These cases all support the views that I have expressed above regarding the ability to extend administration orders after expiry and the making of retrospective administration orders and the limit of 364 days to the backwards effect of the same.

Should an administration order be made in this case with retrospective and prospective effect, the retrospective date being no more than 364 days prior to the order?

45. I consider therefore that I should not now make an administration order which takes effect at a date any earlier than 364 days before the date of my order.

46. On the evidence I am satisfied that the Company has been insolvent throughout the relevant period and that both as at today's date and as at the date to which I am prepared to backdate the order, there was (and is) a real prospect of achieving the statutory purposes of administration. The conditions for the making of an order are therefore met. I am also satisfied that it would be just to make such an order and no relevant prejudice has been identified.

47. I am also satisfied that the administrators have locus to make the application for the making of an administration order in their capacity as creditors of the Company, such position arising in respect of unpaid work carried out during the period of the valid administration (see e.g. *Re Elgin Legal Ltd* [2016] EWHC 2523 (Ch)).

48. It follows that I should make an administration order today but taking effect 364 days ago.

49. I am also satisfied on the evidence (and given that the sale of the Property has still not completed) that it is now appropriate to extend the administration that I have put in place by the retrospective order. In so doing I have considered and applied the principles set out in, for example, *Re Biomethane (Castle Easton) Limited* [2019] EWHC 3298 (Ch). The administration will therefore be extended to midnight on 17 January 2022 (i.e. the end of that day). It also follows that the order of HH Judge Jackson dated November 2020 should be set aside as a nullity. I am also prepared to make the other procedural orders sought in the application to enable it to be heard when it was.

The appropriate recitals regarding the EU Regulation

(a) Introduction

50. The EU Regulation on Insolvency Proceedings 2015[6] was in force in the UK as part of European Community Law whilst the UK was a member of the European Union (the "EU"). As is well known, after the UK left the EU, some parts of European law(with some adaptations in most cases) remain in force, enshrined in the relevant domestic laws of the constituent parts of the UK, notwithstanding the UK's departure from the EU ("Brexit").

51. On 26 June 2018, the European Union (Withdrawal) Act (the "2018 Act") passed into UK law. The 2018 Act as originally enacted repeals the European Communities Act 1972, converts EU law as it stands at the moment of exit into domestic law, and preserves laws made in the UK to implement EU obligations. It also creates temporary powers to make secondary legislation to enable corrections to be made to such laws that would otherwise no longer operate appropriately once the UK has left the EU, so that the UK domestic legal system continues to function appropriately outside the EU.

52. The European Union (Withdrawal) Agreement Act 2020 (the "2020 Act") amended the 2018 Act so as to retain relevant EU law as part of UK law in the period after exit from the EU to the end of the transition period at 11pm on 31 December 2020. After that date the 2018 and 2020 Acts enable such EU law to be converted into the relevant domestic law of the constituent parts of the UK law (as EU retained law) (with adaptations) from that date.

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[66] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings

53. Two relevant sets of UK regulations have been made to deal with EU insolvency law. The first is the Insolvency (Amendment) (EU Exit) Regulations 2019 (SI 2019 No 146) ("the 2019 Regulations"). The 2019 Regulations were themselves amended by the Insolvency (Amendment) (EU Exit) Regulations 2020 (SI 2020 No 647) ("the 2020 Regulations"). Taking the two together, they amend the EU Regulation on Insolvency Proceedings 2015 (insofar as it has been 'retained' in UK law), and amend the 1986 Act and amend the IR 2016.

54. For transitional purposes, the changes effected by the 2019 Regulations (as amended) do not apply to proceedings that are "opened" before the end of the transition period on 31 December 2020. Such proceedings remain subject to the unamended regime.

(1) Regulation 4(2) of the 2019 Regulations (as amended by the 2020 Regulations) provides:

"*The amendments made by these Regulations do not apply in respect of any insolvency proceedings and actions falling within Article 67(3)(c) of the withdrawal agreement.*[7]*"*

(2) Article 67(3) of the withdrawal agreement provides:

"*Regulation (EU) 2015/848 of the European Parliament and of the Council (78) shall apply to insolvency proceedings, and actions referred to in Article 6(1) of that Regulation, provided that the main proceedings were opened before the end of the transition period*."

The question of when proceedings are "opened" is one that is determined by EU law interpreting the 2015 Regulation.

55. Thus the amendments effected by the 2019 Regulations will not apply where main proceedings were 'opened' before 11pm on 31st December 2020. Rather the previous

[7] i.e. the agreement between the United Kingdom and the EU under Article 50(2) of the Treaty on European Union which sets out the arrangements for the United Kingdom's withdrawal from the EU (as that agreement is modified from time to time in accordance with any provision of it): see s39 European Union (Withdrawal Agreement) Act 2020.

legislative background and the EU Regulation will continue to apply (see s1A of the 2018 Act as inserted by the 2020 Act).

(b) the regime where main proceedings are opened prior to 31 December 2020

54. The EU Regulation will apply where an administration order is made in relation to an English incorporated company whose centre of main interests is in the UK (see Articles 1-3 of the 2015 EU Regulation).

55. Where an administration order is made, the order must contain a statement that the court is satisfied either that the EU Regulation does not apply or that it does and, where it does apply, a statement whether the proceedings are main, secondary or territorial proceedings (R3.13(h), (i) IR 2016).

(c) the regime where main proceedings have not been opened prior to 31 December 2010

56. Paragraph 111(1A) of Schedule B1 IA 1986 is amended by paragraph 45 of the 2019 Regulations. The reference to "company" which may be subject to administration is altered to cover (a) a company incorporated in England and Wales or Scotland; (b) a company incorporated in an EEA state or (c) a company incorporated outside the EEA which has its centre of main interests in a member state (other than Denmark) or in the UK.

57. In addition, the 2015 EU Regulation is amended so that article 1 reads as follows:

> "**1.** The grounds for jurisdiction to open insolvency proceedings set out in paragraph 1B are in addition to any grounds for jurisdiction to open such proceedings which apply in the laws of any part of the United Kingdom.
> **1A.—**
> There is jurisdiction to open insolvency proceedings listed in paragraph 1B where the proceedings are opened for the purposes of rescue, adjustment of debt, reorganisation or liquidation and—
> (a) the centre of the debtor's main interests is in the United Kingdom; or

(b) the centre of the debtor's main interests is in a Member State and there is an establishment in the United Kingdom.

1B.—

The proceedings referred to in paragraph 1 are—

(a) winding up by or subject to the supervision of the court;
(b) creditors' voluntary winding up with confirmation by the court;
(c) administration, including appointments made by filing prescribed documents with the court;
(d) voluntary arrangements under insolvency legislation; and
(e) bankruptcy or sequestration.".

58. It therefore follows that in the case of a UK incorporated company, jurisdiction to open insolvency proceedings applies irrespective of whether the company's centre of main interest is in the UK and the adapted EU Regulation will not ground the relevant jurisdiction to open the proceedings. However, if the centre of the debtor's main interests are also within the UK then the (adapted) EU Regulation will provide an additional basis of jurisdiction.

59. The IR 2016 are also amended by the 2019 Regulations.

60. Paragraph 59 of the 2019 Regulations amends R3.13(h) and (i) so that they read as follows (showing the changes, insertions by underline and strike-out for removed text):

"*3.13*

(h) a statement that the court is satisfied either that the EU Regulation *as it has effect in the law of the United Kingdom* *does not apply or that it does*

(i) where the EU Regulation does apply, a statement whether the proceedings are *COMI proceedings or establishment proceedings* ~~*main, secondary or territorial proceedings*~~"

61. The changed reference to COMI proceedings or Establishment proceedings in R3.13(i) IR 2016 flows from amendments made to R1.2 IR 2016 (by paragraph 46 of the 2019 Regulations) which, as amended by the 2019 Regulations, provides (on this point):

"*2.16*

""COMI proceedings" means insolvency proceedings in England and Wales to which the EU Regulation applies where the centre of the debtor's main interests is in the United Kingdom;
"establishment" has the same meaning as in Article 2(10) of the EU Regulation;
"establishment proceedings" means insolvency proceedings in England and Wales to which the EU Regulation applies where the debtor has an establishment in the United Kingdom;".

62. The Application Notice in this case proceeds on the basis that the proceedings will be opened by any order the court makes rather than that they will be opened at the time when any retrospective order takes effect. It therefore contains the statements required by R3.3 of the IR 2016 (as amended by the 2019 Regulations) regarding the modified EU Regulation 2015 as it applies (as modified) as part of the law of England and Wales.

(d) when are proceedings "opened" when there is a retrospective administration order?

63. As I have said, this is in effect a question of EU law and of interpretation of the EU Regulation 2015. The UK Courts will continue to have regard to the rulings of the CJEU and other courts on provisions in the EU Regulation that remain unaltered (s6 2018 Act).

63. Under the EU Regulation 2015, Article 2(8):

> *'the time of the opening of proceedings' means the time at which the judgment opening insolvency proceedings becomes effective, regardless of whether the judgment is final or not'.*

64. Article 2(7) of the EU Regulation 2015 defines "*judgment opening insolvency proceedings*" as including:

> *"(i) the decision of any court to open insolvency proceedings or to confirm the opening of such proceedings; and*
>
> *(ii) the decision of a court to appoint an insolvency practitioner."*

65. Despite the relevant provisions of the application notice in this case, Miss Purnell submits that the proceedings should be treated as "opened" at the date when the administration is ordered to take effect, retrospectively, rather than the date of the order that I now make. In her skeleton argument she put the matter as follows:

> "*the order is treated as having been made on the backdated date for all intents and purposes, including the date of proving debts, antecedent transactions etc. It would result in a perverse outcome if the time of opening of proceedings was held to be the date of judgment in 2021, but the relevant date for all other intents and purposes would be the date of the backdated order*."

66. I have not had the benefit of the full citation of authority, but I disagree. The opening of proceedings has to be recognised in EU member states (see article 19 EU Regulation 2015) and thereafter, although insolvency proceedings may be opened in another member state, such proceedings cannot be main proceedings. Were main proceedings to have been opened in another member state prior to the making of an (say) an English retrospective administration order, but after the retrospective date to which such order was to "date back", it is difficult to see how there would be anything other than chaos were the effect to be that the English order retrospectively changed

the nature of the prior opening in the other EU state. In my judgment, it is necessary to distinguish the opening of proceedings from the effect of their opening. Thus, it is generally considered that under the EU Regulation 2015, English winding up proceedings were opened on an by the making of the winding up order (assuming e.g. no earlier order appointing a provisional liquidator) rather than being opened at the date to which the winding up may be said to date back under s127 IA 1986.

67. As I have said, I have had limited argument on this point and limited reference to authority. Articles such as those of the late Gabriel Moss (*When is a proceeding opened?* Insolv. Int. 2008, 21(3), 33-40) demonstrate how complicated the arguments can be and how it is necessary to consider the whole scope of the EU Regulation 2015 and EU caselaw to reach the correct answer. It might be, for example, that the view would be taken under EU law that the proceedings were opened by the original appointment of the administrator and that the proceedings that I now order are simply a continuation of those. In this case, the issue may not be significant on the facts and may well be capable of being addressed by an alternative recital to my order to cover the possibility that the proceedings are "opened" at the earlier date. I do not consider it right to delay judgment (and thus the making of an administration order) to enable further research and argument to be put before me. Accordingly, I will act on the basis of what is, to some extent, an instinctive and preliminary view.

68. It follows that, on the basis of the evidence before me, the recital to the order will be on the basis that the proceedings are opened at today's date, that is under the new regime following the UK's departure from the EU. I should also add that if I am wrong about the time of the opening of the proceedings, and that is to be taken to be

the date my retrospective order takes effect, I am satisfied that as that date the European Regulation applies and that these would be main proceedings.