Defective Administrator Appointments — The Invalid Versus Irregular Debate Continues (*Security Trustee Services v Seabrook Road*)

Summary

The High Court has provided additional guidance on the importance of serving a qualifying floating charge holder (QFCH) with notice of the appointment of administrators (NOITA) pursuant to paragraph 26 of Schedule B1 of the Insolvency Act 1986. A QFCH was not served with successive NOITAs and, during that time, appointed fixed charge receivers over a property. Miles J held that the filing of the NOITAs and resulting interim moratorium were invalid, he declared that the receivers were validly appointed and he made an order removing the NOITAs from the Court file.

In his judgment (25 January 2021), Miles J held that failure to serve the QFCH was not only a failure to comply with paragraph 26 but also an abuse of process, justifying the NOITAs being removed from the Court file under the principles established by the Court of Appeal in *JCAM Commercial Real Estate v Davis Haulage Ltd*[1]. The decision marks a turn away from the recent cases of *Tokenhouse*[2] and *NMUL*[3], where the failure to serve a QFCH with a NOTIA (either under para 15 or 26) was found by ICCJs to be a mere 'irregularity' that caused no prejudice and did not affect the validity of an administrator's appointment.

Background

The Company defaulted on its obligations under a facility agreement, secured by a debenture including a qualifying floating charge. As a result of the default, the QFCH appointed fixed charge receivers (the Receivers) over the secured property.

Upon the Receivers accepting their appointment, they were notified by the nominee administrator (for the first time) that a NOITA had been filed at Court. On the face of it, the Company had obtained the benefit of an interim moratorium pursuant to paragraph 44 of Schedule B1 to the Insolvency Act 1986 (Sch B1) to the extent that the appointment of the Receivers would be invalid due to the restriction of enforcement of security under para 44(1) of Schedule B1. In addition, a further NOITA was also filed following the Receivers' appointment with a view to extending the moratorium period.

At no stage, either before or after the Receivers' appointment, was the QFCH served with the NOITAs in accordance with paragraph 26(1). In addition, assurances made in correspondence by the Borrower suggested that the Borrower had no intention of appointing an administrator except as a last resort.

[1] *JCAM Commercial Real Estate Property XV Ltd v Davis Haulage Ltd [2017] EWCA Civ 267*
[2] *Re Tokenhouse VB Ltd [2020] EWHC 3171 (Ch)*
[3] *Re NMUL Realisations Limited (in Administration) [2021] EWHC 94 (Ch)*

As such, the Receiver and the QFCH applied to validate their appointment and have the NOITAs removed from the Court file. After issuing the application and gaining access to the Court file, it was discovered that the Company had filed two previous NOITAs (four in total), none of which had been served on the QFCH.

The Relevant Law

Service of NOITA on QFCH

There are authorities pointing different ways on the extent to which a failure to serve a QFCH is a defect capable of remedy and the extent to which such failure renders any subsequent appointment a nullity.

Cases such as *Eco Link*[4] and *Adjei*[5] hold that the failure to serve a QFCH under paragraph 26(1) (or, in the case of a prior QFCH, paragraph 15 of Schedule B1) render the subsequent appointment of administrators invalid because it is fundamental defect that cannot be remedied as an irregularity using the Court's discretionary powers. Most practitioners have therefore proceeded on this basis and sought retrospective administration orders from the Court.

In *Re ARG*[6], HHJ Davis-White QC (in a case dealing with a failure to serve the FCA) held that the failure to serve the FCA rendered the appointment a nullity which could only be remedied by granting a retrospective administration order. In doing so, he conducted an impressive review of the authorities and concluded that the Court will not validate a procedural defect where it has caused 'substantial injustice' (*Skeggs Beef*[7]) and this will include consideration of preventing advantage being taken by a cynical disregard of the rules and deterring such conduct. A failure to obtain the FCA's prior consent to the appointment was treated as analogous to the failure to give a QFCH notice and this was distinguished from other persons who ought to be served with a copy of a NOITA (e.g. the company).

However, in the recent decision of *Tokenhouse*, ICC Judge Jones concluded on the facts of that case (apparently in disagreement with HHJ Davis White QC and contrary to *Eco Link*) that a failure to serve a QFCH was not a fundamental defect or even one that caused injustice. He held that such breach was a mere irregularity which did not impact on the validity of the appointment. He ordering replacement administrators (the QFCH's nominees) to restore the position to what he considered it would have been if the QFHC had been properly served. In doing so, ICCJ Jones considered that there were conflicting High Court authorities and that he was bound to follow the dictum of Norris J in *Re Ceart Risk Services Ltd*[8] which suggested that paragraphs 26 to 32 of Schedule B1 were procedural in nature, rather than going to the power to appoint.

[4] *Re Eco Link Resources Ltd [2012] 7 WLUK 5*
[5] *Adjei v Law for All [2011] EWHC 2672 (Ch)*
[6] *Gregory v A.R.G. (Mansfield) Ltd [2020] EWHC 1133 (Ch)*
[7] *Re Skeggs Beef [2019] EWHC 2607 (Ch)*
[8] *Re Ceart Risk Services Ltd [2012] EWHC 1178 (Ch)*

More recently, in the case of *Re NMUL* before Deputy ICC Judge Frith, the approach in *Tokenhouse* was followed. This was notwithstanding the fact that ICCJ Jones directed in *Tokenhouse* that future cases should be listed before a High Court Judge given the conflicting decisions at that level.

Settled Intention

The Court of Appeal in *JCAM* established that an appointor must have a "*settled intention to appoint administrators*" at the time that notice is given pursuant to para 26(1). The appointment of administrators cannot be conditional on the outcome of other matters; in that case, the outcome of voting on a CVA proposal. Where there was no settled intention, the filing of the NOITA was an abuse of process and the NOITA would be removed from the Court file.

Application in This Case

The Judge's attention was drawn to all of the above cases. However, he considered that it was not appropriate, where the application was not contested and without full argument, to grapple with the issue and determine if *Tokenhouse and NMUL* were wrongly decided.

Instead, the Judge considered the evidence which showed that the Company had not only failed to serve the QFCH but had no settled intention to appoint administrators when any of the NOITAs were filed. He considered that the failure to serve the QFCH clearly demonstrated this.

The Judge determined that the filing of the NOITAs without servicing them on the QFCH was an abuse of process. In doing so, he highlighted that the NOITA itself contains a provision that "*This notice is being given in accordance with paragraph 26(1) to the following persons who is/are or may be entitled to appoint an administrative receiver of the company or an administrator of the company under paragraph 14*". Whilst the NOITA had been filed with that declaration, the Company knew that service was not taking place. The Judge considered that this alone rendered the filing of the NOITA invalid, stating:

"*On the face of it, it is a serious and inexcusable breach of the rules. The relevant NOITA forms refer to the need to provide notice to [the QFCH] and, indeed, the forms as completed stated that notice was being given that was not true. That alone, to my mind renders the notices an abuse of process*".

The Judge noted that the purpose of giving notice under paragraph 26 was to provide protection to the QFCH and to enable the QFCH to appoint its own administrator. He confirmed that in his view the requirement of prior notice was an important '*check and balance*' before a company could appoint administrators.

The Judge went on to consider paragraph 44 and noted that this presupposes that the NOITA has been properly filed with the Court and therefore had been properly served. In his judgment, the failure to serve the NOITA on the QFCH gave the Company a protection which was contrary to the statutory scheme.

He considered that for those reasons alone, the filing of the NOITAs constituted an abuse of process and that they should be removed from the Court file.

Comment

Miles J's judgment helpfully reaffirms the importance of paragraph 26 (and by extension paragraph 15) in providing a check and balance in the process of a company appointing an administrator. Further, it establishes that a deliberate failure to serve a QFCH amounts to an abuse of process, which invalidates the moratorium and will lead to the NOITA being removed from the Court file.

Whilst there remains uncertainty around the extent to which the appointment of an administrator is a nullity or irregularity following the failure to serve a QFCH, what is now clearer is that service of notice on a QFCH is an important requirement and the failure to do so should be considered an abuse of process. This does not sit easily with the decision in *Tokenhouse* that such a failure is neither fundamental nor one that causes substantial injustice.

Hopefully, as ICCJ Jones requested, there will be further High Court Judge consideration of these matters in the near future. In the meantime, this case indicates that the position is far from settled and a failure to give notice to a QFCH under para 26(1) may imperil the validity of the process.

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