

OUT-OF-HOURS ADMINISTRATION APPOINTMENTS: THE SAGA CONTINUES

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INTRODUCTION

1. It is now more than 17 years since the Enterprise Act 2002 was enacted with the laudable aim of streamlining the administration procedure, resulting in the introduction of the out-of-court administration regime set out in Schedule B1 to the Insolvency Act 1986 (“**the Act**”).
2. Since that time, issues have frequently arisen in relation to the formal requirements for out-of-court appointments prescribed by the Act and the corresponding rules. At times, these issues have been helpfully clarified by the court; at others, a series of conflicting first instance decisions have left the position more confusing than ever.
3. At the start of this decade, there were a plethora of cases which considered the validity of a purported administration appointment where the appointor: (i) failed to give prior notice of their intention to appoint the administrator to one or more of the persons specified in the Act or the Rules¹; and (ii) filed a notice of appointment (“**NOA**”) in the wrong prescribed form². Despite some initial confusion, and a wholly unnecessary amount of litigation, these issues now appear to be broadly settled.
4. However, as we approach the end of the decade, a new issue has arisen which is causing considerable professional confusion, namely the thorny question of whether an appointor may e-file an NOA when the court office is closed. This matter has been considered in at least six recent cases, with different judges taking subtly different views, leading to widespread confusion and uncertainty. The purpose of this article is to analyse those decisions and attempt to take stock of where the law currently stands.

¹ *Minmar (929) Ltd v Khalastchi* [2011] EWHC 1159 (Ch); [2011] BCC 485; *Hill v Stokes plc* [2010] EWHC 3726 (Ch); [2011] BCC 473; *Re Assured Logistics Solutions Ltd* [2011] EWHC 3029 (Ch); [2012] BCC 541; *Westminster Bank plc v Msada Group Ltd* [2011] EWHC 3423 (Ch); [2012] BCC 485; *Re Virtualpurple Professional Services Ltd* [2011] EWHC 3487 (Ch); *Re Ceart Risk Services Ltd* [2012] EWHC 1178 (Ch); [2012] BCC 541; *Re BXL Services Ltd* [2012] EWHC 1877 (Ch); [2012] BCC 657; *Re Euromaster Ltd* [2012] EWHC 2356 (Ch); [2013] Bus LR 466

² *Re G-Tech Construction Ltd* [2007] BPIR 1275; *Re Kaupthing Capital Partners II Master LP Inc* [2010] EWHC 836 (Ch); [2011] BCC 338; *Re M.T.B Motors Ltd* [2010] EWHC 3751 (Ch); [2012] BCC 601; *Re Frontsouth (Witham) Ltd* [2011] EWHC 1668 (Ch); [2011] BCC 635

BACKGROUND

5. With effect from 15 September 2003, Schedule B1 to the Act introduced a wholly new administration regime. For the first time, it was possible for an administrator to be appointed out of court. The relevant provisions relating to this can be summarised as follows:
 - a. paras.14(1), 22(1) and 22(2) respectively confer on qualifying floating charge holders (“**QFCHs**”), the company and its directors the power to appoint an administrator of the company;
 - b. paras.15-17 and 23-25 set out a series of restrictions on the exercise of the power to appoint conferred by paras.14(1) and 22;
 - c. paras.26-28 require a company or directors who propose to appoint an administrator under para.22 to first give notice of their intention to appoint to prescribed persons;
 - d. paras.18 and 29 require a person who appoints an administrator under para.14 or para.22 to file with the court: (i) an NOA; and (ii) other prescribed documents;
 - e. paras.19 and 31 Sch.B1 IA provide that the appointment of an administrator under para.14 or para.22 takes effect when the requirements of para.18 or 29 (as appropriate) are satisfied.
6. It will be appreciated that, strictly speaking, the appointment of an administrator (in exercise of the power under para. 14 or para.22) and the filing of the NOA (as required by para.18 and para.29) are separate and distinct acts³. However, the former is only legally effective when the latter has occurred.
7. In order to file the NOA with the court (and thus for the appointment to become effective) it is necessary for the appointor to “deliver [it] to the court for filing”⁴.

³ See *Re NJM Clothing Ltd* [2018] EWHC 2388 (Ch); [2018] B.C.C. 875 and *Re Spaces London Bridge Ltd* [2019] B.C.C. 280

⁴ See r.13.13(3) of the Insolvency Rules 1986 (as amended by para.66(a) of Sch.1(10) to the Insolvency (Amendment) Rules 2003 and r.1.2 of the Insolvency (England and Wales) Rules 2016.

8. Prior to the introduction of Schedule B1, a document could only be delivered to the court for filing when the court office was open. When the Enterprise Act 2002 was enacted (and Schedule B1 was introduced), a new Part 2 of the Insolvency Rules 1986 (“**IR86**”) was introduced⁵. This included a new r.2.19 IR86 which provided that a QFCH may file an NOA when the court was closed by: (i) faxing it to the designated telephone number⁶; and (ii) attaching a statement providing full reasons for the out of hours filing, including why it would have been damaging to the company and its creditors not to have so acted⁷.
9. Thus, from 2003 onwards: (i) the company and its directors could only file an NOA (and therefore any out-of-court administration appointment made by them could only take effect) when the court office was open; whereas (ii) a QFCH could file an NOA (and any out-of-court administration appointment made by them could take effect) when the court office was closed by using the procedure in r.2.19 IR86.
10. With effect from 6 April 2010, r.2.19 IR86 was amended⁸ to enable a QFCH to file an NOA when the court was closed by sending it as an attachment to an e-mail to a designated email address (in addition to being able to fax it to the designated telephone number).

THE PROBLEM

11. On 16 November 2015, Practice Direction 51O – the Electronic Working Pilot Scheme (“**PD51O**”) came into force. This provided for an electronic working pilot scheme to operate in the Business and Property Courts⁹. Paras.2.1 and 2.2 (so far as relevant) provided:

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

(a) planned “down-time”: as with all electronic systems, there will be some planned periods for system maintenance and upgrades when Electronic Working will not be available; and

⁵ By r.5(1) and para.9 of Sch.1 to the Insolvency (Amendment) Rules 2003

⁶ r.2.19(1) IR86

⁷ r.2.19(8) IR86

⁸ By r.2 and para.41(2) of Sch.1 to the Insolvency (Amendment) Rules 2010

⁹ This was initially to run for one year but the period has subsequently been extended (by the 86th, 93rd and 96th updates to the CPR) and is presently due to expire on 6 April 2020.

(b) unplanned “down-time”: periods during which Electronic Working will not be available due, for example, to a system failure or power outage, or some other unplanned circumstance.

2.2 *For the avoidance of doubt, Electronic Working applies to and may be used to start and/or continue...insolvency proceedings.”*

12. At first blush, it appeared that this innovation meant that a QFCH, the company and its directors could all file an NOA at any time (irrespective of whether the court office was open or closed) by e-filing it. However, no corresponding amendments were made to the Act or the Rules and r.2.19 IR86 continued to set out the procedure for a QFCH to use when the court office was closed.

13. On 6 April 2017, r.2.19 IR86 was replaced by r.3.20 of the Insolvency (England and Wales) Rules 2016 (“**IR16**”), which is in materially the same terms. On the same date, Vos C issued the *Practice Note: Relating to the Practice Direction: Insolvency Proceedings*¹⁰ which noted that following the making and coming into effect of the IR16, significant amendments were required to the *Practice Direction: Insolvency Proceedings*¹¹ (“**PDIP**”).

14. On 22 November 2017, para.2.1 of PD51O was amended¹² to insert a new sub-paragraph (c), such that it now reads:

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

(a) where there is planned “down-time”: as with all electronic systems, there will be some planned periods for system maintenance and upgrades when Electronic Working will not be available;

(b) where there is unplanned “down-time”: periods during which Electronic Working will not be available due, for example, to a system failure or power outage, or some other unplanned circumstance; and

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

¹⁰ [2017] BCC 221

¹¹ [2014] BCC 502

¹² By the 93rd update.

15. In *Re HMV Ecommerce Ltd*¹³, *Re Skeggs Beef Ltd*¹⁴, *Re SJ Henderson & Co Ltd/Re Triumph Furniture Ltd*¹⁵ and *Re All Star Leisure (Group) Ltd*¹⁶ (which are all discussed below), the court held that the effect of para.2.1(c) PD51O is that a QFCH may not e-file an NOA when the court office is closed. Instead, the QFCH must use the procedure in r.3.20 IR16. This is uncontroversial given the clear wording of the provision. However, the question of whether the company and its directors may e-file an NOA when the court office is closed appeared to remain open.

16. On 25 April 2018, a new PDIP¹⁷ came into force. This included a new para.8.1, which (in an apparent attempt to resolve the issue identified above), stated:

“Attention is drawn to para.2.1 of the Electronic Practice Direction 510—The Electronic Working Pilot Scheme, or to any subsequent electronic practice direction made after the date of this IPD, where an application is made, or intention to appoint an administrator is made using the electronic filing system. For the avoidance of doubt, and notwithstanding the restriction in sub-para.(c) to notices of appointment made by qualifying floating charge holders, para.2.1 of the Electronic Practice Direction 510 shall not apply to any filing of a notice of appointment of an administrator outside court opening hours, and the provisions of Insolvency Rules 3.20–3.22 shall in those circumstances continue to apply.”

17. At first blush, it appears that this provision was intended to confirm that a QFCH may only file an NOA when the court office is closed by following the procedure in r.3.20 IR16 and the company and its directors may not file an NOA when the court office is closed.

18. However, as will be seen from the cases discussed below, far from clarifying matters, para.8.1 PDIP has created further confusion as to whether or not the company and its directors may e-file an NOA when the court office is closed.

¹³ [2019] EWHC 903 (Ch)

¹⁴ [2019] EWHC 2607 (Ch)

¹⁵ [2019] EWHC 2742 (Ch)

¹⁶ [2019] EWHC 3231 (Ch)

¹⁷ [2018] BCC 241 On 4 July 2018, the PDIP was replaced by a new version ([2018] BCC 421) which corrected some drafting errors. However, para.8.1 remained in the same form.

THE CASES

(1) *HMV Ecommerce Ltd*

19. In *Re HMV Ecommerce Ltd*, the directors of two companies e-filed NOAs at 5.54pm on 28 December 2018 (i.e. after the court office had closed). The filing was accepted by the court at 9.23am on 31 December 2019 (i.e. the next working day) and the NOA was endorsed as having been filed at 5.54pm on 28 December 2018. In light of para.8.1 PDIP, the administrators were concerned about the validity of their appointment and guidance was sought from the court.

20. Barling J held that para.8.1 PDIP (which he described as “somewhat byzantine”) was ambiguous because:

“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.”

21. In the circumstances, he suggested that it was possible that a company and its directors may be permitted to e-file an NOA when the court office is closed. However, he did not resolve the issue but, rather, proceeded on the assumption that this was not the case and that the e-filing of the NOAs after the court office had closed was a defect.

22. Barling J went on to conclude that such defect was a mere irregularity which did not cause any injustice and, accordingly, did not render the appointment invalid. In the circumstances, he declared that the administrators were validly appointed at 5.54pm on 28 December 2018.

(2) *Skeggs Beef Ltd*

23. In *Re Skeggs Beef Ltd*, a QFCH e-filed an NOA at 5.03pm on 10 September 2019 (i.e after the court office had closed). The NOA was subsequently sealed by the court and endorsed with the date and time of filing (i.e. 5.03pm on 10 September 2019).

24. In light of para.2.1(c) PD51O, it was clear that the use of e-filing was a defect; the QFCH should have followed the procedure in r.3.20 IR16. However, Marcus Smith J held that such defect was a mere irregularity which did not cause any substantial injustice. In the circumstances, applying r.12.64 IR¹⁸, he declared that the appointment was valid and took effect at 5.03pm on 10 September 2019.

25. Although strictly *obiter*, Marcus Smith J went on to hold that the company and its directors may not e-file an NOA when the court office is closed.

(3) *SJ Henderson & Co Ltd* and (4) *Triumph Furniture Ltd*

26. In *Re SJ Henderson & Co Ltd*, the directors of a company e-filed an NOA at 6.03am on 1 November 2018 (i.e. before the court office opened). The filing was accepted by the court at 9.44am and the NOA was endorsed as having been filed at 6.03am.

27. In *Triumph Furniture Ltd*, the director of the company e-filed an NOA at 9.29am on 8 October 2019 (i.e. before the court office opened). The filing was accepted by the court at 10.22am and the NOA was endorsed as having been filed at 9.29am.

28. Both cases were considered by the court after the judgment in *Skeggs Beef* had been handed down but before it was published. In consequence, ICC Judge Burton does not appear to have been aware of that decision. Nevertheless, she also held that a company and its directors may not e-file an NOA when the court office is closed (because the introduction of PD51O could not, without more, have been intended to have the effect of conferring on the company and its directors the right to file an NOA when the court office is closed).

¹⁸ Rule 12.64 IR 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.”

29. ICC Judge Burton went on to hold (contrary to the decision of Barling J in *HMV*) that the e-filing of an NOA by the company or its directors when the court office is closed is not a mere irregularity (because, unlike a QFCH, the company and its directors are not entitled to file an NOA when the court office is closed). Although she appeared to suggest that this would render the purported appointment a nullity, ICC Judge Burton ultimately appears to have proceeded on the basis that an NOA e-filed by a company or its directors when the court office is closed should be treated as having been filed (and the appointment as having taken effect) at the time when the court office next opened.

(5) Unreported decision of HHJ Hodge QC

30. The author is aware that in a recent (and as yet unreported) decision, HHJ Hodge QC has disagreed with the decisions in *Skeggs Beef* and *SJ Henderson*, holding that a company and its directors can e-file an NOA at any time irrespective of whether or not the court office is open¹⁹. However, his reasons for doing so are as yet unclear.

(6) All Star Leisure (Group) Ltd

31. In *Re All Star Leisure (Group) Limited*, a QFCH unsuccessfully attempted to e-file an NOA at 3.37pm, 3.50pm (when the court office was open) and 4.01pm (after the court office had closed) on 17 September 2019. It finally succeeded at 4.18pm, notwithstanding that it should have used the procedure in r.3.20 IR16.

32. In line with the earlier decisions in *HMV* and *Skeggs Beef*, HHJ Cooke held that such defect was a mere irregularity which did not cause any substantial injustice and declared that the appointment was valid and took effect at 4.18pm on 17 September 2019.

33. Although strictly *obiter*, he went on to say that had the NOA been e-filed by the company or its directors he would have preferred the reasoning of Barling J in *HMV* to that of ICC Judge Burton in *SJ Henderson* and held that it was a mere irregularity and not a fundamental defect.

¹⁹ <https://www.exchangechambers.co.uk/landmark-high-court-decision-on-out-of-court-appointment-of-administrators/>

34. Finally, he strongly encouraged the Rules Committee to remove the “carve out” in para.2.1(c) PD51O and para.8.1 PDIP and permit QFCHs, the company and its directors to e-file NOAs at any time noting that:

- a. it was not necessary for PD51O to have a carve out for NOAs filed by QFCHs;
- b. it is obviously desirable to ensure that all the required information reaches the court and that there be a publicly available record of the time at which an appointment takes effect. But neither of these reasons can be a reason for insisting that only the r.3.20 IR16 procedure is used at a particular time of day;
- c. the only additional document required if the r.3.20 IR16 procedure is followed is the statement of reasons for filing out of hours. But it is questionable what purpose that statement serves;
- d. it is not necessarily the case that a party would find it impossible to deliver physical documents to court for filing outside the published counter opening hours (e.g. a helpful court clerk may open a few minutes early or stay open late);
- e. there does not appear to be any good reason to prevent a company or its directors from filing an NOA out of hours;
- f. even if there was, it would not be a reason for not offering QFCHs a more convenient way of effecting the electronic delivery to which they are already entitled.

SUMMARY OF THE LAW

35. As things presently stand, it can be said with certainty that a QFCH may not e-file an NOA when the court office is closed. Instead, it must use the procedure in r.3.20 IR16. This much is clear from the relevant rules (r.2.1(c) PD51O, r.3.20 IR16 and para.8.1 PDIP) and has been confirmed in the cases considered above.

36. Equally it seems clear that if a QFCH does e-file an NOA when the court office is closed and the court subsequently accepts the NOA and endorses it with the time at which it was actually filed, the appointment will take effect at the time of filing unless this would cause substantial irremediable injustice (see *HMV, Skeggs Beef* and *All Star Leisure*).

37. In *SJ Henderson*, it was held that a company and its directors may not e-file an NOA when the court office is closed. This was also the *obiter* view of Marcus Smith J in *Skeggs Beef* and of HHJ Cooke in *All Star Leisure*. However, it appears that HHJ Hodge QC has formed a contrary view and it will be necessary to give careful consideration to his judgment as and when it is published.
38. There is also uncertainty as to the consequences if a company or its directors e-file an NOA when the court office is closed (assuming that they are not permitted to do so). In *SJ Henderson*, ICC Judge Burton held both that this was incurably defective and that the appointment took effect when the court office next opened. In *All Star Leisure*, HHJ Cooke cast doubt on this, suggesting (as Barling J held in *HMV*) that this was a mere irregularity and the NOA was effective at the time of e-filing notwithstanding the defect.
39. In view of this uncertainty, it is very much hoped that the issues considered above can be clarified by way of legislative amendment. In the meantime, practitioners are well advised to avoid out-of-hours appointments wherever possible.

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