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Case Nos. CR-2021-000696
CR-2021-000697
CR-2021-000698

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (CHD)

IN THE MATTER OF PATISSERIE HOLDINGS PLC (IN LIQUIDATION)
AND IN THE MATTER OF STONEBEACH LIMITED (IN CVL)
AND IN THE MATTER OF PTS REALISATIONS LIMITED (IN CVL)
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Remote Hearing By Teams
Date: 03/12/2021

Before :

INSOLVENCY AND COMPANIES COURT JUDGE JONES

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Between :

(1) DAVID COSTLEY-WOOD
(acting as former joint administrator of Patisserie Holdings Plc (in liquidation), Stonebeach Limited (in CVL) and PTS Realisations Limited (in CVL))
(2) BLAIR NIMMO
(acting as former joint administrator of Patisserie Holdings Plc (in liquidation))
(3) WILLIAM WRIGHT
(acting as former joint administrator of Stonebeach Limited (in CVL) and PTS Realisations Limited (in CVL))

Applicants

and

(1) GEOFF ROWLEY

(2) PAUL ALLEN

(acting as the joint liquidators of Patisserie Holdings Plc (in liquidation), Stonebeach Limited (in CVL) and PTS Realisations Limited (in CVL))

Respondents

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Mr Richard Fisher Q.C. (instructed by **Faegre Drinker Biddle & Reath LLP**) for the **Applicants**
Mr James Couser (instructed by **Mishcon de Reya LLP**) for the **Respondents**

Hearing date: 23 November 2021
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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....CHJ 3/12/21.....

INSOLVENCY AND COMPANIES COURT JUDGE JONES

I.C.C. Judge Jones:

A) Introduction

1. I have before me applications by the former administrators ("the administrators") of three companies now in liquidation. They have been joined together because of their common theme of concern, namely whether non-compliance with requirements of ***Schedule B1 to the Insolvency Act 1986*** ("***Sch. B1***" and "***the Act***") has affected the subsequent validity and/or conduct of the administrations and subsequent liquidations. They nevertheless present different concerns.

2. In the case of Patisserie Holdings Plc, the main problems result from what occurred after the creditors had decided not to approve the administrators' proposals made in accordance with ***paragraph 49 of Sch. B1***. Rather than seek directions under ***paragraph 55 of Sch. B1*** following the decision made under ***paragraph 53 of Sch B1***, the administrators presented modified proposals to the creditors' committee and acted upon their approval of (amongst other proposals): an exit from the administration into creditors' voluntary liquidation with the Respondents ("Mr Rowley and Mr Allen" or "the liquidators") to be the joint liquidators; and of payment of administrators' fees capped at £75,000.

3. There is no dispute that the creditors' committee had no such power of approval. However, the administrators in due course moved the company from administration into creditors' voluntary liquidation pursuant to ***paragraph 83 of Sch. B1***. Even if that was a valid exercise of their existing powers, which is in issue, Mr Rowley and Mr Allen were not nominated by the creditors as a whole as required by ***paragraph 83(7) of Sch. B1*** and ***Rule 3.60(6) of the Insolvency (England and Wales) Rules 2016*** ("***the Rules***"). In that circumstance ***paragraph 83(7)(b) of Sch. B1*** provides that the administrator shall be the liquidator but in fact Mr Rowley and Mr Allen acted as joint liquidators. There was also the problem (to the extent that the creditors' committee's decisions can be relied upon) that although the creditors had decided to form a committee, no decision had been sought from them to determine the membership of the committee. This was a breach of ***Rule 17.5***.

4. That summarised scenario gives rise to the following questions:

    a) Did the rejection of the proposals and the fact that the administrators then implemented modified proposals approved by the creditors' committee and not the body of creditors as a whole affect the validity of their appointments?

    b) Whether the validity of their appointments was affected or not, did the administrators have power to continue to conduct the administration as they did and in particular to cause the company to move from administration to creditors' voluntary liquidation pursuant to ***paragraph 83 of Sch. B1*** as required by the proposals approved by the creditors' committee?

    c) What are the consequences of Mr Rowley and Mr Allen having acted as joint liquidators in breach of ***paragraph 83(7)(b) of Sch. B1***?

    d) What are the consequences of the breach of ***Rule 17.5***?

e) What are the consequences of the fact that the administrators did not seek directions from the Court under ***paragraph 55 of Sch. B1***?

f) Should the administrators be liable for any of the liquidators' costs resulting from the defaults which occurred?

5. In the cases of Stonebeach Limited ("Stonebeach") and PTS Realisations Limited ("PTS"), companies belonging to the same group, the breaches concerned the holding of physical meetings at which the creditors approved the respective proposals. There were: (i) a breach of the timing requirements of ***Rule 15.6(2) of the Rules***; (ii) possibly a breach of ***Rule 15.6(8)*** concerning the calculation of value and number when deciding whether its 10% threshold for the requisitioning of a physical meeting was met, although that is the subject of argument; and (iii) a possible breach of the timing requirements of ***paragraph 51(2) of Sch. B1*** for the decision approving the proposals.

6. The consequences for those breaches (insofar as they are established) are not specified by ***the Act*** or ***the Rules*** and, therefore, applying the approach approved in ***Re Zoom UK Distribution Ltd (In Admin)*** [2021] EWHC 800 (Ch), [2021] B.C.C. 735 raise the questions: What is the purpose of the requirement breached and what are the consequences of non-compliance applying the appropriate category of case? The categories being: (i) a fundamental breach; (ii) a breach which is not fundamental and causes no injustice, and (iii) a breach which was not fundamental but caused substantial injustice (applying ***Re Skeggs Beef Ltd*** [2019] EWHC 2607 (Ch); [2020] B.C.C. 43).

7. The same approach is to be taken when answering the questions identified for Patisserie Holdings Plc concerning the breach of duty to seek directions from the Court under ***paragraph 55 of Sch. B1*** and the breach of ***Rule 17.5*** (insofar as they are established) because the consequences of breach are not specified. The issue of non-compliance with ***paragraph 83(7)(b) of Sch. B1*** and ***Rule 3.60(6)*** will also require that approach unless it is to be treated in the same manner as cases where there is no power to appoint and any appointment is, therefore, a nullity. However, as will be seen, the issue of validity is to be determined by the express provisions of ***Sch. B1***.

8. I will deal first with the Patisserie Holdings Plc application. I make clear that in respect of each administration the administrators express their regret for the errors that have occurred and offer their apologies to the Court. I accept them. It is also to be noted from the beginning that the applications are advanced on the basis that the respective creditors have been kept informed of the problems and of this application and hearing. None have raised concern or complaint, none appear at the hearing and no prejudice to the creditors has been identified by them.

B) Patisserie Holdings Plc

B1) The Facts

9. The catalyst for the Patisserie Holdings Plc application was a hearing on 29 July 2020 of an application dated 20 June 2021 ("the Liquidators' Application") made in the

course of its voluntary liquidation at which the usual compulsory order was made. The Court at that hearing was only concerned with the validity of the appointment of the voluntary liquidators. A transcript shows that the position was rather vague and the Court was asked to make a retrospective compulsory winding up order pursuant to ***paragraph 55(2)(e) of Sch. B1*** or one effective from the date of the hearing. The administrators were not a party, although they provided part of the evidence supporting the application.

10. The judgment identified the following errors from the evidence in support:

    a) The failure to apply to the Court under ***paragraph 55 of Sch. B1*** after rejection of the proposals by the creditors.

    b) The administrators wrongly acting on the decision of the creditors' committee approving the modified proposals as though it was a decision of the creditors as a whole.

11. The usual compulsory order was made because although it could not be concluded at that hearing that the appointment of the voluntary liquidators was invalid, the fact that serious questions existed made it plain that course should be taken when there could be no doubt that the company should be in liquidation. In circumstances of the application not in fact being made under ***paragraph 55(2)(e) of Sch. B1*** and in the context of the Court deciding not to validate previous acts, at least not at that stage, the order was made pursuant to the Court's inherent jurisdiction to wind up a company even though it does not have a petition before it, provided one or other of the circumstances within ***section 122 of the Insolvency Act 1986*** exist (see ***Lancefield v Lancefield*** [2002] BPIR 1108).

12. Mr Richard Fisher QC, instructed on behalf of the applicant administrators, explained that the purpose of the administrators' application is to provide full information regarding the errors that occurred in the administrations and to address the Court as to the consequences of such errors. In particular, whether they undermine the validity of the appointment or actions of Mr Rowley and Mr Allen as voluntary liquidators or otherwise affect the validity of the acts taken by the administrators during the course of the administration. For that purpose the administrators have provided evidence and argument which presents matters in a different shade to the evidence presented upon the liquidators' application. However, it is emphasised that they do not seek to criticise the approach previously adopted by the Court or to suggest that the appointment of Mr Rowley and Mr Allen as compulsory liquidators is invalid.

13. I accept (subject to relatively minor modification) the following summary of the facts provided by Mr Fisher Q.C. (for which I am grateful) is established by that evidence:

    a) Patisserie Holdings Plc entered administration by way of a directors' appointment on 22 January 2019. The administration was pursued with the aim of achieving the second limb of the statutory purpose, leading to three separate sales of portions of the business and assets of the overall Patisserie Valerie group in February 2019. Whilst the company was a non-trading, holding company and did not receive any consideration, its inclusion in the contracts was required and its administration was necessary to avoid jeopardising existing funding agreements and due to it being the contracting entity for most of the employment contracts in the Group. It

is to be noted that in practical terms the administration was drawing to a close following that sale.

b) On 11 March 2019, a Notice of Decision procedure by correspondence was sent to creditors requesting various decisions be made including the approval of the administrators' statement of proposals. The proposals were circulated on 18 March 2019. In broad terms they were that: (i) The administrators should continue to take reasonable steps to maximise realisations to achieve a better result than would have been achieved in a liquidation; (ii) They be authorised to use one of a number of routes to end the administration in due course, including via a CVL with the administrators becoming liquidators; (iii) A creditors' committee should be formed; (iv) Terms relating to remuneration, disbursements and pre-appointment costs should be approved; and (v) The administrators would be discharged from liability in due course on standard terms (i.e. filing of final receipts and payments account).

c) The majority by number of creditors would have approved those proposals but Mr Johnson, the majority shareholder and creditor with around 69% of the total debt amounting to some £12,454,000, voted (as he was entitled to do) against the proposals other than the formation of a creditors' committee. It is not pertinent to set out the reasons other than to observe that it appears reasonably obvious that they could potentially have been resolved with further time and effort. Nevertheless the decision not to approve the proposals (except for the formation of a creditors' committee) was recorded and registered with the Registrar of Companies on 5 April 2019. All creditors and shareholders and the Court were informed of the decision but no application was made to the Court pursuant to ***paragraph 55 of Sch. B1*** for directions.

d) A creditors' committee was established with three members, including representatives of Mr Johnson and HMRC, the other substantial creditor. Those three were accepted by the administrators because they were the only nominees of the creditors. All creditors were informed of this by letter dated 5 April 2019. There was no objection. Collectively, the creditors on the committee held more than 50% of PH's outstanding liabilities of £18,039,156.62. However, the committee was formed without seeking a decision from the creditors concerning its membership as required by ***Rule 17.5(4)***.

e) Modifications to the original, rejected proposals were prepared by the administrators taking into consideration the position of Mr Johnson. In substance the rejected proposals remained subject to the modifications that: (i) the amount of the Administrators' remuneration was fixed at £75,000 plus VAT; and (ii) the exit from the administration would be by entering into CVL, with Mr Rowley and Mr Allen, partners of another firm (FRP Advisory) to be appointed as liquidators.

f) Rather than seeking directions from the Court or, indeed, seeking a decision from the full body of creditors insofar as that remained an option, the creditors' committee was asked to formally approve the modified proposals, which they did. The administration proceeded on the basis of that approval. This approval, purportedly (but not) in accordance with ***Sch. B1***, was recorded at Companies House on 17 July 2019. The next day the administrators notified all creditors and

shareholders and the Court of the decision. No creditors or shareholder raised any objection to this process.

g) The Administrators took steps to complete the administration. They circulated progress reports including a final report indicating that Mr Rowley and Mr Allen would be appointed joint liquidators. They then placed the company into CVL by filing a notice under ***paragraph 83 of Sch. B1***. Mr Rowley and Mr Allen were considered to be appointed and acted accordingly.

h) No creditors objected to those steps being taken, and all were kept informed. The only fees and remuneration drawn were in the amount of £75,000 plus VAT as approved by the creditors' committee. The fact that the modified proposals were approved by the creditors' committee and not the creditors as a whole was subsequently identified by Mr Rowley and Mr Allen causing them considerable concern over the validity of their appointments.

B2) Breaches

14. The consequence of the creditors' decision to reject the proposals should have been that the administrators applied to the Court for directions under ***paragraph 55 of Sch. B1*** (see ***Re BTR (UK) Ltd, Laving v Swindell*** [2012] EWHC 2398 (Ch) [2012] BCC 864 and ***Re Pudsey Steel Services Ltd*** [2015] BPIR 1459) unless that course would serve no effective purpose and, therefore, incur unnecessary cost (see ***Re Parmeko Holdings Ltd*** [2014] BCC 159). This obligation was breached.

15. It cannot be successfully argued that the ***Parmeko Holdings*** exception applied because the course taken by the administrators, namely to seek to implement modified proposals, required directions from the Court. There are two self-standing reasons for that. First because there is no express provision enabling them to take that course following rejection of the proposals and, therefore, it is a course subject to the supervisory control of the Court unless (arguably but fact dependent and for another case) that supervision is unnecessary by reason of the agreement of the creditors. There was no such agreement in this case. Second, even if there had been agreement, a new decision would have been required under ***paragraphs 51 and 53 of Sch. B1*** and the 10 week time limit for that decision (beginning with the date of the administration) would have expired. In that circumstance an extension would have had to have been sought from the Court under ***paragraph 107 of Sch. B1*** pursuant to ***paragraph 51(4) of Sch. B1***, there being no consent for the purposes of ***paragraph 108 of Sch. B1***.

16. If the administrators had sought directions from the Court, ***paragraph 55(2) of Sch. B1*** would have empowered the Court to make any order it thought appropriate including: by declaring that the administrators' appointments should cease from a specified time or adjourning the hearing to enable the administration to continue whether conditionally or not and with or without an interim order. There was no suspended winding up petition in this case. ***Sch. B1*** does not provide for any consequences upon breach of ***paragraph 55(2) of Sch. B1***.

17. Instead of seeking directions, the administrators chose (mistakenly rather than in bad faith) to continue the administration in accordance with modified proposals approved

by the creditors' committee. This is not a breach in the sense that it fails to comply with a specific provision of ***Sch. B1***. It is a breach in the sense that it fails to comply with and is not permitted by the whole scheme of ***Sch. B1***. It is this which gives rise to the question whether that course following rejection of their proposals affected the validity of their appointment. It is logical to deal with this before the breaches of ***paragraph 83(7)(b) of Sch. B1*** and ***Rule 3.60(6)***, ***Rule 17.5*** and (to the extent necessary) ***paragraph 55 of Sch. B1***.

B3) Was the validity of the administrators' appointments affected?

18. It is not in doubt that the administrators were originally, validly appointed. ***Paragraph 1(2) of Sch. B1*** expressly provides that an administrator's appointment, which starts when the appointment has effect, will continue until it ceases to have effect "in accordance with" the provisions of ***Schedule B1***. ***Paragraphs 98 and 99 of Sch. B1*** (which address the consequences of discharge from liability and charges) identify three occasions when this may occur: the administrator vacates office; is removed from office; or it is prescribed that the appointment ceases to have effect. Obviously the first two do not arise.

19. As to cessation, the important point to be drawn from ***paragraph 1(2) of Sch. B1*** is that the acceptance and implementation of modified proposals approved by the creditors' committee following the rejection of the original proposals by the full body of creditors will only result in the cessation of the administrators' appointment if that is "in accordance with" the provisions of ***Schedule B1***. Cessation in those circumstances may be specified expressly or by implication but normally one would expect an intention of Parliament to that effect to be expressed with clear unequivocal language. If there is no provision for cessation, it follows from the wording of ***paragraph 1(2) of Sch. B1*** that the administrators will remain validly appointed.

20. It is to be observed (unsurprisingly) that ***Sch. B1*** makes it clear when there is to be automatic cessation of appointment. Accordingly, ***paragraph 76 of Sch. B1*** expressly provides that the administrator's appointment will cease to have effect at the end of one year from the date it took effect, subject to provisions for the extension of the term. That expressed intention of automatic provision is the exception rather than the rule within the general scheme of ***Sch. B1***. The common approach is to make provision for cessation of appointment in specified circumstances, for example by steps being taken by the administrator or upon an application to the court, without providing that the appointment will cease to have effect automatically if those circumstances occur but those steps are not taken. For example:

    a) An administrator is required to apply to the court for directions in the event of thinking that the administration's purpose cannot be achieved or that the company should not have entered into administration or, in a court appointed administration, that the purpose has been sufficiently achieved or, for any administration, if required to do so by the creditors (see ***paragraph 79 of Sch. B1***). However, there is no provision that the appointment ceases for failure to do so and whilst termination of the administration is the primary, discretionary power granted to the Court, it is not the only one (see ***paragraph 79(4) of Sch. B1***).

b) The same applies to ***paragraph 80 of Sch. B1***, which provides for termination of an administration by notice when the administrator thinks the purpose of the administration has been sufficiently achieved.

c) Similarly ***paragraph 84 of Sch. B1***, which requires (subject to dispensation by the Court) an administrator to send a notice to the registrar of companies should they think the company has no property which might permit a distribution to creditors. Registration of the notice will result in the automatic cessation of their appointment but there is no automatic cessation should the required circumstances arise and the notice not be given or dispensation obtained.

d) It is perhaps not entirely clear which side of the line ***paragraph 89 of Sch B1*** lies. It applies when an administrator ceases to be qualified to act as an insolvency practitioner. They must vacate office and give notice to specified persons. They will commit a criminal offence for failing to do so. It is a moot point whether the words "shall vacate office" are to be construed as meaning that this will occur automatically with the giving of notice being a consequential procedural requirement. However, even if that is so, the point for the purposes of this judgment is that the consequence of cessation is specified by ***Sch B1*** as required by ***paragraph 1(2) of Sch. B1***.

21. There is no express provision that the appointment will cease in the circumstances of the creditors having rejected the proposals and the administrators choosing nevertheless (whether mistakenly or in bad faith) to continue the administration in accordance with modified proposals approved by the creditors' committee. Nor can it be implied from the wording of any of the provisions of ***Sch. B1***. Therefore, ***paragraph 1(2) of Sch. B1*** continued to apply, as did the administration of Patisserie Holdings Plc. The next question, therefore, is whether the administrators had power to act as though the proposals approved by the creditors' committee had been approved by the creditors.

B4) The Administrators' Powers and Commencement of the Liquidation

22. It follows from the continuing validity of their appointment that the administrators still held the powers conferred upon them by ***Schedule B1***, including those within ***Schedule 1 to the Insolvency Act 1986***. This conclusion is sustained by the following authorities and submissions presented by Mr Fisher Q.C.:

a) In ***Re Stanleybet UK Investment Ltd*** [2012] BCC 550, in which an application was made under ***paragraph 55 of Schedule B1***, Mr Justice Sales at [8] commented that, even where proposals had been voted down: "*It would be unusual, but not legally impossible, for administrators to proceed with a course which 87 per cent of creditors were opposed to."* That is to say, the approval of proposals is not a pre-requisite to the ongoing validity of an administration.

b) Similarly in ***Re Parmenko*** (above), at [10]-[12], it was made clear that the administrators retained all powers to conduct the affairs of the company in

administration as they in their discretion considered fit, even where there was no approval of proposals by the creditors:

> *"[10] The formal position, it seems to me, is that unless and until proposals have been approved by the creditors, or directions have been given by the court, an administrator has the extensive powers that are given to him by **Sch. B1** and the authority to exercise them in such a manner as he considered best for fulfilling the purposes of the administration.*
>
> *[11] If and when proposals are approved then he is required by **para.68** to manage the affairs of the Company in accordance with those proposals, but if no such proposals are approved then he is not so constrained and he must act in accordance with his own discretion.*
>
> *[12] Similarly, if the court has given directions pursuant to **para 68** (and it could do so on an application such as this, pursuant to **para 55(2)(e)**), then the administrator must exercise its powers in accordance with that direction, but unless and until such directions are made the administrator continues to have all those powers and must exercise them in accordance with his own discretion in pursuit of the statutory purposes."*

c) There can be unusual circumstances in which administrators can be directed not to comply with the requirements of ***paragraphs 49 and 51 of Schedule B1***: see, for example, ***Re UK Coal Operations Ltd*** [2014] 1 BCLC 471. Whilst this is not such a case, the fact that the Court may so direct further demonstrates that approved proposals are not a pre-requisite to a valid administration.

23. Obviously, there may be potential issues concerning the exercise of those powers in scenarios similar to this. There may even be cases where actions could be challenged for an improper exercise of power. However, in this case the only issue raised is whether there was power to rely upon ***paragraph 83 of Sch. B1*** to move the company from administration into creditors' voluntary liquidation.

24. There is no suggestion that the conditions for the making of that decision specified in ***sub-paragraph (1) of paragraph 83 of Sch B1*** did not exist. It may be that the failure to obtain approval in accordance with ***paragraph 53 of Sch. B1*** could have led to the Court intervening upon an application by creditors. However, that did not occur and it is not being asked to do so now. The conclusion, therefore, is that this exit step was taken in accordance with statutory powers which the administrators could still exercise.

25. There is, however, the problem that by virtue of ***paragraph 83(7) of Sch. B1***, the liquidators in any CVL are either the administrators or "*any person nominated by the creditors of the company in the prescribed manner and within the prescribed period*". ***Rule 3.60(6)*** provides that any such nomination occurs when (in summary): (i) the creditors approve the administrator's proposals and they include provision for the proposed liquidator to be appointed; or (ii) another nomination procedure was conducted by the creditors before they approved the proposals.

26. Whilst it might be argued that this ***Rule*** demonstrates an intention that ***paragraph 83 of Sch. B1*** is limited to cases where the proposals have been approved, that would plainly be reading words into ***paragraph 83 of Sch. B1*** which could not be justified. Its clear intention is that a company can be placed into voluntary liquidation as an exit procedure if the ***subsection (1)*** conditions are met. ***Subsection (7)*** does not alter that but provides the creditors with the opportunity to have someone other than the

administrator as liquidator in circumstances to be provided by ***the Rules***, in the prescribed manner.

27. It also follows that the problem that Mr Rowley and Mr Allen were not nominated by the creditors and that the administrators did not act as liquidators, as provided for in that circumstance by ***paragraph 83(7) of Sch. B1***, did not affect the validity of the liquidation. ***Paragraph 83(6) of Sch. B1*** clearly provides that an administrator's appointment will cease to have effect and the company is to be wound up as if a resolution had been passed on the day the Registrar of Companies registers the notice from the administrators that ***paragraph 83(6) of Sch. B1*** applies. In this case, that notice was registered and the voluntary liquidation commenced on registration irrespective of whether ***paragraph 83(7) of Sch. B1*** would be breached.

B5) The Consequences of Breach of *Paragraph 83(7)(b) of Sch. B1*

28. However, the position remains that Mr Rowley and Mr Allen acted as liquidators of the company without having been nominated in accordance with ***Rule 3.60(6)*** which provides:

> *"For the purposes of paragraph 83(7)(a) of Schedule B1, a person is nominated by the creditors as liquidator by—*
>
> *(a) their approval of the statement of the proposed liquidator in the administrator's proposals or revised proposals; or*
>
> *(b) their nomination of a different person, through a decision procedure, before their approval of the proposals or revised proposals.*

29. Mr Fisher Q.C. submits that despite the non-approval of the proposals, they should be regarded as having been properly appointed from the outset on the basis that the defect was not fundamental and did not cause injustice. In any event, to the extent that there was a defect in their appointment under ***Rule 3.60(6)***, it does not invalidate their appointment or the actions they have taken as such because of ***section 232 of the Act*** and ***Rule 12.64*** which provide:

> *"232 Validity of office-holder's acts.*
>
> *The acts of an individual as … liquidator of a company are valid notwithstanding any defect in his appointment, nomination or qualifications."*
>
> *And*
>
> *"Formal defects*
>
> *12.64. 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."*

30. The first issue, therefore, is whether the breach of ***Rule 3.60(6) of Sch. B1*** meant Mr Rowley and Mr Allen were not lawfully appointed liquidators. Most properly for the purposes of considering his submission that the "fundamental breach/injustice" tests

of ***Re Zoom UK Distribution Ltd (In Admin)*** (above) applied, Mr Fisher Q.C. drew attention to the contrary decision of H.H. Judge Purle Q.C., sitting as a High Court Judge, in ***Hobbs v Gibson*** [2010] EWHC 3676 (Ch). It considered the predecessor to ***Rule 3.60(6) of Sch. B1***, ***Rule 2.117(3) of the Insolvency Rules 1986*** ("***the 1986 Rules***"). Although I do not consider the differences in wording to be material to the point, it provided that for the purpose of ***paragraph 83(7) of Sch. B1*** a person should be nominated as liquidator in accordance with the provisions of ***Rule 2.33(2)(m)*** or ***Rule 2.45(2)(g)***. This enabled the creditors to nominate a proposed person different to the person proposed by the administrators. A nominated liquidator's appointment would take effect by the creditors' approval of the administrator's proposals or revised proposals with that nomination. Instead, in that case the proposals left the nomination of liquidator to the creditors' committee rather than require nomination by the creditors.

31. H.H. Judge Purle Q.C. approached the issue from the premise that the creditors' committee had no power to nominate. He decided with reference to what is now ***Rule 12.64*** (namely ***Rule 7.55*** of ***the 1986 Rules***) that this was not a formal defect or irregularity. It was a case of non-appointment due to a lack of power. I note that he was also concerned but did not have to decide whether there were "insolvency proceedings".

32. That decision follows the basic principle that an absence of power will mean that the act purportedly carried out simply did not produce the intended result (as explained in ***Jyske Bank (Gibraltar) Ltd v Spjeldnaes (No2)***, CA 29/7/99, [1999] 7 WLUK 629 when considering ***Rolled Steel Products (Holdings) Ltd v. British Steel Corporation*** [1986] Ch. 246 and applied in cases concerning the purported appointment of administrators such as ***Re Kaupthing Capital Partners II Master LP Inc; Pillar Securitisation Sarl v Spicer*** [2010] EWHC 836 (Ch), [2011] B.C.C. 338 and ***Minmar (929) Ltd v Khalastchi*** [2011] EWHC 1159 (Ch); [2011] B.C.C. 485). An appointment will be a nullity if there is no power to appoint.

33. Mr Fisher Q.C. submits that this is an incorrect analysis. What has occurred is a failure to follow "the prescribed manner" and that gave rise to a breach of a procedural ***Rule***. Therefore, it is a case to which the approach approved in ***Re Zoom UK Distribution Ltd (In Admin)*** (above) is to be applied (see paragraph 6 above) and for which distinctions between nullities and irregularities do not arise.

34. Absent binding authority, I would have agreed with Mr Fisher Q.C. on the facts before me. The fact that the creditors' committee made the nomination meant that three of the creditors nominated Mr Rowley and Mr Allen even if their representative capacity is ignored. Those three together held a voting majority within the context of the body of creditors as a whole. Therefore, the appointment was subject to a formal defect, namely the failure to hold a meeting to obtain a vote from all creditors as opposed to relying on a nomination by the majority of creditors without a meeting. It may also be noted that it follows from this analysis that it does not matter for the purposes of this decision that there had been a breach of ***Rule 17.5*** when constituting the committee.

35. That being so, the approach approved in ***Re Zoom UK Distribution Ltd (In Admin)*** (above) would lead to the conclusion that this failure to comply with ***Rule 3.60(6)*** was not fundamental and did not cause injustice. The appointment pursuant to the

prescribed manner was not a nullity for want of power but a breach for which the outcome depended upon the nature of the breach and its consequences not upon any distinction between nullity and irregularity. This breach could be cured, although that is no longer necessary. ***Section 232 of the Act*** and ***Rule 12.64*** can be relied upon. They have a broad and purposive construction. As to the former, I add that there were insolvency proceedings because the company had moved into creditors' voluntary liquidation.

36. However, H.H. Judge Pearl Q.C. was sitting as a High Court Judge and I am bound by his decision even though he was not sitting at appeal level if it still stands as a mandatory precedent. It seems to me, however, that this area of law has changed significantly since his decision. I refer to the analysis of case law within the Appendix to the judgment in ***Re Tokenhouse VB Ltd*** [2020] EWHC 3171, [2021] B.C.C. 107. Whilst H.H. Judge Pearl Q.C. decided that the case before him fell within the type of case which sits outside the approach approved by ***Re Zoom UK Distribution Ltd (In Admin)*** (above) because of the absence of power, it is clear that the later decisions of High Court Judges have completely changed the manner in which the Court approaches such cases when deciding whether the approach approved in ***Re Zoom UK Distribution Ltd (In Admin)*** (above) applies.

37. For obvious reasons I have considered this with particular care and with the greatest of respect to H.H. Judge Purle Q.C., whose expertise in company and insolvency law was renowned whilst at the Bar and whilst as a Judge. I conclude that if ***Hobbs v Gibson*** is treated as binding upon me, it would mean that I would be applying an approach to the problem that was inconsistent with the later decisions of High Court Judges referred to in the above-mentioned Appendix which followed the decision of ***Re Ceart Risk Services Ltd*** [2012] EWHC 1178 (Ch), [2012] B.C.C. 592. It is they which are binding upon me and I accept Mr Fisher Q.C.'s submissions. Mr Rowley and Mr Allen were appointed liquidators notwithstanding the defect in the implementation of "the prescribed manner".

B6) The Breach of Rule 17.5

38. The breach of ***Rule 17.5*** nevertheless remains relevant to the extent that the administrators rely upon the approval of their fees of £75,000. The first observation, however, is that no-one suggests that this fee was other than one far lower than the administrators would obtain upon an application to the Court. It is capped at a level which does not come close to reflecting the time reasonably spent on the work carried out. It stands as less than a quarter of the chargeable time that would be submitted.

39. Mr Fisher QC submits in any event that the breach was minor, resulting from the fact that only three creditors indicated that they wished to be represented on the creditors' committee but nevertheless leaving the majority of creditors in value with the decision making role. In addition, he observes that a notice of the constitution and membership of the committee was delivered to the Registrar of Companies as required by ***Rule 17.5(6)-(9)***. The effect of this, he submits, is that the creditors' committee was "*established*" for the purpose of ***Rule 17.5(5)***, notwithstanding any non-compliance with ***Rule 17.5(4)***. In any event he relies upon ***Rule 17.27(1)***. It provides that:

> *"The acts of a creditors' committee or a liquidation committee are valid notwithstanding any defect in the appointment, election or qualifications of a member of the committee or a committee-member's representative or in the formalities of its establishment."*

40. In my judgment this is a clear case of a failure to comply with the ***Rules*** for which no consequence is specified but which was not fundamental and did not cause injustice. That is because on the facts before me the composition of the committee represented the majority in value of the creditors and because of the absence of any identified cause to challenge the sum paid. There is the option of the Court considering the fees but for the reasons stated that appears pointless. No remedy is required to cure the breach.

B7) The Breach of Paragraph 55 of Sch. B1

41. There is no need to address the breach of ***Rule 55*** any further. Whilst the breach was plainly a serious error, no relief is needed within the case before me. The administration has ended.

B8) The Liquidators' Costs

42. The parties agreed to make submissions concerning the recovery of costs before judgment was delivered. Mr Couser on behalf of Mr Rowley and Mr Allen has submitted that because of the negligence of the administrators the liquidators had to incur the cost of their application to the Court to move Patisserie Holdings plc into compulsory liquidation and that such order has resulted in additional liquidation costs and expenses which would not have been incurred in the CVL. The administrators should bear those costs and any costs that might reasonably follow should this Court find that Mr Rowley and Mr Allen were not lawfully appointed. He also asks for the liquidators' costs in respect of the administrators' application before me. Mr Couser also draws attention to and relies upon the fact that the financial circumstances of the liquidation mean that the liquidators will have to personally bear any of those costs not recoverable from the administrators.

43. Mr Fisher Q.C. whilst accepting that this Court's supervisory and inherent jurisdiction enables it to make the costs orders sought, has emphasised that it is still necessary to justify such orders by reference to jurisdiction, cause and causation. I agree. Except for the costs attributable to the administrators' application, he submits that the costs and expenses claimed should be seen as expenditure incurred in the ordinary course of the administration of the company's liquidation estate and not as costs recoverable through an adverse litigation costs order. As part of that administration the liquidators chose to apply for relief but that choice was protective and the costs and further costs resulting are only to be treated as costs and expenses of the liquidation. It matters not that the estate does not have the funds. That should not be cause for a costs order against the administrators.

44. As an initial point, I do not consider that my decision should be affected by the fact that the financial position of the company means the liquidators will bear any irrecoverable costs personally. The financial position which leads to that result is one

they were aware of when accepting their appointments and in any event should not determine the outcome.

45. As to the costs of this application, the administrators have accepted that they should pay the liquidators' costs and have identified an acceptable figure of £16,000 to meet the costs of assisting with the administrators' application. A costs order will be made, the parties should try to agree quantum and the Court can be asked to decide any area of disagreement if that is required.

46. As to the other categories of costs and expenses claimed, in many ways they draw attention to what might be described as "the elephant in the room". Namely, why has it been necessary for this matter to be brought before the Court when the administration is concluded, the administrators no longer act for the company and the compulsory winding up has meant that the liquidators' joint appointment is not in issue?

47. It is of course not to be thought by asking that question that there should be any concept of hiding matters from the current office holders and/or the creditors. In addition, it is plainly right that the administrators having acted as officers of the court (see ***section 5 of the Act***) should be able to seek directions relating to matters of concern even though their appointment has ceased. However, subject to the crucial provisos of transparency and to the importance of the Court's supervisory role, it is for the relevant party to decide whether relief is needed by the company concerned and/or by its current office holders and/or by the former office holders from the Court. That party in the context of the company's needs is now the joint liquidators.

48. What happened was that the liquidators took a pragmatic approach when discovering the problems addressed above. They did not seek answers to the questions now asked by the administrators' application but instead asked for a compulsory liquidation to ensure there would be no issue over their appointments. That is plain from the transcript of the hearing on 29 July 2020 of their application dated 20 June 2020.

49. Mr Couser emphasised that the liquidators took that step after the administrators had failed to refer the problems to the Court. However, that was not the administrators' role from the perspective of the company. They no longer held any standing to act on its behalf and they did not have any personal cause as former office holders to raise the problems identified when only the liquidators could decide whether it was necessary for the company to do so and only the liquidators could commence proceedings which would obtain relief for the company.

50. As previously explained, the catalyst for the application by the administrators was that approach and in particular the findings of default within the judgment in the liquidators' application. Their application has required the time, cost and detailed analysis which the liquidators' pragmatic approach avoided. The outcome, in summary, is that the liquidators did not need to apply for a compulsory order. That does not mean they were wrong to do so. Quite the opposite. It was sensible within the conduct of the administration of the estate to adopt their pragmatic approach to reach a quick solution without having to establish whether their appointment as voluntary liquidators was invalid. However, whilst that pragmatic approached flowed from the most unfortunate breaches that occurred during the administration, the costs should not be laid at the administrators' door for three reasons.

51. The first is that the liquidators' application was made to avoid the need for a decision as to whether the actions of the administrators meant the liquidators' appointment was invalid. The second is the finding that it was valid. Taking those two matters together, the approach taken by the joint liquidators should not be treated as a link in the chain of causation. Whilst it could be presented as mitigation to avoid the costs which an application such as this incurs, it would not be right to treat the liquidators' application in that way when it was in fact unnecessary.

52. In addition there is the third reason to be read with the first two. Namely, the fact that there is an obligation to ensure that the appointment by statute will be made if it is accepted and the assumed fact that the liquidators' application will have been made in the context of them having checked that the requirements of ***paragraph 83 of Schedule B1*** were met, including their nomination by the body of creditors as a whole.

53. For those reasons, in my judgment it would not be a proper exercise of the Court's jurisdiction to order costs, whether under the CPR or the inherent jurisdiction, to order payment by the administrators of the costs attributable to the liquidators' application or of any additional costs and expenses resulting from the compulsory winding up. The finding that Mr Rowley and Mr Allen were lawfully appointed ends any application for costs resulting from the contrary finding.

C) The Stonebeach and PTS Applications

C1) The Facts

54. Stonebeach was the main trading entity of the Group. PTS (formerly Philpotts Limited) was a group entity, conducting business as a sandwich chain from 22 sites across the UK. I accept from the evidence the following summary by Mr Fisher Q.C. (subject to modifications) of the circumstances and nature of the breaches of ***the Rules*** identified within the former administrators' application to which Mr Rowley and Mr Allen are joined as liquidators:

a) Notice of the decision procedure for the purpose of voting on the administrators' proposals was circulated to creditors in accordance with ***Rule 15.8*** on 13 March 2019.

b) On 14 March 2019, a representative of a creditor common to both Stonebeach and PTS, Brake Bros Ltd ("BB") requested copies of the documents loaded onto the creditor portal. They were provided on 22 March 2019. On 28 March 2019, proofs of debt and a request for a physical meeting were submitted by BB. ***Section 246ZE(3), (4) and (7) of the Act***, enables (amongst others) 10% or more of creditors in value to request a physical meeting of creditors, which is otherwise barred by ***section 246ZE(2)***.

c) The administrators decided that BB's claim was for more than 10% in value of the total creditors' claims both at the point when the threshold was assessed, and then at the Stonebeach and PTS meetings to approve the administrators' proposals. There were two significant claims excluded within that calculation:

HMRC for £2.6 million and intercompany claims for some £30.9 million. The HMRC claim was in due course admitted (at around £2.7 million), but BB would still have held a claim for more than 10% if that claim had been taken into account for the purpose of determining the threshold. The intercompany claims were never ultimately submitted as claims in the administration.

d) On 1 April 2019, a notice of physical meeting was given to creditors by the administrators. It took place on 18 April 2019. The Stonebeach and PTS proposals presented by the administrators were approved at the meeting. No creditors' committee was formed. The decisions were subsequently recorded by lodging a Form AM07 at Companies House.

e) On 13 August 2019, the administrators sent letters to creditors of both companies requesting approval by way of creditors' decision procedure of revised proposals. They provided for the Respondents, Mr Rowley and Mr Allen, to be appointed joint liquidators of Stonebeach and PTS without further recourse to creditors, and to permit the administrators' remuneration to be drawn on a time costs basis in accordance with a revised estimate. ***Paragraph 54 of Sch. B1*** allows for revised proposals when an administrator wishes to work to different arrangements than those approved by the creditors.

f) The Stonebeach and PTS revised proposals were approved by decisions by correspondence with effect as at 4 September 2019 and 30 September 2019. The decisions were recorded at Companies House by lodging forms AM09 dated 2 October 2019. Both of Stonebeach and PTS entered CVL following ***paragraph 83 Sch. B1*** notices being given effect on 29 October 2019. The appointments of the administrators ceased.

C2) The Physical Meeting Timing Breach

55. The first identified problem is that the request from BB for a physical meeting pursuant to ***section 246ZE(3), (4) and (7) of the Act*** was made on 28 March 2019, whereas ***Rule 15.6(1)*** provides that it must be made *not later than five business days after the date on which the convener delivered the notice of the decision procedure or deemed consent procedure unless these Rules provide to the contrary*". The convener notice was delivered to creditors on 13/3/19.

56. Mr Fisher QC observes that there is nothing in ***section 246ZE*** which itself provides for the request for a physical meeting to be made within 5 working days of the date of delivery of the notice. This flows from ***the Rules*** and it is clear from ***Rule 15.6(2)*** that it is the responsibility of the convener of the meeting to check whether any request is submitted "*before the [five business days] deadline*". The Rules do not provide for what is to happen where there is a failure by the convener (or, as in this case, a mistake by the convener) in calculation of the relevant deadline.

57. He submits that a failure to check and apply the relevant deadline provided for in ***Rule 15.6(1) and (2)*** cannot invalidate an otherwise valid decision procedure which occurs at a physical meeting, or have been intended to render it a nullity. That would be to visit on the creditors the consequences of the convener's error, to their potential prejudice rather than that of the convener. The correct analysis must be that there is a

procedural irregularity or formal defect for the purpose of ***Rule 12.64*** (above), which does not render the approval of the Stonebeach and PTS Initial Proposals invalid in any way.

58. I agree.

C3) Calculation of the Requisition Threshold

59. The second matter is raised as a potential problem but one Mr Fisher Q.C. submits is not a problem at all. It is whether the 10% in value threshold required by ***section 246ZE(3), (4) and (7) of the Act***, was met entitling a physical meeting to be called.

60. Mr Fisher QC observes that there is no detailed indication in the Act or the Rules as to precisely how the threshold is to be calculated. ***Rule 15.6(8)*** states that the convenor must calculate the value of the creditor's claim by reference to ***Rule 15.31*** (i.e. by reference to the amount of the claim as at the date of administration). The administrators measured the 10% by reference to the value of claim accepted by "the convener" at the point of assessing whether the threshold is met. In doing so they rejected the above-mentioned claims of HMRC and the inter-company claims.

61. Mr Fisher QC submits that the approach taken is correct and, in which case, no problem arises. I agree.

C4) The Decision Date Timing Breach

62. ***Paragraph 51(2) of Sch B1*** requires that the initial decision date in relation to administrators' proposals (defined in ***paragraph 51(3) of Sch. B1***) is within 10 weeks of the day on which the company enters administration. Both Stonebeach and PTS entered administration on 22 January 2019. 10 weeks expired on 2 April 2019. The physical creditors meeting did not take place until 18 April 2019. The evidence establishes that the delay is attributed to the request for and subsequent holding of the physical meeting for which a further 14 days' notice must be given.

63. Mr Fisher QC submits that as a matter of purposive construction of ***Schedule B1***, an administrator who complies with the requirements of ***paragraph 51*** ought not to be placed in breach (and potentially subject to sanction for committing an offence) if, having taken steps to obtain a decision complying with its requirements, it is necessary to supersede that process with a physical meeting for which a further 14 days' notice must be given.

64. Alternatively that:

a) The Court can and should retrospectively extend time for compliance with the requirement of ***paragraph 51(2) of Sch. B1*** until 18 April 2019.

b) Non-compliance with the timing requirements of ***paragraph 51 of Sch. B1*** would not in any event lead to the conclusion that the approval of the proposals was a nullity (as opposed to being subject to a formal defect or

procedural irregularity for the purpose of ***Rule 12.64***), nor that it affected the subsequent conduct or validity of the administration. That is particularly so where the revised proposals were properly approved by creditors using a qualifying decision procedure (as occurred here). That must necessarily have provided the appropriate creditor input, and a basis on which the Court can be satisfied that there is no conceivable prejudice to any person.

65. This is a case where the breach is also not fundamental and did not cause injustice. The Court has power under ***paragraph 107 of Sch B1*** to extend the time after its expiry and would no doubt have done so upon an application by the administrators during the course of the administration. The administration is now over and therefore it appears unnecessary, although the requirement that an application to extend time should be made by the administrator can be read as including a former administrator (see ***paragraph 111(1) of Sch. B1***).

Order Accordingly