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Judgment: approved by the Court for handing down | *Delivered:* **20/04/2018**
*(subject to editorial corrections)**

2014 No. 120539

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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IN THE MATTER OF CLOUGHVALLEY STORES (NI) LIMITED (IN ADMINISTRATION)
AND
IN THE MATTER OF THE INSOLVENCY (NORTHERN IRELAND) ORDER 1989

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BETWEEN:

MICHAEL QUINN
&
BRIGID QUINN

Appellants/Respondents

and

CLOUGHVALLEY STORES (NI) LIMITED
BY ITS ADMINISTRATOR THOMAS KEENAN

Respondent/Petitioner

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TREACY J

Introduction

[1] The Court of Appeal has before it an appeal against the judgment of Horner J delivered on 25th October 2016. He dismissed their appeal against the winding up Order made by Master Kelly on 19th March 2015. He noted at paragraph 17 that the appellants are in desperate financial straits, appear quite prepared to grasp at straws and that their understanding of the law is completely erroneous.

[2] Before the Court of Appeal, the appellants introduced a number of new issues challenging the appointment of the administrator on the basis that the

administration application was flawed because of the absence of a company resolution and the consent of only one director of the company was obtained. The respondent filed a supplemental skeleton argument before the Court of Appeal to address the new issues belatedly introduced before it. By Order dated 5th April the matter was remitted to a judge of the Chancery Court,

"...to determine the issues in relation to the notice of intention, namely, was it served? If it was not served, what is the effect of a failure to allow the notice in? Was the affidavit that has now been lodged correct?"

There was a further short hearing on Friday 11th August when the Court of Appeal identified the following questions:

(1) Whether the Notice of Intention to appoint an administrator dated 17th October 2011 was valid;
(2) What effect the failure of any file or record of the decision of the directors to appoint an administrator had on that appointment;
(3) Whether in any event the subsequent lodgment of a copy of the Notice of Intention to Appoint, with a record of the decision of the directors attached, has rectified any such failure.

That matter was remitted to another Judge for adjudication by this Court. At the hearing before me evidence was given by Mr McVeigh of EDG, the solicitor retained on behalf of the administrator. Evidence was also given by the appellant, Brigid Quinn.

The evidence before me

[3] The "Minute" of 17 October 2011 had been prepared in advance of the meeting of directors on that date by Mr McVeigh, with no input from the Quinns. It was not shared in advance of the meeting with the Quinns. Mr McVeigh gave evidence that he read out the prepared Minute and that the meeting lasted for approximately one hour. Mr McVeigh said that he made no notes of this meeting. The Minute states that Mr Quinn was elected as "Chairman". Mr McVeigh agreed that despite what the Minute states on its face, that there was no election of Mr Quinn as Chairman. I accept Mr McVeigh's evidence that he read out the prepared Minute.

[4] The Minute is signed by Mr Quinn but not by Mrs Quinn. It is common case that she was at the meeting. Mrs Quinn stated in evidence that the directors (i.e. her and her husband Michael Quinn) were going to Belfast to find out what "options" they had. In cross examination she accepted that the company was being placed into administration, that the company was insolvent and that she was aware that the effect of the forms, as executed on 17 October 2011, was to place the company into administration. I agree with the respondent that the appointment of a chairperson was not a formal requirement in law or a prerequisite to a valid appointment. What

was required was that there be a meeting of the directors (which there was) and that they agreed to appoint the administrator (which they did). I am satisfied that there was a meeting of the directors and that they were both aware that an administrator was being appointed. The prepared Minute of the meeting was read out and was signed by her husband. Mrs Quinn was not asked to sign the document. I am quite satisfied that if she did not consent to the appointment that she would have made that clear. She registered no dissent to the appointment during the meeting which was convened for that purpose. Nor did Mr or Mrs Quinn raise any concerns at the meeting about the procedure being deployed to appoint the administrator.

[5] As regards the requirement of notice for the meeting I accept that the Company's Articles of Association do not change the requirements of Regulation 88 of the Companies (Tables A to F) Regulations (Northern Ireland) 1986 save for deletion of the third sentence as provided in Article 28. Article 2 provides that:

> "The Regulations (i.e. the Companies (Tables A to F) Regulations (Northern Ireland) 1986) shall apply to the company. Article 3 describes those Regulations which are dis-applied; Regulation 88 is not included. Article 28 provides for the modification of Regulation 88 by the deletion of the third sentence (which provides that the chairman shall have a second or casting vote in the event of a tied vote)."

The meeting in question was of the directors and not a general meeting of the shareholders. There are no specific notice requirements for such a meeting of directors unlike, for example, an AGM.

[6] Mrs Quinn also complains that she did not have the benefit of independent legal advice prior to the decision to put the company into administration. No authority was cited in support of the proposition that the Directors of a company require independent legal advice before putting a company into administration. Mr Dunlop confidently submitted that there is no such authority. The directors were aware that the company was insolvent; were seeking advice from the company accountant; were aware that Mr Keenan had been contacted to act as Administrator; attended the offices of EDG aware that an administrator was being appointed and agreed with that appointment. Neither has suggested that even if they had received such legal advice they would have taken a different course.

[7] Furthermore, the legal requirement is not that there is a resolution of the directors but that the directors "decide" to put the company into administration, Rule 2.023 only requires a "record of the decision of the directors". As previously pointed out Mrs Quinn accepted that she knew the company was being put into administration. Mr Quinn signed the relevant papers which also included signing a statutory declaration before a solicitor. The directors were both present and I accept both were fully aware that the decision which *they* were consensually taking was to

appoint an administrator. Mrs Quinn did not suggest that she objected to the appointment of the administrator and there is no evidence that she took any issue with the validity or propriety of the decision at the time. Mr Dunlop submitted that it was "most unusual" that the Quinns' now challenged the validity of the appointment of the administrator given that in law it was the directors who appointed the administrator and who had the legal responsibility for implementing the process correctly.

The Administration Application

[8] The respondent has helpfully and accurately set out the statutory procedure governing the making of an administration application in the supplementary skeleton argument furnished to the Court of Appeal. In summary the application was made by the directors of the company pursuant to Para 23 of Schedule B1 to the Insolvency (NI) Order 1989. This process does not require any application to the Court**.**

[9] The process of appointment requires a Notice of Intention to Appoint to be given to the prescribed persons. Paragraph 27 of Schedule B1 governs the procedure. The 1989 Order makes clear that the notice must be given to any person who may be entitled to appoint an administrator which includes the holder of a qualifying floating charge (see paragraph 15).

[10] The Northern Bank was (per paragraph 15) entitled to appoint an administrator. It endorsed the Notice of Appointment and thus gave written notice of its consent to the appointment of the administrator by the directors (Paragraph 29(1)(b) of Schedule B1).

[11] Brigid Quinn avers that there was no company resolution and that Michael Quinn had no authority to bind the company on his own.

[12] Mr Dunlop says that there are therefore 2 assertions being advanced:

(i) that Michael Quinn sought to appoint an administrator without proper authority and without the consent of his co-director Brigid Quinn;

(ii) that the Notice of Appointment (per paragraph 30 of Schedule B1) did not have annexed to it a "Company Resolution".

[13] The first assertion is simply wrong. The appointment of the administrator did not require a company resolution since the appointment was by the directors of the company and not by the company itself. The missing document alleged is not a Company Resolution but, instead, a record of the decision of the directors of the company. The directors' power to appoint is clearly established pursuant to paragraph 23(2) of Schedule B1.

[14] Having regard to the evidence summarized above I entertain no doubt that both directors approved the appointment of the administrator. Her contention that she did not consent to the appointment of an administrator is confounded by the evidence including that a meeting of the Board of Directors was convened, the necessary resolution of the Board was passed signed by Mr Quinn, Mrs Quinn was present at this this meeting, a record of the Directors' decision is available, by her conduct she clearly approbated the decision and registered no dissent at the material time.

[15] In accordance with paragraph 30 of Schedule B1 the directors were required to and did file a notice in the prescribed form and filed it in the High Court. Further, as required by paragraph 28(2) the form was accompanied by a statutory declaration containing the prescribed information.

[16] The relevant notice is contained in the trial papers and contains the statutory declaration of Mr Quinn. Under paragraph 30(7) of Schedule B1 a criminal offence is committed where the person making the declaration includes a false statement or one which he does not reasonably believe to be true. I am satisfied that Mr Quinn did not knowingly make a false statement or one which he did not reasonably believe to be true. On the contrary, and consistently with all the other evidence, when he stated that the appointment was being made by the director(s) he was plainly telling the truth.

[17] In respect of her second assertion, while mistakenly referring to a Company Resolution, the respondent acknowledges that Mrs Quinn appears to be correct that the "record of the decision of the Directors" was not attached to the Notice of Intention to Appoint. However, it has been 6 years or so since the notice was filed with the Court Office and searches in the Court Office have not located any such record.

[18] Paragraph 28(1) of Schedule B1 requires the person, who gives Notice of Intention to Appoint to file in the High Court both the Notice **and** "any document accompanying it".

[19] Rule 2.023 of the Insolvency Rules (NI) states:

> "2.023. The notice of intention to appoint shall be accompanied by either a copy of the resolution of the company to appoint an administrator (where the company intends to make the appointment) or a record of the decision of the directors (where the directors intend to make the appointment)."

[20] Counsel informed the court that there did not appear to be any authority directly equating with the procedural defect in the instant case in which the relevant

record of the directors' decision was not filed in the Court office. Most of the other cases involve failures to give notice to prescribed parties as required under the Rules.

[21] This procedural defect has now been remedied and the record of the decision of the directors has now been filed in the Court Office.

The approach of the courts to procedural defects

[22] In the context of an administration application, the court was referred to *Re Bezier Acquisitions Ltd* [2011] EWHC 3299. Norris J, at paragraphs [13]-[21] addressed the effect of a failure to comply with the procedural requirements.

[23] He concluded:

> "[21] …..As a separate and independent ground I hold that IR2.8 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 where 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)."

[24] *Re Virtualpurple Professional Services Ltd* [2012] 2 BCLC 330 was a case where the prescribed notice was filed in Court but not served on the company in accordance with the Insolvency Rules. On the question of non-compliance Norris J stated at paragraph 25(b):

> "For the reasons which I gave in paras [13] to [20] of my judgment in Re Bezier Acquisitions Ltd [2012] 2 BCLC 322 I consider that the correct approach to the construction of a provision such as para 26(2) of Sch B1 and IR 2.20(2) is to focus intensely on the consequences of non-compliance, and to pose the question, taking into account those consequences, whether Parliament intended the outcome to be total invalidity."

[25] In *Re Euromaster* [2012] EWHC 2356, there had been a failure to file the Notice of Appointment within the 10 day period required under Schedule B1 to the Insolvency Act 1986. Unlike the 2 cases cited above, there was no possibility of construing the legislation to enable the Court to conclude that the requirement was not, in fact, mandatory. Norris J considered the approach to be adopted by reference to the requirements of the legislation and the effect of non-compliance holding:

> "I propose to adopt the approach taken by Judge McCahill QC in *Hill and Pope v Stokes plc* [2010] EWHC 3726 (Ch), [2011] BCC 473 at [63]–[67], by Judge Purle QC in *Re Assured Logistics Solutions Ltd* [2011] EWHC 3029 (Ch), [2012] BCC 541 at [33], and which I followed in *Re Bezier Acquisitions Ltd* [2012] 2 BCLC 322 and *Re Virtualpurple Professional Services Ltd* [2012] 2 BCLC 330 (which themselves have been followed by Arnold J in *Re Ceart Risk Services* [2012] 2 BCLC 645 and by Judge Purle QC in *Re BXL Services* [2012] EWHC 1877 (Ch), [2012] All ER (D) 87 (July). 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 para 28(2) should be null."

[26] The Court concluded that the appointment of the administrator was not a nullity even though undertaken in breach of an express requirement in Schedule B1 which stated:

> "An appointment **may not be made** under paragraph 22 after the period of 10 business days beginning with the date on which the notice of intention to appoint is filed under paragraph 27(1)."

[27] By contrast the statutory requirement in this case specified in paragraph 28(1) requires the person giving Notice of Intention to Appoint the obligation of filing the Notice and any document accompanying it "as soon as is reasonably practicable". However paragraph 32 of Schedule B1 states:

> "The appointment of an administrator under paragraph 23 *takes effect* when the requirements of paragraph 30 are satisfied."

The appellants contend that the failure to attach the "record of the decision of the Directors" therefore prevented the appointment of the administrator from taking effect.

[28] The record of the directors' decision has now, in fact, been filed with the Court. The oversight has been retrospectively rectified. The respondent submits that the issue for the court to address is whether such an error renders the entire administration void so that the administrator is not now entitled to continue to act and, in particular, to present a winding up petition.

[29] The error which only came to light some 6 years later was procedural in nature. There is and can be no suggestion of anyone trying to gain some advantage by failing to comply with the relevant provision. It appears that the failure to attach the requisite document was an oversight pure and simple. The intention was to appoint an administrator, the consent of the Northern Bank (as qualifying charge holder) was plainly obtained and the defect has since been rectified. I propose to follow the course adumbrated in the authorities referred to above and to "focus intensely" on the consequences of non-compliance. Taking into account those consequences I do not consider that Parliament intended the outcome to be total invalidity. Further, the irregularity which has occurred by oversight has not caused substantial injustice. On the contrary, to hold otherwise would frustrate the intentions of all parties at the material time in seeking to appoint an administrator.

[30] The Insolvency Rules (NI) 1991 expressly provide for such an error under Rule 7.50:

> "7.50. No insolvency proceedings shall be invalidated by any formal defect or by any irregularity, unless the court before which objection is made considers that substantial injustice has been caused by the defect or irregularity, and that the injustice cannot be remedied by any order of the court."

[31] No substantial injustice has been caused by the defect in the instant case. The oversight was a failure to file the notice accompanying the Notice of Intention to Appoint and that has now been retrospectively rectified.

[32] In *Re Care People Ltd (In administration)* [2013] EWHC 1734 Judge Purle QC declared the appointment valid, notwithstanding the defect:

> "[16] I am mindful also that administration is a class remedy in respect of which the interests of all creditors have to be taken into account. There is obvious potential for injustice where an appointment is made against a company prematurely. In the present case, however, unless the company can dispel the clear impression that I have from the evidence that that is all it was – a premature appointment – and that the company could not and would not have met the unchallenged part of the

> demand in time, a valid appointment would have followed at most two days later. In those circumstances, it seems to me that the prejudice to the company is very limited and there is no substantial injustice. It is only substantial injustice which is capable of invalidating an appointment under r 7.55. There is, however, room for real prejudice to creditors if an undoubtedly insolvent company is taken out of administration. In my judgment, as the company has suffered no substantial injustice, I propose to declare the appointment to be valid, notwithstanding the defect, and (so far as I need to) to waive the defect."

[33] I propose to adopt this course and declare the appointment to be valid, notwithstanding the defect in failing to attach the requisite record of the directors decision which had undoubtedly been made. Had this course not been appropriate an alternative option is an Order pursuant to paragraph 105 of Schedule B1:

> "105. An act of the administrator of a company is valid in spite of a defect in his appointment or qualification."

[34] Had the primary remedy of a declaration not been appropriate the respondent contended that the appropriate relief in accordance with Rule 7.50 of the Rules, is an Order under paragraph 105 of Schedule B1. As to the process for making such an order, see *Ceart Risk Services Ltd* [2012] 2 BCLC 645 at paragraphs 25 *et seq.*

Conclusion

[35] For the reasons given above this court holds (1) that the Notice of Intention to Appoint an Administrator dated 17 October 2011 is valid; (2) the failure to file the record of the decision of the directors to appoint an administrator did not invalidate that appointment; (3) In any event the subsequent lodgment of a copy of the Notice of Intention to Appoint with a record of the decision of the directors attached, has rectified any such failure.