Re Skeggs Beef Limited [2019] EWHC 2607 (Ch)
Re S.J. Henderson & Co Limited; Re Triumph Furniture Limited [2019] EWHC 2742 (Ch)

Two recent decisions have shed yet more light on the "byzantine" system for out of hours appointments. Both confirm that the courts will continue to take a relatively detailed, yet pragmatic, approach to this issue.

The facts and the decisions

All three applications were unopposed. Counsel were instructed essentially to confirm that the administrators were validly appointed, and that their acts to date remained valid.

In *Skeggs Beef*, the applicants were purportedly appointed by qualifying floating charge holders ("**QFCHs**") after the court office had closed. The notice of their appointment was not filed in accordance with rr.3.20 and 3.21 of the Insolvency Rules 2016 ("**IR 2016**"). The applicants had mistakenly relied on the Electronic Working Pilot Scheme for the filing of documents (PD51O). Although PD51O permits the use of Electronic Working (i.e. CE-filing) to "*start and/or continue… insolvency proceedings*", PD51O, para 2.1(c) creates an exception whereby a notice of appointment filed by a QFCH out of hours must be filed by way of fax or email, in accordance with IR 2016, r. 3.20.

The notice was therefore filed at 5.03pm under PD51O, and not r.3.20 (as should have happened). The appointment was therefore defective. However, Marcus Smith J held that the defect was not fundamental, and was able to be cured under IR 2016, r.12.64.

In both *S.J. Henderson & Co* and *Triumph Furniture*, the purported appointments were made by resolution of the company's director(s), and were received by the court when the court counters were shut. The notices were therefore purportedly e-filed out of hours. Departing from the earlier decision of Barling J in *HMV Ecommerce Ltd* [2019] EWHC 903 (Ch), ICC Judge Burton held that there was no basis for out of hours appointments to be made by directors/companies. However, instead of holding that there had been no appointment, the Judge held that the correct approach was that the appointments took effect when the courts next opened.

Comment

Administrators can be appointed by the company or its directors, or by a QFCH. These decisions confirm that different regimes apply to each for the purposes of out of hours appointments. In short, when the court office is closed, (i) a company/its directors may not file a notice of appointment; and (ii) a QFCH may only file a notice of appointment by using the procedure in IR 2016, rr.3.20 and 3.21 (and not CE-filing).

Applying general principles of statutory interpretation, a hierarchy of rules then follows. At the top is primary legislation, then specific secondary legislation (in this case the IR 2016), then the general provisions of the CPR (which in this case included the PD51O), then the Insolvency Practice Direction (July 2018) ("**IPD**"). The problem arose because of the conflicts of statement between these sources of law.

However, the exceptions carved out in one layer do not necessarily reflect the correct legal position. By way of example, if the rules are read on the same plane, PD51O, para 2.1 and IR 2016, r.12A.14(1) are flatly contradictory in their intent; one is permissive, the other is restrictive. PD51O, para 1.1(2) says that Electronic Working is an electronic scheme for the purposes of IR 2016, r.12A.14, but then that leaves open the question as to what the current purpose is of r.12A.14(1).

This complexity is compounded by the IPD, which refers (at para 8.1), to PD51O, para 2.1, and appears to relate appointments of administrators outside court opening hours (but does not refer to whether those appointments are by directors or QFCHs). The morass of conflicting rules is such that Counsel made the rare submission that Parliament had simply made a mistake. In the author's view, although the general principles of Parliamentary interpretation constrained the court from holding that there was such a mistake, outside those principles of interpretation, the rules themselves do seem to indicate that due regard was not given to the other components of the legislation when successive amendments were made.

The conclusion arrived at in *S.J. Henderson* also casts significant doubt on the decision of Barling J in *Wright v HMV Ecommerce Ltd* [2019] EWHC 903 (Ch), which had previously suggested that a company and its directors (but not a QFCH) may be able to file a notice of appointment when the court office is closed by using CE-filing. Broadly the opposite position now appears to be correct.

Summary of the law

The summary of the current position is as follows:

(1) Administrators must be appointed pursuant to Sch. B1 of the Insolvency Act 1986. Since the coming into force of the Enterprise Act 2002, this has effectively replaced the power of QFCHs to appoint an administrative receiver (although that background was central to the decision in *S.J. Henderson*).

(2) Sch. B1, paras 22 and 29 apply when an out-of-court appointment is made by a company or its directors. Sch. B1, paras 14 and 18 apply where the appointment is made by a QFCH.

(3) The appointment of an administrator takes effect when a notice of appointment has been filed: see Sch. B1, paras 18 and 19, and 29 and 31. This step logically follows from the decision to appoint the administrator and, somewhat awkwardly, the appointment of the administrator: *Re NJM Clothing Ltd* [2018] EWHC 2388 (Ch).

(4) The simplest way to avoid the problems of out of hours appointments is to ensure that notices are filed with the court when it is open. Out of hours issues do not then arise. Practitioners adopting this strategy would be well-advised to make the application in good time before the court office shuts.

(5) The out of hours regimes apply when the court counter is shut. Unhappily, this varies from court to court, and is not contingent on there being court staff in attendance (which gives rise to a risk of a member of court staff being in early, and accidentally stamping a notice as being received 'out of hours', even if it has been filed when the court is open).

(6) Following from the distinction between Sch. B1, paras 14 and 22, different principles apply to out of hours appointments. QFCH appointments must be made under IR 2016, rr.3.20-22, which requires the notice of appointment to be filed by way of (i) fax; or (ii) email to a designated email address. The appointment is made at the time of filing.

(7) If QFCH appointments are made under PD51O instead of rr.3.20-22 (i.e. if CE-filing is used instead of email or fax), that will probably constitute a remediable defect: *Skeggs Beef* at [20] and [23].

(8) Director and company appointments cannot be made out of hours (IPD, para 8.1 notwithstanding). Such an appointment will not be a procedural defect only; it appears from the tenor of ICC Judge Burton's decision that there will be no appointment at all. In this respect, Barling J's decision in *Wright v HMV Ecommerce Ltd* [2019] EWHC 903 (Ch) appears probably to be wrong: *Re S.J. Henderson & Co Ltd* at [93].

(9) However, the solution to that problem, and the problem of court staff working before 10am or after the counter closes, is that the appointment will simply take effect when the court next opens. The appointments are therefore not 'out of hours' appointments at all. That sits awkwardly with the requirement for a notice of appointment to state the date of appointment: IR 2016, r.3.24(1)(j), but in the author's view, that is a more satisfactory and pragmatic decision than there simply being no appointment at all.

In the best interests of creditors?

The current state of the law arises from an unnecessarily unclear network of rules, which (aside from the applicable tenets of statutory construction) appears to have resulted from successive amendments being made to different pieces of secondary legislation, without sufficient consideration of the knock-on effects of those amendments in other areas of legislation.

Stepping back from the complexities of the underlying legal position, it is clearly unsatisfactory from a creditors' perspective for applications to be made to court to verify the appointment of administrators, especially where those appointments are unchallenged and there is no mention of prejudice in any case. Such applications demonstrate that the utility of out-of-court appointments are at risk of being undermined by such applications (which ultimately end up involving the court anyway). It is suggested that, while these decisions offer some much-needed clarity to the position on out of hours appointments, the Insolvency Practice Direction can and should be amended to put the position beyond doubt.

As a simpler solution, the IR 2016 could be amended to allow the more generally permissible approach in PD51O to prevail in all cases of administrator appointment, as may have been contemplated by ICC Judge Burton in *Re S.J. Henderson & Co* at [89]. Given the confusion created by the legislature, it is the author's view that it would also be doing UK Plc a service to give retrospective effect to that amendment (thereby granting a r.12.64-type amnesty in all out of hours appointments), unless identifiable prejudice can be shown by an applicant as to the timing of the appointment.