ADMINISTRATIONS

THE FLOOD OF INVALID ADMINISTRATOR APPOINTMENTS

A TRIUMPH OF FORMS OVER SUBSTANCE?

Christopher Brockman & Jeremy Bamford

Guildhall Chambers

1. The new, quicker and cheaper out of court appointment process of administrators introduced by the Enterprise Act 2002 also brought in its wake new issues as to the validity of appointment, which had not arisen under the old court appointment regime and which continue to trouble practitioners. The issues concerning validity, initial cases and practical solutions were highlighted in a previous paper[1]. In summary, it will be recalled that:

1.1. in *Re G-Tech Constructions Ltd*[2], Hart J held that an appointment was invalid where the wrong prescribed notice of appointment had been filed at court. Form 2.9B (to be used after giving of notice of intention to appoint) had been used, when it ought to have been Form 2.10B (to be used where there is no need to serve a notice of intention to appoint). The error was accidental, technical and no one suffered any prejudice, however the Judge held that the filing of the correct prescribed form was a critical step and necessary prerequisite for a valid appointment. There was no jurisdiction to waive that error whether under r.7.55 IR 1986, under para. 104 Sch B1 or otherwise. The Judge did however grant an order appointing the administrators with retrospective effect.

1.2. in *Blights Builders Ltd*[3]an out of court appointment was made by the executors of the sole director and shareholder of the company on 24 July. Unbeknown to the executors a creditor had presented a winding up petition to the court on 5 July but the court did not get round to sealing the petition or returning it for service to the creditor until 25 July. HHJ Norris QC held that the petition had been "presented" for the purposes of para. 25 Sch B1 when it was delivered to court

[1] "Administration ins and outs – Defective, invalid or inchoate?" Jeremy Bamford , Jan 2010 http://www.guildhallchambers.co.uk/uploads/docs/section9/1_InsandOuts_JRB.pdf

[2] [2007] BPIR 1275 heard 29 September 2005

[3] [2008] 1 BCLC 245 heard 2 October 2006 before *G-Tech* reported or widely known about. An application for the retrospective appointment of the administrator was not therefore made.

1.3. for sealing and issue; as a result the appointment of administrators was invalid as the company had no power to appoint out of court given the extant winding up petition: para. 25(a) Sch B1. The judge held that r. 7.55 IR 1986 did not give power to remedy the invalidity. The invalidity having been spotted early and prior to any substantive steps by the purported administrators, the petitioning creditor was persuaded to apply instead for the appointment of administrators, so the judge made a fresh appointment of administrators with effect from the date of the order, together with ancillary orders by way of indemnity to the invalidly appointed administrators under para. 34(2) Sch B1 and under para. 104 Sch B1, as to the validity of acts of the invalidly appointed administrators[4].

2. The initial warning of concerns over validity issues identified above has been followed by a steady stream of invalidity cases which during 2011 turned into a veritable flood of first instance cases, which shows no signs of abating, absent guidance from the Court of Appeal.

3. The purpose of this paper is to highlight these invalidity cases, the causes of invalidity, arguments deployed in an attempt to avoid a finding of invalidity and developments concerning the curative power of a retrospective appointment of an administrator.

Kaupthing

4. There were 3 significant cases during 2010 dealing with invalid appointments. In *Kaupthing Capital Partners II Master LP Inc*[5] ("**Kaupthing LP**") administrators were appointed out of court in England over Kaupthing LP, a limited partnership established in Guernsey which had legal personality pursuant to an election made under the Limited Partnership (Guernsey) Law 1995, by KCP the general partner of Kaupthing LP. The appointment used Form 2.10B, i.e. the prescribed form for the appointment in respect of a company as defined in para. 111(1A) Sch B1. However article 13 of the Insolvent Partnerships Order 1994, applying modified para. 29(5) Sch B1, requires a notice of appointment of an administrator of a partnership to be in Form 1B.

5. Proudman J on a contested hearing[6] with submissions from leading counsel held that the appointment was invalid as the wrong prescribed form had been used, following the reasoning in *G-Tech*. Whilst the entity involved is unusual, the judgment is significant for its approval of *G-Tech*, after adversarial argument and the following additional points, which have more general application, where the judge:

[4] The para 104 order arguably ought not to have been made, given that the appointment was invalid, rather than defective.
[5] [2010] EWHC 836 (Ch) aka *Pillar Securitisation Sarl v Spicer*
[6] Pillar Securitisation SARL, the largest creditor of Kaupthing LP which was owed £63M, challenged the validity of appointment.

5.1. rejected submissions that Kaupthing LP (i) was a company within the meaning of para 111(1A) Sch B1, and (ii) was a form of hybrid between a company and a partnership as it was a body corporate with legal personality and the court should therefore apply a beneficent construction of the rules;

5.2. was prepared to consider whether the difference in forms was merely a difference in the heading but concluded that substantively the wrong form had been used, as the form wrongly referred to Kaupthing LP as a company;

5.3. whilst she initially considered whether G-Tech could be distinguished on the basis that there was a substantive distinction between the forms she was dealing with and the Form 2.9B filed and the Form 2.10B which should have been filed in that case, she concluded it was not appropriate to do so as:

> "It would open a can of worms and lead to great uncertainty to say that some forms were in effect more prescribed than others. If a principle can be found to distinguish which forms are essential to validity and which are not, it is for a higher court to identify."(para 55).

5.4. concluded that the court had no jurisdiction to waive or correct the invalidity under r. 7.55 IR 1986 or para. 104 Sch B1;

5.5. rejected a submission that the appointment was also invalid because, it was alleged, KCP as general partner did not have authority to appoint administrators without the participation of the limited partners;

5.6. rejected a submission that the appointment was also invalid due to conflicting statements in the form as to whether the EC Regulation applied;

5.7. rejected a submission that the appointment was also invalid due to the misdescription of KCP as the "sole member" rather than "general member" in the resolution annexed to the form;

5.8. held that a retrospective appointment of administrators with effect from 364 days prior to the order could be made but there was no jurisdiction to make 2 back-to-back retrospective orders to cover a longer period;

5.9. was not prepared to grant a retrospective administration order forthwith, as the invalidly appointed administrators had no standing to seek an administration order, it would be made purely in the interests of the invalidly appointed administrators and she wished to consider evidence, further argument and the views of creditors as to the choice of administrator.

M.T.B. Motors

6. *Re M.T.B. Motors Limited*[7] reveals a trap for the unwary. The company, which had carried on business running car-sale showrooms, was authorised by and registered with the FSA to sell products such as warranties, protected payment policies, insurance GAP policies and holding insurance mediation client money. An out of court appointment under paragraph 22 of Schedule B1[8] can only be made in respect of a company authorised by the FSA if the written consent of the FSA is filed at court with the other appointment documents, see s 362A, Financial Services and Markets Act 2000:

> "362A **Administrator appointed by company or directors**
>
> (1) This section applies in relation to a company of a kind described in section 362(1)(a) to (c).
>
> (2) An administrator of the company **may not be appointed** under paragraph 22 of Schedule B1 to the 1986 Act or paragraph 23 of Schedule B1 to the 1989 Order **without the consent of the Authority**.
>
> (3) Consent under subsection (2):-
>
> (a) must be in writing, and
>
> (b) must be filed with the court along with the notice of intention to appoint under paragraph 27 of Schedule B1 to the 1986 Act or paragraph 28 of Schedule B1 to the 1989 Order.
>
> (4) In a case where no notice of intention to appoint is required—
>
> (a) subsection (3)(b) shall not apply, but

[7] [2010] EWHC 3751 (Ch) HHJ Hodge QC Manchester DR

[8] It appears that FSA consent may not be needed where the appointment is by a QFCH under para. 14: see Recovery, Summer 2011, p.34-35 Alan Gar.

(b) **consent under subsection (2) must accompany the notice of appointment filed under paragraph 29 of Schedule B1 to the 1986 Act** or paragraph 30 of Schedule B1 to the 1989 Order."

7. Many companies which may not at first sight be involved in financial services have to be authorised by the FSA[9]. If a business is still authorised with the FSA, the FSA's written consent is required, even if the business has ceased to carry on the relevant regulated activity or has ceased to trade altogether.

8. In *M.T.B. Motors* the administrators and their advisors had in fact searched the FSA register but did so against the exact name of the company, as it was shown at Companies House, with full stops after the "M", "T" and "B" in the company name. There was no match on the FSA register. The directors therefore appointed administrators under para 22 Sch B1 on 7 October 2010. However the FSA register in fact had recorded the name of the company without the full stops, and the online search did not show the registration. This came to light when the FSA subsequently contacted the administrators in response to a circular letter to creditors announcing their appointment. The FSA in fact co-operated with the administrators and, after the event, by letter dated 3 November 2010 gave their written consent to the appointment of the administrators under para 22, which was filed in court on 25 November 2010.

9. The administrators applied to the court for a declaration that all acts undertaken and decisions made by the administrators be deemed to be valid under r. 7.55 IR 1986 and para 104 Sch B1. Counsel for the administrators whilst drawing attention to *G-Tech* and *Kaupthing LP*, sought to distinguish them on the basis that:

   9.1. para 31 Sch B1 provides that the appointment of an administrator takes effect when the requirements of para 29 are satisfied;

   9.2. para 29(1) provides that:

[9] Other examples of companies whose main business is not financial services but who may be registered with the FSA because of ancillary business might include retailers (e.g. furniture, kitchen and bathroom retailers) who may have an authorisation in relation to consumer credit activities sold to customers to allow the purchase; builders may be authorised in relation to arranging home finance facilities, travel agents and holiday companies in respect of ancillary sale of insurance.

"a person who appoints an administrator of a company under paragraph 22 shall file with the court:

(a) a notice of appointment, and
(b) such other documents as may be prescribed."

9.3. the consent of the FSA under s. 362A(3) FSMA 2000 was not "prescribed" by the IA 1986 or IR 1986, therefore it was not required to be filed under para 29(1)(b) as a mandatory requirement but was of an administrative nature, was merely a defect and did not render the appointment invalid or a nullity.

10. However HHJ Hodge QC rejected those submissions and held that the appointment of the administrators was invalid. In effect counsel's submissions sought to insert wording into para 29(1), i.e. "such other documents as may be prescribed by this Act or the Rules made thereunder", which words were not there and were inappropriate to add. The reference in para 29(1) to prescribed documents was without any limitation expressed upon the source of the prescription and the wording of s.362A(3) FSMA 2000 requiring the consent of the FSA to be filed with the notice was such that Parliament "prescribed" that that notice be filed. The judge consider that

"it would defeat the legislative purpose underlying Section 362A of the 2000 Act if the failure to file such consent with the court, along with a notice of intention to appoint, did not operate to invalidate any appointment of an administrator purportedly made pursuant to the notice."

11. It did not matter that the administrators and the appointers were not responsible for the mistake in not obtaining consent, which was caused by the error on the FSA's register or that the consent was subsequently obtained[10].

12. Having decided that the appointment was invalid, the court made an order re-appointing the administrators with effect from the date of the invalid appointment, and ordering that the costs of the application should be costs of the administration. The appointment was made on the application of

[10] It appears that an argument that the administrators were appointed with effect from 25 November 2010, i.e. when the consent of the FSA was filed with the Court and therefore all the prescribed notices had been filed was not run, presumably because of concerns over the invalidity of actions taken by the administrators between 7 October 2010 and 25 November 2010, which would be cured by a retrospective appointment but not by arguing that the appointment was valid from 25 November 2010.

the former administrators, but the administrators' standing to make such an application does not appear to have been addressed in detail.

Hill & Pope v Stokes

13. Some comfort for IPs against the strict and inflexible interpretation of appointment requirements was provided in *Hill and Pope v Stokes PLC* ("*Stokes*")[11] by HHJ McCahill QC[12]. The directors of the company served notice of intention to appoint on a bank as QFCH and on the company itself on 19 Oct and, with the consent of the bank, appointed the administrators under para. 22 on 20 Oct. However the directors failed to serve notice on the landlords of 4 properties occupied by the company, who had distrained (which was known to the directors), and on the bailiffs, as required by para. 26 (2):

> "A person who proposes to make an appointment under paragraph 22 shall also give notice as may be prescribed to such other persons as may be prescribed"

and r. 2.20(2):

> "A copy of the notice of intention to appoint must, in addition to the person specified in paragraph 26, be given to –
>
> (a) any enforcement officer who to the knowledge of the person giving the notice is charged with execution or other legal process against the company;
>
> (b) any person who, to the knowledge of the person giving the notice, has distrained against the company or its property;
>
> (c) any supervisor of a voluntary arrangement under Part I of the Act; and
>
> (d) the company, if the company is not intending to make the appointment".

14. The error was spotted relatively swiftly in or around the start of Nov, however the administrators had in the short period since their appointment closed 20 stores, made various employees redundant and sold 8 other stores. Application for declarations as to validity of appointment were made on notice to

[11] [2010] EWHC 3726 (Ch)
[12] Whilst decided 23 November 2010 the case was only reported and became widely known about in 2011.

the company and bank. The judge directed that the landlords and bailiffs be served with the application and none of them objected or appeared[13].

15. Para. 28(1) Sch B1 provides:

"(1) An appointment may not be made under paragraph 22 unless the person who makes the appointment had complied with any requirement of paragraphs 26 and 27 and –

(a) the period of notice specified in paragraph 26(1) has expired; or

(b) each person to whom notice has been given under paragraph 26(1) has consented in writing to the making of the appointment."

HHJ McCahill QC accepted 2 submissions made on behalf of the administrators:

15.1. in para 28(1), the reference to paragraph 26 should, in fact, be read as a reference only to paragraph 26(1) Sch B1;

15.2. alternatively "complied with any requirements of paragraphs 26 and 27" meant compliance with any mandatory requirement and the failure to serve notice on the landlords and bailiffs was not a failure of such a quality that it amounts to a failure to comply with a mandatory requirement.

16. The judge's reasoning principally centred on an acceptance of the submission in para. 7.1 above and he relied on the following factors in concluding that the reference should only be to para 26(1)[14]:

16.1. no minimum period of notice to prescribed persons, cf. 5 days notice to QFCH under para. 26(1). That suggests that the reason for notice to prescribed persons is for information purposes, to avoid them innocently breaching interim moratorium;

16.2. the requirement that a landlord or bailiff be notified was qualified by the person serving notice having knowledge of distraint, which suggested non-compliance should not result in invalid appointment;

[13] There was therefore no adversarial argument.
[14] The judge did, in case he was wrong on the first point, also concluded that the failure to notify was not a mandatory requirement and that non-compliance was not fatal to the validity of appointment.

16.3. the prescribed form of notice of intention to appoint does not require anything to be recorded concerning the notice given to prescribed persons and appears to suggest that the only material notification is to the QFCH who can trump the appointment;

16.4. the prescribed persons specified in r. 2.20(2) do not suggest a distinction between non-service on the 4 categories of prescribed person, yet

> "it would be surprising if the court were constrained to find that the appointment was rendered invalid, by reason of a failure to give the company notice of that which it already knew. It must be a rare situation where the company was unaware of what its directors were doing"[15];

16.5. para. 30 deals with the information to be included in the statutory declaration "In a case in which no person is entitled to notice of intention to appoint under paragraph 26(1) (and paragraph 28 therefore does not apply)". The underlined wording in brackets is inconsistent with the strict wording of para 28(1) but provided support for the proposition that the reference in para. 28 to para 26 was meant to be a reference to para 26(1);

16.6. there was no compelling reason for construing the obligation in para 26(2) as mandatory such as to render an appointment following failure to comply a nullity and strong policy arguments for giving the court a degree of flexibility; and

16.7. the judge referred to a previous unreported decision of his own (Re Garden Land Ltd[16]) where there had been a failure to file a para. 100 statement by each of the proposed administrators, which he concluded was not so fundamental as to invalidate the appointment.

[15] See *Minmar* below, where this very point arose, and The Chancellor concluded that the appointment was invalid.
[16] Counsel instructed was Richard Ascroft from the Guildhall Insolvency team.

Minmar

17. Rejoicing over that pragmatic and flexible construction was however short-lived in 2011 due in particular to the decision of The Chancellor, Sir Andrew Morritt, in *Minmar (929) Ltd* [2011] EWHC 1159 (Ch) on 8 April 2011. That decision has produced a slew of subsequent cases during 2011, massive uncertainty concerning out of court appointments by directors under para. 22 Sch B1 and called into question the validity of a substantial number of historic para.22 appointments.

18. *Minmar* was a heavily contested[17] "company hijacking" case, whereby 3 corporate company directors were allegedly appointed as directors of Minmar (929) Ltd ("Minmar"), a gambling business, on 16 March 2011 and the same day those directors purported to appoint administrators over Minmar under para. 22 Sch B1. One of the original directors of Minmar, Mr Chohan, applied for an order setting aside the appointment of the administrators on various grounds including (i) there was no valid board meeting of the directors of Minmar to resolve to appoint administrators and (ii) no notice of intention to appoint had been served on the company under para. 26(2) Sch B1.

19. The 3 corporate directors contended that they constituted a majority of the board of Minmar and that, whilst there was no notice of a board meeting given to the original directors, no formal board meeting[18] and no quorum for such a meeting, nonetheless they were entitled to appoint administrators by reason of para. 105 Sch B1, which provides:

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

20. Para. 105 had been thought to allow a majority of the directors without unanimity and without holding a formal board meeting in accordance with the company's articles to appoint administrators. Thus Sealy & Milman[19] commented:

> "Para 22(2): The directors for this purpose may act by a majority and it doesn't appear to be necessary that they should do so at a formal meeting: see paragraph 105. This is confirmed by

[17] Adversarial argument with leading counsel for the claimant director and for the intervening directors, the administrators remaining neutral.
[18] The so-called meeting was attended only by one individual on behalf of one of the newly appointed corporate directors
[19] Annotated Guide to the Insolvency Legislation, 13th Ed.

Insolvency Rule 2.2(2) which refers to a copy of the *resolution* of the company but a record of the *decision* of the directors."

"[Para. 105] General note: this is a novel and welcome provision. References in earlier legislation to an act done by the directors have been construed as requiring either that the directors should act unanimously or that a meeting be duly convened at which a decision is reached by the requisite majority: see the notes to Section 9(1) and 124(1). Under the present provision a meeting is not required."

21. The Chancellor rejected that interpretation and concluded that para. 105 did not allow a majority of the directors to appoint administrators without complying with the internal management requirements of the articles by holding a board meeting on the grounds that:

21.1. the reference to decision in r.2.2(2) IR 1986 did not import any notion of informality and did not bear the weight put on it by Sealy & Milman;

21.2. whilst the terms of para. 105 gave the act of a majority the same validity as the act of the directors as a whole, it did not dispense with the usual rules of internal management;

21.3. para. 105 gave statutory force to the decision of Millett J in Re Equiticorp International Plc[20] where he had concluded that an administration petition had been validly presented by directors pursuant to a resolution of the board passed at a properly convened meeting attended by 8 out of 10 of the directors, the question being whether the absence of the other 2 directors meant that the petition had not been presented by "the directors". Millett J concluded the appointment was valid:

"It is true that nothing is known about the attitude of one of the directors of the company, and it may be that he is strongly opposed to the making of the application – though that is doubtful. I am perfectly prepared to read the words "the directors" in section 9 as meaning all 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 specific

[20] [1989] 1 WLR 1010

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 a 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."

21.4. If it had been intended that para. 105 should go further than that existing case law, then the Chancellor would have expected some clear statement to that effect in the White Paper which preceded the EA 2002 or in the explanatory notes to the Act. There was no such statement.

22. Given the Chancellor's conclusion on para. 105, the point of law as regards failure to serve the company under para. 26 did not arise, however the Chancellor indicated his conclusions, in case there was an appeal[21]. The applicant contended that the appointment of the administrators was invalid because notice of intention to appoint was not given to the company[22]. The corporate directors contended that the obligation to give such notice under para 26(2) only arises if there are persons within para. 26(1) on whom notice of intention to appoint needs to be served, relying on the word "also" in para 26(2) and the words in parenthesis in para. 30, which indicated that para. 28 only applies where there is an obligation under para. 26(1)[23]. Unfortunately *Hill & Pope v Stokes* although by then decided was not cited and therefore not considered by the Chancellor.

23. The Chancellor concluded that notice had to be served on the Company and that the appointment was therefore invalid:

23.1. there was no reason why the prescribed persons should receive notice where there was a floating charge holder who could appoint an administrative receiver or administrator but not otherwise. Prima facie each was concerned with the appointment, whether or not there was a floating charge;

[21] There is no indication of an appeal in the CofA case tracker.
[22] See paragraph 16.4 above, the very point on which HHJ McCahill QC had expressed the obiter view in Hill & Pope v Stokes that it would be surprising if such an omission to serve notice on the company would render the appointment invalid.
[23] i.e. in substance the same as the first submission in *Stokes* that in para. 28(1), the reference to para. 26 should in fact be read as a reference only to para. 26(1).

23.2. the use of the word “also” in para. 26(2) made it plain that it was an additional obligation;

23.3. whilst there was no prescribed period of notice, presumably it must be a reasonable period;

23.4. the fact that there is no prescribed form for notice to be given to the prescribed persons and that Forms 2.8(b), 2.9(b) and 2.10(b) do not contain space for recording the notices given to the prescribed persons did not support either construction;

23.5. the inconsistency lay in the words of paras. 26 and 28 on the one hand (which required notice to the prescribed persons) and para. 30 which provides: "In a case where no person is entitled to notice of intention to appoint under paragraph 26(1) (and paragraph 28 does not therefore apply) …" ;

“So far as the parenthetical phrase is concerned, it appears to express the draftsman’s understanding of what he has already provided. Unless and until such regulation as paragraph 26(2) refers to is made, such understanding was no doubt correct, but when such provision was duly made by the Insolvency Rules, the draftsman’s understanding of the effect of paragraph 26 became incorrect. But that cannot alter the plain meaning and effect of the earlier provision.”

23.6. whilst there was an inconsistency, the appropriate course was to follow the clear words of paragraphs 26 and 28, which required notice to be given to the company.

Derfshaw

24. *Re Derfshaw Limited* [2011] EWHC 1565 (Ch) 2 June 2011 is an example of the practice which has emerged where there is a defective appointment. In seven consolidated cases administrators were purportedly appointed by directors under para 22(2) Sch B1 but no notice of intention to appointment was given to the company. On the basis of the decision in *Minmar,* the directors accepted that the purported appointments were invalid and applied to the court for administration orders with retrospective effect[24]. They were aware of the conflicting decision in *Hill & Pope v Stokes* and could have contended that *Minmar* was wrongly decided but instead took the view that the better and more practical course in terms of speed, expense and certainty was to accept that the appointments were invalid and start again by seeking retrospective orders. In making the retrospective orders, Morgan J

[24] Leading counsel was instructed for the directors. There was no adversarial argument.

followed the decision of Hart J in *Re G-Tech Construction Ltd*, although he did express some reservations about the jurisdiction to make a retrospective order [para 15]:

> "One can see scope for argument as to the correctness of *G-Tech Construction Ltd*. It is, in my judgment, quite a significant thing to make an administration order with retrospective effect and one would have liked ideally to have had clearer statutory language than the statutory language in para 13, Sch B1. On the other hand, in the case before me, the desirability of making retrospective orders is considerable. The authority for making such orders exists. The authority has been applied in a number of cases. That authority has not been called into question in a later case, nor indeed, so far as I am aware, in any textbook commenting on the point.
>
> [16] It seems to me in those circumstances that I ought t follow the lead of *G-Tech Construction Ltd* to assume for myself jurisdiction t make a retrospective order and if I have the jurisdiction, I have no hesitation in exercising it."

Frontsouth

25. In *Re Frontsouth (Witham) Limited* [2011] EWHC 1668 (Ch) (30 June 2011) the administrators overlooked the need to obtain the consent of one of two secured creditors to the extension of the administration for a period of six months under paragraph 78(2) of Schedule B1. They were aware of the secured creditor, who was a contingent creditor under an overage agreement in respect of the sale of a development property being developed by the company, secured by a registered charge, had written to the secured creditor requesting consent but did not receive such consent prior to the expiration of their term of office. The court on a second application to extend the term of office of the administrators was made aware of the above facts and was asked to decide whether this was a formal defect which could be corrected by rule 7.55 IR 86, and if not, an application was made by the administrators for a retrospective reappointment.

26. Henderson J held that the failure to obtain the necessary consent under paragraph 78(2) could not be corrected by rule 7.55 IR 86, because the defect was fundamental. Without the necessary consent, the administration had expired. It followed from that conclusion that the extension purportedly granted by the court on the earlier application for an extension (when the failure to obtain the consent of the secured creditor was not drawn to the court's attention) was itself made without jurisdiction and was therefore a nullity.

27. Counsel for the administrators had drawn the judge's attention to instances where registrars in the Companies Court had made declarations under rule 7.55 IR 86 in similar cases where the required consent of a secured creditor had not been obtained. Henderson J commented that:

> "If and to the extent that a practice has developed in the Companies Court of purporting to waive defects of this or a similar nature in reliance upon Rule 7.55, such practice has no solid foundation in law and must therefore cease. It might well be convenient if the court had a power to waive defects of a relatively technical nature in the out of court appointment of administrators, but Rule 7.55 cannot be pressed into service for that purpose, and in my view such a change could only be brought about by legislation."

28. Henderson J went on to hold that an application for a retrospective appointment cannot be made by the "administrators" themselves, because an insolvency practitioner who has purportedly been appointed as administrator has no standing to make the application. The application needs to be made by a creditor or by the company acting by its directors.

29. There were stated to be practical difficulties in obtaining a formal resolution of the board of directors, and the court was asked to rule that a unanimous resolution of the shareholders of the company [25] should be sufficient to form the basis of an application by the company. Henderson J declined to make a formal ruling on this point, and the case was adjourned to allow a creditor (the company's bank) to make the application. The judge's provisional view was that where there is a functioning board of directors, the shareholders in general meeting should not be permitted to act on behalf of the company in matters which are reserved exclusively to the directors. To decide otherwise could result in unacceptable uncertainty.

Care Matters

30. In *Care Matters Partnership Ltd* [2011] EWHC 2543 (Ch) 7 October 2011, a decision of Norris J, provides a warning shot to administrators that the curative power of the court to grant a retrospective administration order is not a panacea to all invalid appointments.

31. In this case, Mr Soloman had been appointed administrator out of court by the directors of the company on 12 Oct 2010. Within days he had sold the company's business for £15,000 and set about realising the book debts, which were estimated to realise £30,000 but in fact only realised £5,856. The realisations were massively outstripped by administrator time costs of £68,436 to 31 March 2011 and rising. Mr Solomons continued to act as purported administrator until 15 April 2011 when he was

[25] As the company was a wholly owned subsidiary of a parent which was itself in administration with the invalidly appointed administrators of the subsidiary validly appointed as administrators of the parent, the shareholders' resolution had been signed by the administrators.

removed by order of the court and Mr Defty was appointed administrator as his replacement[26]. Following the decision in *Minmar*, the directors of the company (presumably prompted by the purported administrators) applied for the retrospective appointment of Mr Solomons as administrator from 12 Oct 2010 and Mr Defty from 15 Apr 2011.

32. It appears that the ground for invalidity was non service of the notice of intention to appoint on the company, although that is not expressly recorded. The directors did not seek to argue that *Minmar* was wrongly decided. Whilst the application sought a validation order under para 104 Sch B1 in respect of the acts of the purported administrators, that application was not pursued before the judge. Nonetheless Norris J reopened, in *obiter* comments, the debate on invalid/defective appointments and whether it was possible to validate the acts of administrators where the appointment was defective as opposed to invalid as follows:

> "In *G-Tech Construction Limited* Hart J took the view that the only course open was to make a fresh administration order with retrospective effect. In *Re Blights Builders Ltd* …unaware of the decision in *G-Tech*, I took a different course, making a fresh administration order with prospective effect and validating the acts of the administrator who had been defectively appointed under paragraph 104 of Schedule B1 to the Insolvency Act 1986. Hart J had also been invited to take this course but had held
>
> > "It is certainly the case that that provision plainly may [assist] in assessing the validity of acts done by a person purporting to be at the administrator, but it does [not] seem to me to provide in itself a cure for the fact that ... there has been no administration ... if the requirements of paragraph 29 have not been complied with".
>
> For my own part (and with considerable diffidence in differing from Hart J) I adhere to my view that paragraph 104 may supply the answer in many cases. As Lord Simonds said (of similar provisions in s.143 of the Companies Act 1929 and Article 88 of the then-current Table A) in *Morris v Kassen* [1946] AC 459 and 471:-
>
> > "There is ... a vital distinction between (a) an appointment in which there is a defect or, in other words a defective appointment, and (b) no appointment at all. In the first case it is implied that some act is done which purports to be an appointment but is by reason of some defect inadequate to the purpose: in the second case there is not a defect, there is no act at

[26] Presumably this was pursuant to a block transfer order, rather than an application to replace the administrator for cause shown.

all ….. [T]he section and article alike deal with slips or irregularities in appointment, not with a total absence of appointment"

It may well be that paragraph 104 is of no assistance where there is no power to make an appointment (for example because there is no valid charge in respect of which the power under paragraph 14 of Schedule B1 could be exercised, or the persons purporting to appoint an administrator under paragraph 22 are not themselves directors). But it may well be that paragraph 104 is of assistance where there is a power to make an appointment but that power has been defectively exercised through some irregularity in procedure."

33. The only relief pursued before the judge was for the retrospective appointment as administrators of Mr Solomons and then Mr Defty. Norris J declined to make retrospective orders:

33.1. as regards the proposed retrospective appointment of Mr Solomons from 12 October 2010 to 15 April 2011, the judge refused to make an order because the court had to be satisfied that as at the date when the administration order is made (not the retrospective date when the order takes effect), the conditions for making an order are satisfied, i.e. (i) insolvency and (ii) reasonable likelihood of achieving the purpose of the administration.

"[11] In my judgment there are two separate questions. The first question is whether an administration order should be made at all. This requires both the satisfaction of the two conditions set out in para 11 (which alone enable the court to make an order) and a decision by the court that it is appropriate to make an order – as at the date when the order is made. The second question is (under para 13(2)(a)) as to the time at which the administration order "takes effect". These questions should not be confused."

"[13] Whilst it may be taken to be the case that the company remains insolvent and unable to pay its debts I am not satisfied on this evidence (a) what the objective of an administration order would now be (beyond enabling the purported administrator to collect something on account of his fees, which is not one [] of the statutory objectives); or (b) that the purpose of the administration is reasonably likely to be achieved. As far as the evidence goes, all that can now be done is to dissolve the company by filing a notice under para 84 of sch B1."

Norris J rejected a submission that the purpose of the administration had been achieved in the past and that by making a retrospective administration order now, the court would validate the acts that had achieved the purpose of the administration in the past, which would thereby achieve the purpose of the administration. In addition and in any event, given that the purported administrator's costs of the administration had greatly outstripped the modest realisations, the judge concluded that "I do not think that this administration achieved anything" (para [14]).

33.2. As regards Mr Defty, the judge declined to make a retrospective appointment because he concluded that, notwithstanding concerns as to the validity of appointment of Mr Solomons by the directors, Mr Defty had been appointed as administrator by order of the court, which order remained unrevoked and under which he continued in office as administrator (para [17]).

Law for All

34. In *Re Law for All Limited* [2011] EWHC 2672 (Ch) (19 October 2011)[27] Norris J was again asked to make a retrospective administration order where notice was not given by the directors on a para 22 out of court appointment to Barclays, who held a registered debenture although Barclays was not owed any debt and the continued registration of the debenture had been overlooked[28].

35. Norris J held that failures to complete the notice of intention to appoint correctly (the definition of the appointor had not been completed and the relevant markings had not been made to indicate whether the company was an insurance company or the EC Regulation applied) were defects rather than resulting in invalidity and were capable of remedy under r 7.55.

36. It was not contended by the applicants that *Minmar* or *G-Tech* were incorrect and therefore accepted that by parity of reasoning that the failure to serve the QFCH was a fundamental fault which could not be corrected. Norris J granted the relief sought by way of a retrospective appointment of the administrators on the application of the directors, on the basis of evidence of insolvency and that the purpose (a better return for creditors) was likely to be achieved. It should be noted however, as regards the practice on such retrospective applications, that the judge:

[27] No adversarial argument.
[28] The requirement for notice under para 26 is to give notice to a person who "is or may be entitled" to appoint an administrative receiver or administrator under para 14. It was not argued in Law For All that there was no need to give notice to Barclays because they were not entitled to notice and did not come within the above wording, given that there was no debt owing to Barclays and the continued registration of the charge had simply been overlooked.

36.1. declined to make supplemental orders ratifying acts or declaring acts valid or in connection with the remuneration of the administrators:

> "[19] The effect of the order is that the administrators will be treated as having been in office from 28 July 2011. There is no need for the Court to "ratify" or "declare valid" the acts of the administrators or to declare that they are "entitled to receive remuneration for their services". Indeed there is a strong reason why the Court should not do so. I do not know in detail what acts the administrators have done or what remuneration they claim: and I should not ratify acts or declare entitlement to remuneration in those circumstances, in case there is someone aggrieved by what has occurred who has a proper ground for challenge or complaint."

36.2. did extend the time for the administrators to circulate their proposals and hold an initial creditors meeting;

36.3. however he refused to make an order that the costs of the application should be paid as an expense of the administration as he did not see why the return to creditors should be depleted in this way (para [22]):

> "The directors purported to make the original appointment and made a mistake in doing so: this present application by the directors is necessary in order to remedy their previous mistake. I do not see why the directors should receive the first fruits of the administration by way of reimbursement of the expenses of their corrective action".

Bezier Acquisitions

37. In *Re Bezier Acquisitions Ltd* [2011] EWHC 3299 (Ch) (12 December 2011)[29] Norris J, on an out of court appointment by the directors notice of intention to appoint was served on the secured creditor but not notice was served on the company at its registered office. Instead the notice of intention to appoint signed by the director was handed to a trainee in the company's solicitors (Linklaters) at a meeting. The evidence was that all the directors and shareholders were aware of and consented to the proposed appointment.

[29] No adversarial argument, although the applicants were represented by leading counsel, the judge reserved judgment and commented that "Although the points have been argued on one side only the presentation was in each case fair to the weight of the argument on either side" (para [1]).

38. Norris J held that the appointment of administrators was not invalid for 2 reasons:

38.1. whilst r. 2.20(3) declared that the provisions for service contained in r. 2.8(2) (which deals with the service of an administration application) to the giving of notice of intention to appoint and r. 2.8(2) provides that "Service shall be effected … on the company … by delivering the documents to its registered office" and r. 2.8(3) provides that if that is not practicable, then it can be served at the company's last known principal place of business:

38.1.1. those rules did not provide a complete and exhaustive code as to the mode of service on a company;

38.1.2. r. 12A.5 provided that where a document is required to be given, delivered or sent to a person, it may be so communicated "to a solicitor authorised to accept delivery on that person's behalf". R. 13.4 also allowed the notice to be served on a solicitor authorised to accept service;

38.1.3. those rules were not excluded;

38.1.4. those rules were complied with by the notice of intention being delivered to the solicitors retained by the company.

38.2. As a separate and independent ground for holding the appointment to be valid, the judge held that r. 2.8 requiring service at the registered office was in any event directory and not mandatory, such that a failure strictly to comply with it did not render the appointment invalid (para [21]):

> "As a separate and independent ground I hold that IR 2.8 is to be construed in the sense that Parliament did not intend that a failure strictly to comply with the rule as to service of the Notice of Intention at the registered office should invalidate the giving of notice were at a valid meeting of the directors of the company (a) it was resolved that the company enter administration and that Notice of Intention to Appoint be given and (b) an agent was appointed to act on behalf of the company in respect of the appointment of the administrators (that engagement to include the taking receipt of, and dealing on the company's behalf with, all relevant notices and formal documentation). I would follow and apply the decision in Re Regent United Service Stores, the principle underlying which I consider remains good law. There has in the present case been "such a service as gives full and complete information to every body to whom information ought to be given".

39. The judge allowed the costs of the application to be an expense of the administration, as he considered that neither the directors nor the advisers had made a mistake that required correcting but rather the application arose because of the state of the law and to quell any concerns over the validity of the sale of the business by the administrators.

40. It is worth noting the further and alternative arguments as to validity and relief sought in that case, which, given the above conclusions, it was not necessary for the judge to deal with but which might be deployed in other cases (para [23]):

> "I should record that Mr Trower QC also argued that there was no mandatory requirement to serve the company because under paragraph 22 of Schedule B1 the appointment of the administrators took effect when the requirements of paragraph 29 were satisfied (paragraph 29 requiring only the filing of a Notice of Appointment with the prescribed accompanying materials). He submitted that the requirements of paragraph 29 so read were fulfilled at 4.30pm on 19 August 2011. If this argument failed he and Mr Robins sought (in their comprehensive skeleton argument) an immediate order for the appointment of administrators but with retrospective effect (following G-Tech Construction [2007] BPIR 1275); alternatively relief under para. 104 of Schedule B1; and as an ultimate "fall-back" a declaration that the administrators had been validly appointed agents for the purpose of effecting a sale of Bezier's assets."

Virtualpurple

41. *Bezier* was one of two applications heard by Norris J in the Applications Court on successive days, the other application being *Re Virtualpurple Professional Services Ltd* [2011] EWHC 3487 (Ch) although the reserved judgement was delivered later than *Bezier* on 21 December 2011[30]. In Virtualpurple, the sole director held a formal meeting on 9 February 2011 the minute of which recorded the financial difficulties of the company, advice received that it was in the best interests of creditors that the company enter administration, as there was no QFCH, the director was able to appoint the administrator pursuant to para 22 and a resolution that the appropriate steps be taken forthwith to file Form 2.10B (Notice of Appointment of administrator by company or directors (where a notice of intention to appoint has not been issued)). The completed Form 2.10B was filed at court on 9 February 2011. Because there was no QFCH a Form 2.8B was not completed and the director did not given a copy of that form "in addition" to the company as a person set out in r.2.20(2). The

[30] No adversarial argument but the directors and administrators were represented by leading counsel and the judge noted (para [2]) that leading counsel in both this case and Bezier "were helpful to me in not seeking to avoid the weight of the argument on the other side".

director and her advisors had followed the guidance issued by the Insolvency Service in their "Dear IP" No 47 issued in October 2010, which stated:

> "The Insolvency Service has been asked to provide its view on the circumstances in which a copy of the Form 2.8B Notice of Intention to appoint an administrator is required to be given to the persons specified in rule 2.20(2) of the Insolvency Rules 1986 by either the directors or the company … It is our view that, when read together, paragraph 26(2) of Schedule B1 of the Insolvency Act 1986, Rule 2.20 and Form 2.8B should be interpreted to mean that paragraph 26(2) does not give rise to a stand alone requirement to give notice of the intention to appoint an administrator. Form 2.8B is not a form that can be completed unless Notice of Intention to appoint is also being given under paragraph 26(1). Rule 2.20(2) requires that specified persons must be given a copy of the Form 2.8B notice (given under paragraph 26(1)) and a copy of the form cannot be made and given where no original form exists. To interpret paragraph 26(2) as requiring s stand alone notice independent of paragraph 26(1) would serve no useful purpose and would be contrary to the policy intention."

42. The director and the administrators applied for a declaration that the appointment of the administrators was valid, mounting a direct challenge to *Minmar* and relying upon the decision in *Hill & Pope v Stokes*. Norris J aligned himself with the decision of HHJ McCahill QC in *Hill & Pope v Stokes* and disagreed with the conclusion of the Chancellor in *Minmar*. He concluded that (para [18]):

    42.1. directors do not have to give the company notice of intention to appoint an administrator when the appointment will have immediate effect;

    42.2. alternatively, a failure to give such notice does not automatically nullify the appointment process and render invalid the appointment of the administrator.

Notice to the company

43. As regards the first conclusion, the judge:

    43.1. Had regard as a matter of construction to the notice requirements for administration applications (noting that the purpose of notifying a person entitled to appoint an administrative receiver or QFCH was to enable them to exercise their rights notwithstanding the application and that the court would have power in an appropriate case to waive defects in service or timing or service on those persons and also in respect of those prescribed persons who had to be given notice under r. 2.6(3) e.g. an administrative receiver, supervisor of CVA, administrator or company) and out of court appointments by a QFCH, in particular noting that there was a requirement to give 2 business days notice to the holder of

a prior floating charge to afford an opportunity to appoint its own administrator but no requirement to give notice to other persons.

43.2. Rejected a "bright line test" argument that the court should by reason of para 31[31] ("The appointment of an administrator under paragraph 22 takes effect when the requirements of paragraph 29 are satisfied") simply look to para 29 alone to see whether an appointment was valid, which merely required the filing in court of the notice of appointment in prescribed form together with prescribed documents but does not itself expressly require any of the other paragraphs of Sch B1 to be complied with. Para 31 was directed as the point in time at which the officeholder assumes office, it is not directed to the conditions for the validity of appointment. Furthermore, whilst accepting that there was no express reference within para 29 to compliance with other paragraphs, there was an indirect reference to compliance with other paragraphs in that the notice of appointment was required to include a statutory declaration that "the appointment was in accordance with this Schedule".

43.3. Concluded that the words in para 28 that an appointment may not be made by a director "unless the person who makes the appointment has complied with any requirement of paragraphs 26 and 27" was a reference to para 26(1) because:

43.3.1. the wording of para 30 (dealing with the contents of the statutory declaration) "in a case in which no person is entitled to notice of intention to appoint under paragraph 26(1) *and paragraph 28 therefore does not apply*" (emphasis added), was a strong indication that the draftsman contemplated 2 scenarios, one in which notice of intention had to be given to the QFCH or chargeholder entitled to appoint an administrative receiver and the other in which no such notice had to be given;

43.3.2. r.2.20(2) which provides that "a copy of the notice of intention to appoint must, in addition to the persons specified in paragraph 26" be given to other persons (including the company) must also be referring to the persons specified in para 26(1) as no other persons are specified in para 26.

43.3.3. that reading is reinforced by the requirement in r. 2.20(1) that the notice of intention to appoint "for the purposes of paragraph 26" shall be in Form 2.8B. That prescribed form specifies that the notice is to be given to "persons who … are or may be entitled to appoint an administrative receiver of the company or an

[31] The reference to para 30 of Sch B1 in paragraph [20] of the judgment appears to be an error and should refer to para 31 of Sch B1

administrator of the company under paragraph 14 of Schedule B1" and the notice is not therefore suitable for giving notice to anyone other than those specified persons.

43.3.4. that reading is reinforced by the requirement in r. 2.20(2) that what is to be given to the persons listed in r. 2.20(2) is "a copy" and that it is to be given to those listed persons "in addition to the persons specified in paragraph 26". If there is no qualifying chargeholder then there will be no notice of intention to appoint in respect of which a "copy" can be given, nor can it be given to the company "in addition".

43.3.5. that is consistent with the headings of the prescribed Form 2.9B (where a notice of intention to appoint has been issued) and Form 2.10B (where a notice of intention to appoint has not been issued).

43.3.6. if the directors of a company are always bound to give notice to the company (and must therefore always use Form 2.9B to appoint), then the contents of Form 2.10B are wrong, as para 1 gives alternatives for the company/the directors making the appointment and the statutory declaration in para 10 of the form is only appropriate where no notice of intention to appoint has been given.

43.3.7. the Form 2.8B notice of intention to appoint is specifically addressed to qualifying chargeholders and cannot sensibly be completed to refer to the company or those exercising recovery rights.

43.3.8. the above reading makes functional sense.

43.3.9. the Chancellor in Minmar could see no reason why the persons listed in r. 2.20(2) should receive notice of intention to appoint if there was a qualifying chargeholder but not otherwise. The reason for the difference was that if there was a qualifying chargeholder there would have to be a notice of intention to appoint and there would be an interim moratorium, which should be notified to those affected. But where there is no chargeholder and the appointment is immediately effective, the listed persons would be notified of the moratorium under r. 2.27(2). Notice of intention to appoint (with no prescribed minimum period) is without function if the appointment is immediate and notice of the appointment is immediate.

Even if requirement to notify company, does failure to do so render appointment a nullity?

44. Norris J agreed with the conclusion of HHJ MaCahill QC that even if wrong on the first point, a failure to give notice to the company would not automatically render the appointment invalid, given:

    44.1. although the language of r.2.20(2) is imperative, the consequences of failure to comply are not expressed;

    44.2. the correct approach to construction of para 26(2) and r. 2.20(2) is to "focus intensely on the consequences of non-compliance, and pose the question, taking into account those circumstances, whether Parliament intended the outcome to be total invalidity.

    44.3. the fact that the appointor might not know of an enforcement officer or creditor distraining and that the obligation to serve notice was limited by having such knowledge, was inconsistent with non-compliance leading to invalidity.

    44.4. the fact that there as no minimum period of notice and that the listed persons did not have superior rights preventing appointment did not suggest invalidity.

    44.5. it would be a rare case where the company did not know what the directors were doing and therefore it would be odd to treat a failure to give notice as automatically leading to invalidity.

    44.6. if the directors had made an administration application, a failure to serve someone with it would not automatically render the application a nullity.

    44.7. it was highly undesirable to have a multiplicity of circumstances in which the appointment of an administrator is automatically invalidated, which was not consistent with the policy of facilitating business rescue or out of court appointments.

Msaada Group

45. In a curious twist of fate, on the same day that Norris J delivered his judgment in *Virtualpurple*, the judgment in *National Westminster Bank Plc v Msaada Group (a firm)* [2011] EWHC 3423 (Ch) was also handed down by Warren J on 21 December 2011, who came to exactly the opposite conclusion in following *Minmar* in preference to *Hill & Pope v Stokes*!

46. In *Msaada* there was adversarial argument and (like *Minmar*) the facts were extreme. In summary:

46.1. the out of court appointment of an administrator of a partnership had been made by the husband and wife partners by way of pulling a fast one on NatWest;

46.2. there was no person who might appoint an agricultural receiver or chargeholder entitled to appoint an administrator who had to be served with notice of intention to appoint under modified para 26(1) as modified for partnerships. Para 26 (2) however required such notice as may be prescribed to be given to such other persons as may be prescribed, which by r. 2.20(2)(c) included the supervisor of a voluntary arrangement;

46.3. the partnership was the subject of a voluntary arrangement entered into on 30 Sep 2010 the purpose of which had been to give the partnership time to restructure its business and refinance its debt to NatWest. NatWest however as a secured creditor was not a party to the PVA;

46.4. no notice of the intended appointment was given to the supervisor;

46.5. the appointment was made against the background that on 15 Sept 2011 a representative of KPMG advised one of the partners that NatWest intended to seek an administration order; on 23 Sept 2011 NatWest made formal demand and on the same day drafts of an administration application and supporting evidence were served on the partners; NatWest attended court on 29 Sept 2011 in respect of its proposed administration application but the partners made an offer to purchase various properties in the group with an indication of finance; NatWest therefore agreed to the application being removed from the list to allow the partners to obtain a valuation of the properties which was a requirement of the offer of finance but NatWest wrote to the partners on 30 Sept warning that if the valuation did not produce a figure of £7.1M, then the administration application would be relisted; despite chasing letters from the bank no valuation was obtained so on 28 Oct 2011 NatWest e-mailed one of the partners to inform her that in the absence of further information about funding, the bank intended to attend court on 2 Nov 2011 to obtain an administration order; without warning on 28 Oct 2011 the partners appointed their own nominee as administrator out of court.

46.6. NatWest applied for a declaration that the appointment was invalid not because of any failure to notify NatWest (it was not a qualifying chargeholder and was not a prescribed person to whom notice must be given) but because of a failure to serve notice on the supervisor of the PVA, even though NatWest was not a party to the PVA.

47. In summary Warren J:

47.1. Doubted whether as a matter of construction of paras 28 and 26 Sch B1 it was permissible to have regard to r.2.20(2) or the prescribed rules, which were introduced subsequently [24];

47.2. rejected each of the reasons relied upon by HHJ MaCahill QC for concluding that in para 28(1), the reference to para 26 should in fact be read as a reference only to para 26(1), such that there was no need to serve a copy of the notice of intention to appoint on those prescribed persons if there was no qualifying chargeholder who had to be served with notice of intention to appoint under para 26(1): see paras [32] – [43];

47.3. rejected the submission that the purpose of notifying the prescribed persons for to prevent them breaching the interim moratorium, although the judge appears to have failed to identify what other purpose is served by the rule [32];]

47.4. proceeded on the basis that the obligation to notify the prescribed persons, whether or not there was a qualifying chargeholder to whom notice had to be given, did not in practice raise any problems because the appointer simply had to serve notice [35];

47.5. "It has not been suggested to me that the decision in Minmar has caused any problem in relation to appointments made after the Chancellor's decision had become widely known: the problem is for the past, as in the present case, and is a problem which arises because of an incorrect understanding that there was no requirement to serve a notice and not because of the draconian consequences of a perhaps unavoidable failure to give a notice."

47.6. It would appear that the practical problems that continue to arise on future appointments, not least the uncertainty, lack of a prescribed period of notice, risk of enforcement action by notified enforcement officer or distraining creditor were not drawn to the Judge's attention;

47.7. did not consider is surprising that a failure to give notice to the company would result in invalidity [40];

47.8. sided with the Chancellor in concluding that the wording of paras 26 and 28 was clear and that it should not be affected by the parenthetical words in para 30 (which only refer to para. 26(1)) [41];

47.9. rejected the suggestion that assistance could be obtained from those cases on mandatory/directory requirements in statutes [43]

47.10. “Thus the use of the word “must” in various provisions had been taken as directory rather than mandatory. But the wording in the present case leaves no room for that approach. Paragraph 28 is quite clear in saying that an appointment may not be made unless the requirements referred to in paragraph 26 have been satisfied. The question is what, as a matter of construction, those requirements are; and that is not, I consider, a matter which can properly be decided by reference to what the court might see as a “desirable flexibility”.

47.11. As regards the form of notice to be given to prescribed persons where there is no qualifying charge holder, Warren J suggested [50]:

47.12. “Clearly it is Form 2.8B, the same form as was required in relation to the notice under paragraph 26(1); and that is so either because the notice is within the ambit of “The notice of intention to appoint” in Rule 2.20(1) or because the effect of Rule 2.20(2) is to prescribe the form. In this context, it is to be noted that Rule 2.20(2) refers to a copy of the notice being given not only to the listed persons but “in addition to the persons specified in paragraph 26”. Thus, what is seen as being given even to the persons specified in paragraph 26(1) is a copy of the notice. There are therefore to be as many pieces of paper in the same form as there are persons to whom notice must be given. Each piece of paper is both a “copy” of the notice of intention to appoint for the purposes of Rule 2.20(2) and a notice in the prescribed form for the purposes of paragraph 26(1) and (2). I think it is right to see all of these notices as within Rule 2.20(2): each of them when given is a “notice of intention to appoint” and the role of Rule 2.20(1) is, it seems to me, to prescribe Form 2.8B in relation to all of them. That is why Rule 2.20(1) refers to paragraph 26 and not just paragraph 26(1) thereby reflecting the provisions of paragraph 26(3).[32]

Conclusions

48. In respect of prospective appointments, prudence dictates that the preferred options for the appointment of administrators are by way of (a) QFCH appointment under para 14 at the request of the directors or (b) if there is no QFCH or the QFCH is unwilling to appoint, an administration application by the directors under para 12.

49. If those options are not available and the directors have to appoint out of court under para 22, then:

[32] If that conclusion of Warren J is right and the notice given to each of the prescribed persons, even where there is no qualifying chargeholder, is a “notice of intention to appoint”, then which form should be used for the actual appointment? Presumably Warren J would say Form 2.9B, which is to be used after giving “notice of intention to appoint”. It also in itself opens up a further trap and uncertainty as to which appointment form should be used because it will be recalled that the whole invalidity saga commenced with the use of the wrong appointment form in G-Tech. For commentary on the use of forms see Recovery Autumn 2011, 9-11 Nigel Barnett.

49.1. the internal management requirements of the articles of the company for the holding of a board meeting and resolution to appoint administrators or written resolution need to be complied with;

49.2. a search should be made for winding up petitions and because such search is not bound to reveal the presentation of a petition, enquiries should be made of the directors as to correspondence threatening the presentation of a winding up petition;

49.3. enquiries need to be made of the directors as to whether the company is or was registered with the FSA and, if needs be, a search made of the FSA register using multiple search terms;

49.4. in case Minmar/Msaada are correctly decided, notice of the proposed appointment should be given to the persons specified in r 2.20(2) including the company. There may however be practical concerns as regards precipitating enforcement action by notifying enforcement officers and those distraining and issues over the form of and reasonableness of the period of such notice.

50. As regards historic cases where a defect/invalidity point is spotted /taken;

50.1. the simplest, quickest and cheapest solution if it is spotted early may be (i) a fresh appointment or (ii) an application for a retrospective appointment;

50.2. mere errors in the completion of the contents of the prescribed forms of notice of intention to appoint or of the appointment or documents attached, may be declared merely to be defects and not result in invalidity[33];

50.3. it is likely that the filing of the wrong prescribed form of appointment or failure to give notice to a QFCH (even where there has been no prejudice and the failure is entirely technical) would be held at first instance to invalidate the appointment, given that *G-Tech* has been followed in *Kaupthing LP* (where there was adversarial argument) and a number of other cases. The writers' view however is that *G-Tech* was wrongly decided and should not have

[33] *Kaupthing LP* (conflicting statement in form as to whether EC Reg applied; misdescription of member in resolution); *Re Garden Land Ltd* noted in *Hill & Pope v Stokes* (failure to file para 100 statement by administrators; Law for All (notice of intention to appoint failed to complete definition of appointor and failure to indicate whether insurance company or EC Reg applied).

been followed, that the use of the wrong form should have been classified as a defect rather than an invalid appointment[34];

50.4. a failure to formally serve notice on the Company[35] or on one of the prescribed persons under r. 2.20(2) remains a moot point at first instance as to whether it will result in the invalidity of appointment, given that *Hill & Pope v Stokes* was followed in *Virtualpurple*, whereas *Minmar* was followed in *Msaada*;

50.5. strictly speaking, by reason of the Practice Direction (CA:Citation of Authorities) [2001] 1 WLR 1001, para 6.1 and 6.2[36] neither Hill & Pope v Stokes nor Virtualpurple may be cited in argument as there was no adversarial argument and the judgments do not include the required reference to the PD allowing them to be cited. However, that PD appears to have been studiously ignored in all of the cases and it can be argued that the court should have regard to those decisions;

50.6. subject to that PD point, given that the judgments in Virtualpurple and Msaada were by some bizarre coincidence handed down on the same date, it appears that when the point is next argued at first instance, the first instance judge is not constrained as a matter of comity from following either decision but can assess the arguments on their own strength[37]. The writers' view is that the reasoning in Hill & Pope v Stokes and Virtualpurple is to be preferred, not least on purely pragmatic grounds.

Christopher Brockman
Jeremy Bamford
Guildhall Chambers
February 2012

[34] See para 104 Sch B1 which draws such a distinction; *Morris v Kassen* [1946] AC 459 at p. 471; *Care Matters* para [8] and the cases on mandatory/directory statutory language, the consequences of non-compliance and whether Parliament intended non-compliance to result in invalidity: see *Virtualpurple* para [25], *Seal v Chief Constable of Wales* [2007] 1 WLR 1910, *Adorian v Commissioner of Police of the Metropolis* [2009] 1 WLR 1859; *Bank of Scotland v Breytenbach* 30 November 2011 LTL 12/12/2011 AC0130646

[35] Assuming it has not been served on the company's solicitors: *Bezier*.

[36] Para 6.1 "A judgment falling into one of the categories referred to in paragraph 6.2 below may not in future be cited before any court unless it clearly indicates that it purports to establish a new principal or extend the present law" and para. 6.2 refers to "applications attended by one party only".

[37] See *Msaada* para [29]; *Re Saunders* [1997] Ch 60 at p.79G; *Colchester Estates (Cardiff) v Carlton Industries Plc* [1986] Ch 80 at p.85; *Forsikringsaktieselskapet Vesta v Butcher* [1986] 2 All ER 488 at p.508 per Hobhouse J "As I read what Nourse J is saying, he is doing no more than stating what is practical common sense and ordinary judicial comity. One judge does not gratuitously depart from, still less review, another's decisions. The law having been stated by one judge, another judge will not lightly differ from what he has said. Where the judgment in question is fully reasoned after full argument it will have very great persuasive authority which it may be difficult for any litigant at first instance to displace."