Case No: 318 of 2017

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

The Law Courts
The Quayside
Newcastle-upon-Tyne, NE1 3LA

Tuesday, 20 March 2018

BEFORE:

HIS HONOUR JUDGE KLEIN
(Sitting as a Judge of the High Court)

BETWEEN:

(1) STEVEN PHILIP ROSS
(2) MATTHEW JAMES HIGGINS
(as Joint Administrators of NJM Clothing Limited)

Applicants

- and -

(1) FASHION DESIGN SOLUTIONS LIMITED
(2) ACES COUTURE LIMITED

Interested Parties

MR RODGER appeared on behalf of the Applicants
MISS TOMAN appeared on behalf of the First Interested Party
MR FLETCHER appeared on behalf of the Second Interested Party

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JUDGMENT

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(Official Shorthand Writers to the Court)

JUDGE KLEIN:

1. The application before me is an application, by notice dated 7 February 2018, by which Steven Philip Ross and Matthew James Higgins as the joint administrators (or purported joint administrators) of NJM Clothing Limited seek:

   (i) a declaration that there is no defect in the notice of their appointment and that they were validly appointed at 2.50 pm on, they say, 4 October 2017 but I take that to be a typographical error and to be a reference to 17 October 2017;

   (ii) in the alternative, an order pursuant to paragraph 12(1)(b) of Schedule B1 of the Insolvency Act 1986 that they were appointed with effect from the same date and time; and

   (iii) for an order that they can proceed with the conduct of the administration on certain terms and in the alternative for an order that the company, NJM Clothing Limited, be placed into a compulsory liquidation with Mr Ross and a second person being appointed as joint liquidators.

2. The second of the remedies which are sought by the application, namely for an order pursuant to paragraph 12(1)(b) of Schedule B1 of the 1986 Act, is a somewhat odd order for the administrators to be seeking because paragraph 12(1)(b) of the 1996 Act reads:

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

3. Miss Toman (who appears on behalf of Fashion Design Solutions Limited ("FDS"), the first interested party) understood the applicants to be seeking a retrospective administration order. Whilst a retrospective administration order is possible under paragraph 32 of Schedule B1 of the 1986 Act (see for example *Re: G-Tech Construction Ltd* [2007] BPIR 1275, one of the cases Miss Toman took me to), it is clear to me that an applicant who was purportedly appointed as an administrator but has in fact not been appointed does not have standing to make such an application. So, in this case if what is sought by the second of the remedies the applicants refer to in the

application notice is a retrospective administration order, it seems to me that that part of the application takes matters no further because either their appointment was valid and effective from the date and time for which they now contend, namely 2.50 pm on 17 October, or, broadly, they have not been validly appointed; in which case, as I say, they have no standing, in my view, to seek a retrospective administration order. In any event, Mr Rodger, in fairness to him, did not press on me any application to make a retrospective administration order.

4. Rather, as I understand the position, the parties have agreed that the course which this company will take is for it to enter into a compulsory liquidation with an independent liquidator or independent liquidators (that is, independent of any of the parties) taking on that role. It may be asked why therefore, as there is sensibly such an agreement between the parties, I am still being asked to determine the validity and effectiveness of the administrators' appointment as the applicants invite me to do by way of their application for a declaration. That is because there has been a breakdown in relations between the applicants on the one hand and FDS on the other hand and between FDS on the one hand and the second interested party, represented at this hearing by Mr Fletcher, Aces Couture Limited.

5. As between the applicants and FDS, there are broadly cross-allegations as to the parties' respective conduct. One of the complaints that FDS makes against the applicants is in relation to the sale contract of part or all of the company's (NJM Clothing Limited's) business which sale contract the applicants entered into with Aces Couture Limited, which is a matter to which I will return in a moment. So far as the applicants are concerned, and particularly as between them and FDS, a principal reason in practice, it seems, why I am being pressed to determine the validity and effectiveness of their appointment, may be because there will be an issue about the legitimacy or entitlement of the applicants to recover the costs and expenses they have incurred in the course of the administration.

6. As between FDS on the one hand and Aces Couture on the other hand, there is other litigation in which the validity of the sale contract to which I have referred may be in issue. If it is the case that the applicants were not validly appointed as administrators, it may be that it is not possible to validate the sale contract by them to Aces Couture

Limited under paragraph 104 of Schedule B1 of the 1986 Act, which may have a significant impact on the other litigation. So, it may be said that this application, in particular the requirement of all the parties for me to determine the validity of the applicants' appointment, may be a tactical manoeuvre on the part of one or more than one of the parties for the purposes of either further litigation, existing litigation or further possible litigation. But that that may be the motive for this application or for resisting it should not affect the outcome of the application.

7. Turning then briefly to some factual matters, the company was incorporated on 3 February 2016 and effectively traded as an online retailer of clothes and other goods. A moving force behind the company was David Marshall and indeed he was initially the sole director. He is also the principal shareholder in the company. Another director of the company was his son (and he may still be a director of the company); Nicholas Marshall. Broadly, the business model of the company involved dealings between the company and FDS and in practice dealings between the Marshalls on the one hand and Matthew Salter on the other hand; FDS being one of Mr Salter's corporate vehicles. Indeed, Mr Ross, one of the applicants, in a witness statement says that he understood that FDS was to be the primary manufacturer of the goods which the company was to supply.

8. Broadly, what happened in 2017 is that there was a breakdown in relations between the Marshalls on the one hand and Mr Salter on the other. I do not, in this case and in this judgment, need to say more than that but what it led to in due course, at least chronologically, was a board meeting on 3 October 2017 which was said to have been held at Jurys Inn in Newcastle and which was attended by the Marshalls, Mr Salter by telephone and Mr Ross.

9. At that board meeting, the company resolved that, first, having regard to the financial position of the company, it would be in the best interests of the company and its creditors for the directors to place the company into administration and to appoint the applicants as administrators of the company. Secondly, the form of the notice of intention to appoint administrators and the notice of appointment of administrators was approved. Thirdly, any director was given authority to finalise and sign documents and otherwise to take all action and execute all documents needed to effect the appointment

of the administrators to the company. Fourthly, there was approval of the applicants' fees and disbursements together with their agents' and solicitors' costs and out of pocket expenses properly incurred with a view to the company entering administration.

10. That board minute also recorded that there was, in this case, a qualifying floating charge holder; namely, Lloyds Bank Commercial Finance Limited. As I said, that board meeting took place on 3 October. On 4 October, because of the existence of a qualifying floating charge holder, a notice of intention to appoint an administrator by the company or directors was given to the qualifying floating charge holder and filed at court. That notice recorded that the directors of the company intended to appoint Steven Philip Ross and Matthew James Higgins, that is the applicants, as administrators of the company.

11. Pausing there, therefore, the documents as a matter of fact indicate that, on 3 October, a decision was taken by the board of directors to appoint administrators and that notice of the intended -- that is future -- appointment of the applicants as administrators was given on the following day.

12. On 17 October, a notice of appointment of an administrator by directors of a company where a notice of intention to appoint has been given was filed at court. That notice provided, amongst other things, as follows:

> "The directors of the company have appointed the following named persons as administrators of the company [then the applicants are identified] and notice that this appointment has been made is hereby given.

The notice continued:

> "The administrators' appointment was made on the date and time this notice is filed with the court."

As part of the notice, Mr Nicholas Marshall made a statutory declaration and there was an endorsement by the court that the notice was filed on 17 October 2017 at 2.50 pm.

13. Before turning to the relevant statutory provisions, there is a further point I need to make. In paragraph 66 of Mr Ross's witness statement in support of the application, he says:

> "On 17 October 2017 at 14.50 Matthew Higgins and I were appointed as joint administrators following the filing of the notice of appointment with the court."

14. The relevant statutory provisions are these.

15. By paragraph 22 of Schedule B1 to the 1986 Act, "The directors of a company may appoint an administrator." By paragraph 26 of Schedule B1, there is a requirement that, where there is a qualifying floating charge holder (as in this case) notice, of the intended appointment be given by the intended appointor to, amongst others, the qualifying floating charge holder.

16. The notice under paragraph 26 has to be in the prescribed form. In fact, following the replacement of the Insolvency Rules 1986 with the Insolvency Rules 2016, there are not, as I understand it for these purposes, prescribed forms but rule 3.23 of the 2016 rules requires that the notice of intention to appoint must be accompanied by:

> "(a) a copy of the resolution of the company to appoint an administrator, where the company intends to make the appointment, or
>
> (b) A record of the decision of the directors, where the directors intend to make the appointment."

17. Paragraph 29 contains a number of important provisions and it is those provisions which have been the focus of counsel's submissions today. It provides, first:

> "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."

Secondly:

"The notice of appointment must include a statutory declaration by or on behalf of the person who makes the appointment -

(a) that the person is entitled to make an appointment under paragraph 22,

(b) that the appointment is in accordance with this Schedule, and

(c) that, so far as the person making the statement is able to ascertain, the statements made and information given in the statutory declaration filed with the notice of intention to appoint remain accurate."

Thirdly:

"The notice of appointment must identify the administrator and must be accompanied by a statement by the administrator -

(a) that he consents to the appointment,

(b) that in his opinion the purpose of administration is reasonably likely to be achieved, and

(c) giving such other information and opinions as may be prescribed."

Fourthly:

"The notice of appointment and any document accompanying it must be in the prescribed form."

Fifthly:

"A statutory declaration under sub-paragraph (2) must be made during the prescribed period."

The prescribed period being not more than five business days before the notice is filed with the court.

18. As I have said, there are no prescribed forms any more but rule 3.24 of the 2016 rules provides that the notice of appointment under paragraph 29 must contain, "A statement that the company has, or the directors have, as the case may be, appointed the person named as administrator of the company," and must also contain, "The date and time of the appointment."

19. There is a further rule which is relevant to the notice contemplated by paragraph 29 of Schedule B1 and that is rule 3.26 of the 2016 rules which provides that:

> "The court must apply to the copies the seal of the court, endorse them with the date and time of filing and deliver two of the sealed copies to the appointer."

20. The final provision with which I am concerned is paragraph 31 of Schedule B1 of the 1986 Act which provides:

> "The appointment of an administrator under paragraph 22 takes effect when the requirements of paragraph 29 are satisfied."

21. The present insolvency rules are notably different to the 1986 rules. Under the 1986 rules, there were no equivalent detailed provisions to those which now appear in rule 3.24. Under the 1986 rules, the requirement was that the form prescribed for paragraph 29 of Schedule B1 of the 1986 Act be completed and that form provided that, "Notice is given that in respect of the company, the directors of the company hereby appoint … " and then the names of the appointees were inserted "as administrators of the company". So, notably, the prescribed form fulfilled the purpose of effecting the appointment of administrators and notably too the prescribed form under the old rules did not require, for those reasons perhaps, the specification of the date and time of the appointment of the administrators although there was a requirement that the court endorsed on the form the date and time of the filing of the form.

22. There is one further point I need to make before considering the statutory procedure so far as is relevant to this application and that is this. *Kerr & Hunter on Receivers and Administrators* (20th edn) provides -- and I referred the parties to this during submissions -- at paragraph 14-63 as follows:

> "The extra-judicial appointment of an administrator by an appointor (as distinct from an appointment made by an administration order) does not take effect solely by means of the physical act of making the appointment. It only takes effect legally when all the statutory obligations attendant thereon have been complied with as to the filing and giving of notices of and relating to the appointment."

23. The totality of the language of the Act leads me to conclude that most probably: in a case such as this, first, the directors must resolve or decide to appoint administrators; secondly, they must then give notice of intention to appoint administrators; thirdly, they must appoint the administrators; and then fourthly and lastly, notice of appointment must be given.

24. As I say, that seems to be the correct statutory structure, for present purposes, of Schedule B1 but if I need to give a specific reason for that structure, I say this. If it was effective to file a notice of appointment before the appointment was actually made, then the result would be an absurd result. Under paragraph 31 of Schedule B1 the appointment takes effect when the notice is filed. It would be absurd if the appointment could take effect before an appointment is in fact made and so it seems to me that the language of the Act requires the appointment precedes, even if only momentarily, the filing of the notice of appointment.

25. I find further support from that, as I believe I am entitled to do, from rules 3.24 and 3.26 of the 2016 rules. The language of rule 3.24 is, to my mind, clear. At the time the notice of appointment is filed, the appointment must have been made. I have been given no reason why, if the notice of appointment could itself effect the appointment, there would be any need for the notice under rule 3.24 to contain the date and time of the appointment and, under rule 3.26, also to contain the date and time of the filing.

26. Miss Toman very properly took me to a decision of Peter Smith J in *Fliptex Ltd v Hogg & Ors* [2004] EWHC 1280 (Ch) in which the judge decided that in fact, broadly, the appointment was made when the notice is filed. If that is right, then a significant part of Miss Toman's case falls away but I do not proceed on the basis that that decision is right, most favourably to Miss Toman, if only because the form that the judge had in mind and the rules which the judge had in mind were the old form and rules which, as I have said, contemplated that the form fulfilled two functions; namely, as a notice of appointment and, secondly, as the appointment itself.

27. The question I have to decide therefore, if I am right that the correct structure in time is: first, decision to appoint; secondly, notice of intention to appoint; thirdly, appointment; and fourthly, notice of appointment, is when, in this case, Mr Ross and Mr Higgins were appointed or purportedly appointed as administrators. Mr Rodger's case, which he described as his primary case, is that, in this case, the appointment of the applicants was made at 2.50 pm on 17 October 2017. He says that that is the proper inference I should draw from all the evidence and in particular the notice of appointment because that is the effect of the words from the notice of appointment which I have already quoted.

28. It is important to note that, at this point, I am not considering whether any insolvency rules have been complied with or whether there is an error on the notice. I am just determining when, as a matter of fact, the appointment or purported appointment of the applicants was made.

29. With some reservations, I have concluded that the appointment of the applicants as administrators was in fact made at 2.50 pm on 17 October 2017. I say that I have reached that conclusion with some reservations. Those reservations are these.

30. It is, at first blush, perhaps surprising that the appointment of administrators, which, as I have sought to explain, must be a separate act to the giving of the notice of appointment, took place at the same minute of the same day when the notice was filed.

31. Secondly, I should say that Mr Rodger indicated to me during submissions that he may have wished to adduce evidence that, in fact, the appointment of the applicants was

made at an earlier date and time. As it happens, he has not adduced that evidence and I have to decide the case on the evidence before me.

32. Thirdly, I have had to bear in mind paragraph 66 of Mr Ross's witness statement which, on one reading, may be taken to suggest that, in fact, the appointment of the applicants occurred sometime after the filing of the notice; but I accept Mr Rodger's submission that that paragraph of Mr Ross's witness statement is not sufficiently to outweigh what is said on the notice of appointment which was a contemporaneous document.

33. The next question I have to ask myself is whether, as a matter of fact, the appointment was made before the notice was filed. Again, to be clear, to my mind this is purely a question of fact but a question of fact in which it seems to me the burden is on Miss Toman's client, FDS, to persuade me that, in fact, in time, even if only momentarily, the notice of appointment preceded the appointment rather than the other way around. I say that because it seems to me I am entitled to presume that, absent evidence to the contrary, what the directors in this case did was regular.

34. Miss Toman rightly points to the language of the notice itself. However, I am not satisfied that the language of the notice is sufficiently precise that it is right for me to conclude, contrary to the presumption of regularity, that, whilst both the appointment and the filing of the notice were carried out in the same minute (that is, at 2.50 pm on 17 October), the notice preceded the appointment. To my mind the notice itself is sufficiently imprecise that, bearing in mind the presumption of regularity to which I referred, the proper conclusion I should reach and I do reach is that, whilst both acts were done at the same "time", the appointment was made momentarily before the notice was filed.

35. On this basis, the only possible defects in the procedure which was adopted in this case were, first, that the notice did not specify, save referentially, the date and time of the administrators' appointment and, secondly, the notice did not accurately record the precise moment during 2.50 pm on 17 October when the appointment was made and that it was made before the notice of appointment was filed. Most favourably to Miss Toman, I will assume that both those matters amount to defects. In this context, I have to have regard to rule 12.64 of the insolvency rules which provide:

> "No insolvency proceedings will be invalidated by any formal defect or any irregularity unless the court before which objection is made considers that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of the court."

36. In this context, it is important to understand what part the defects to which I have referred play. They play some part in one provision; namely, paragraph 29 of Schedule B1 of the 1986 Act. Paragraph 29 imposes a number of obligations. The first, as I have sought to indicate, is that a notice of appointment must be filed by the appointor after the appointment is made; secondly, that the appointor must file other documents as may be prescribed, again after the appointment; thirdly, that the notice of appointment must include the statutory declaration which I have identified; fourthly, for present purposes, that the notice must identify the administrator and must be accompanied by the administrator's statement to which I have referred; fifthly, that the statutory declaration to which I have referred must be made during the prescribed time; and sixthly, that the notice of appointment must be in the prescribed form. It is only as to the last of those requirements that it may be said that there is a defect. So, what I am concerned about is a defect of one part of one provision of Schedule B1.

37. As I have indicated, Miss Toman very properly took me to *Re Euromaster Ltd* [2012] EWHC 2356 (Ch) in which Norris J said, at paragraph 17, of what is now rule 12.64:

> "This is to focus on the consequences of non-compliance and, taking into account those consequences, to consider whether Parliament intended the outcome of non-compliance to be total invalidity: in short, to ask whether it was a purpose of the legislation that an appointment made in breach of paragraph 28 should be null."

38. It is difficult to see what purpose the date and, in particular, the time of the appointment satisfies in the present circumstances. To my mind, what is particularly of substance is that the administrator has been appointed which this form makes clear and the date and time when that appointment takes effect which the notice in this case also makes clear. It is also important to bear in mind, it seems to me, that, until the change in the rules which was brought about by the 2016 rules, it was never seen by Parliament or the Insolvency Rules Committee as being particularly important that the form stated, at all, the date and time of the appointment.

39. In those circumstances I have concluded that this is a case in which what is now rule 12.64 is engaged. I should add that the defect which I have assumed in this case is not so grave or substantial that it can be said that there were no insolvency proceedings. It seems to me that the proper order in this case is for me to declare, following the approach of Norris J in *Re Euromaster*, that Mr Ross and Mr Higgins are in office as administrators of NJM Clothing Limited and will continue to be so and that no prior act of theirs in the administration is invalidated by reason only of the defect in their appointment. That is of course subject to the order which I am likely to be invited to make in a moment that the company is put into compulsory liquidation.

(After further submissions)

40. I now have to deal with the question of the costs of this application. This application was necessary for two reasons: first because there was a question as to the validity and effectiveness of the administrators' appointment and secondly because the creditors had not agreed the administrators' proposals for the administration.

41. The parties to the application have though sought to expand its ambit to deal with matters which do not concern this court and every party, in particular the administrators on the one hand and FDS on the other hand, have been very much guilty of that. So far as the administrators' costs are concerned, the view I take, standing back, is that they have succeeded in obtaining an order which was fundamental to their own position as administrators and which they were compelled to litigate because of FDS's opposition. To that extent it may be said that they have won and they have won significantly and that they have won against FDS.

42. On the other hand it may be said that, as I have already indicated, much of their evidence on the application was, frankly, entirely irrelevant. Indeed, of bundle 2 which runs to many hundreds of pages, I think I was referred to about six pages and part of their application, frankly, was bound to fail; that is, the parts of the application by which they sought a retrospective appointment under paragraph 32 and by which they invited the court to effectively approve their proposals in the face of opposition from creditors in circumstances where the time for appealing the admission of FDS as a creditor for the purpose of voting in the proposals has passed.

43. Taking a step back and having taken into account all that Mr Rodger and Miss Toman have said and in particular also taking into account Miss Toman's point that to some extent she has succeeded, but very much of the view that -- as I say, taking a step back -- the administrators have succeeded in part, the order I propose to make is that the administrators are entitled to 50 per cent of their assessed or agreed costs which shall be paid by FDS and, in default of payment, those costs can be treated as an expense of the administration. As to the balance of their costs, they will have to bear them themselves and they are not to be an expense of the administration. That deals with the administrators' costs and FDS's costs as against the administrators.

44. So far as Aces Couture Limited's costs are concerned, whilst I understand that they had an interest in the outcome of these proceedings, that interest can be considered in this context.

45. First, they were concerned to ensure that a determination of the validity and effectiveness of the administrators' appointment was made before the adjourned date of their injunction proceedings. But Mr Fletcher fairly tells me that Aces Couture Limited apparently opposed in the first instance an adjournment of the hearing of this application on 2 March which in my view was an adjournment which was entirely justified bearing in mind that the judge had an hour and this hearing has taken a day; contrary to all my expectations. So far as the adjournment which has brought about today's hearing is concerned, Aces Couture Limited played no part whatsoever.

46. Aces Couture Limited's second concern was to ensure that the argument that the administrators were validly and effectively appointed was advanced but there is nothing to suggest -- and it is frankly unreal to suggest -- that the administrators were going to do anything other than actively contend that their appointment was a valid and effective one. That position is entirely clear from the very long first witness statement from Mr Ross and, if Mr Fletcher's solicitors or clients were at all concerned about that, they could have written to Ward Hadaway and said, "At the hearing, are you going to actively contend that your appointment was valid and effective?" Had Ward Hadaway, on their client's instructions, not responded or not responded positively, then, at that stage, I quite understand why Aces Couture Limited would have wanted to be party to these proceedings. But it is, to my mind, unreal to suppose, as I have said, in those

circumstances, that Aces Couture Limited could have been under any illusion whatever that the administrators would not actively advance this application. I have concluded therefore, having regard to everything that Mr Fletcher has said and everything that is in CPR rule 44.2, that Aces Couture Limited's costs should lie where they fall and there should be no order as to Aces Couture Limited's costs.

(Judgment ends)

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