Neutral Citation Number: [2020] EWHC 3123 (Ch)

Claim Nos.: CR-2020-LDS-000752
CR-2020-LDS-000754
CR-2020-LDS-000755

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN LEEDS
INSOLVENCY AND COMPANIES LIST (CH D)

IN THE MATTER OF ARL O09 LIMITED (Co. No. 11113979)
AND IN THE MATTER OF ARL 011 LIMITED (Co. No. 11121147)
AND IN THE MATTER OF BRK 001 LIMITED (Co. No. 11243276)

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Date: 19 November 2020

Before:

Mr Andrew Sutcliffe QC, sitting as a Judge of the High Court

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BETWEEN:

(1) ARLINGTON INFRASTRUCTURE LIMITED (in administration)
(2) MARK AGRASUT

Applicants

and

(1) BEN WOOLRYCH
(2) PAUL ALLEN
(3) JASON BAKER
as purported administrators of ARL O09 Limited, ARL 011 Limited and BRK 001 Limited
(4) STRATEGIC ADVANTAGE SPC ARLINGTON 1 SP
(5) STRATEGIC ADVANTAGE SPC ARLINGTON 3 SP
(6) ARL O09 LIMITED (purportedly in administration)
(7) ARL 011 LIMITED (purportedly in administration)
(8) BRK 001 LIMITED (purportedly in administration)
(9) STRATEGIC ADVANTAGE SPC

Respondents

Mr Olivier Kalfon and Ms Hannah Ilett (instructed by **Blake Morgan LLP**) for the Applicants

Mr Hugo Groves and **Mr Matthew Maddison** (instructed by **Walker Morris LLP**) for the Fourth, Fifth and Ninth Respondents

The First to Third and Sixth to Eighth Respondents did not appear and were not represented

Hearing date: 13 November 2020

Approved Judgment

I direct that pursuant to CPR PD 39 a para-6.1 no official shorthand notes will be taken at this judgment and the copies of this version as handed down may be treated as authentic

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand- down is deemed to be 10:00 a.m. on Thursday, 19 November 2020

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MR ANDREW SUTCLIFFE QC:

Introduction

1. The First Applicant, Arlington Infrastructure Ltd (**AIL**), is the sole shareholder and parent company of the Sixth to Eighth Respondents (the **Subsidiaries**). The group operates in the energy sector. Amongst other things, AIL raises finance for the group, and lends money to the Subsidiaries.

2. The Fourth and Fifth Respondents are segregated portfolios of the Ninth Respondent, a Cayman Island Segregated Portfolio Company. They are a single legal entity: I refer to the Fourth, Fifth and Ninth Respondents together as **SASPC** and to the Fourth and Fifth Respondents as the **Junior Creditors**.

3. SASPC has loaned approximately £39 million to AIL, pursuant to facility agreements secured by debentures which constituted qualifying floating charges (**QFCs**) over AIL and the Subsidiaries, together with a first fixed charge over AIL's shares in the Subsidiaries.

4. A group of lenders (the **Senior Creditors**) subsequently lent approximately £5 million to AIL, secured by a QFC over AIL but not over the Subsidiaries. The only chargeholders over the Subsidiaries' assets and their shares are the Junior Creditors.

5. By a deed of priority dated 20 September 2019 (the **Deed of Priority**), it was agreed that the Senior Creditors' QFC over AIL would rank ahead of the Junior Creditors'

QFC over AIL. This judgment is concerned with the meaning and effect of the Deed of Priority, the terms of which I consider in more detail below.

6. On 17 August 2020, the Senior Creditors appointed administrators of AIL pursuant to paragraph 14 of Schedule B1 of the Insolvency Act 1986. The administrators of AIL have stated that they intend to sell AIL's shares in the Subsidiaries.

7. On 28 September 2020, the Junior Creditors purported to appoint administrators over the Subsidiaries. Following correspondence between the parties, this application was issued by AIL, acting by its administrators, and one of the Senior Creditors (the **Applicants**) on 27 October 2020. It is not disputed that, prior to appointing administrators over the Subsidiaries, the Junior Creditors did not obtain the prior written consent of the Senior Creditors pursuant to clause 9.1.4 of the Deed of Priority. The Applicants say that the consequence of failing to obtain such prior written consent was to render the appointments of administrators over the Subsidiaries invalid because the QFCs were not enforceable by the Junior Creditors at the relevant time and the appointments did not therefore comply with Paragraph 16 of Schedule B1. This constitutes the first limb of their application which I shall call the **Paragraph 16 Application**.

8. The Applicants' second limb of their application only arises if I dismiss the Paragraph 16 Application. The Applicants allege in the alternative that the Junior Creditors had an improper motive in appointing administrators over the Subsidiaries and apply for an order under paragraph 81 of Schedule B1 that such appointment should cease to have effect forthwith (the **Paragraph 81 Application**). SASPC submits that the Paragraph 81 Application should be dismissed on a summary basis without hearing witness evidence. Both sides addressed the Paragraph 81 Application in their skeleton arguments but, due to the fact that there was insufficient time to hear submissions on this part of the application, the parties agreed that I should first deliver judgment on the Paragraph 16 Application.

9. The hearing took place before me remotely on Friday, 13 November 2020. Mr Olivier Kalfon and Ms Hannah Ilett appeared for the Applicants. Mr Hugo Groves and Mr Matthew Maddison appeared for SASPC. The Applicants' evidence was contained in witness statements from Simon Campbell of Quantuma Advisory Limited, one of AIL's administrators, Richard Shardlow, a director of AIL and each of the Subsidiaries, and Paul Gazzard, a director of AIL and two of the Subsidiaries. SASPC's evidence was contained in witness statements from Heesuk (Shawn) Jee, one of its directors, and Jason Baker of FRP Advisory Trading Limited, one of the administrators of the Subsidiaries.

Statutory framework

10. Paragraph 14 of Schedule B1 permits a qualifying floating chargeholder to appoint administrators of a company out of court.

11. Paragraph 16 of Schedule B1 provides that: "*An administrator may not be appointed under paragraph 14 while a floating charge on which the appointment relies is not enforceable*". The issue in this case is whether the Junior Creditors' QFCs over the Subsidiaries are or are not "enforceable" within paragraph 16.

12. Paragraph 18(2)(b) of Schedule B1 provides that the notice of appointment of an administrator must include a statutory declaration by or on behalf of the person who makes the appointment that each floating charge relied on in making the appointment is (or was) enforceable on the date of the appointment. It is not in dispute that Ms Dods, of Walker Morris, made such a declaration on behalf of SASPC. Again, the issue is whether she was entitled to make such a declaration if in fact the Junior Creditors' QFCs were not "enforceable" within paragraph 16.

Contract documents

13. Clause 9.7.1 of each QFC over the Subsidiaries provides the Junior Creditors with a power to appoint administrators without notice. The power arises *"if the security constituted by this deed becomes enforceable"*.

14. By clause 10.1 of each QFC, the QFC becomes immediately enforceable if an Event of Default occurs. Event of Default is defined as having *"the meaning given to that expression in the Facility Agreement"*.

15. Event of Default is defined in each Facility Agreement as *"an event or circumstance listed in clause 17.1 to clause 17.12"*. Events of Default include a failure by AIL to pay any sum payable by it under any Finance Document when due (clause 17.1) and any action or step taken in relation to the appointment of an administrator in respect of AIL (clause 17.7.4). There is no doubt that Events of Default have arisen (and the Applicants do not contend otherwise) because, amongst other matters, AIL had failed to pay to SASPC interest in the sum of £470,748.30 on 7 March 2020 (which constituted an Event of Default under clause 17.1 of, at least, the Third Facility Agreement) and administrators in respect of AIL were appointed by the Senior Creditors on 17 August 2020 (which constituted an Event of Default under clause 17.7.4 of each of the Facility Agreements).

16. The Deed of Priority was a contract made between the Senior Creditors and the Junior Creditors. Clause 9.1 of the Deed of Priority provides:

> *"Except with the prior written consent of the Senior Creditors, the Junior Creditors shall not: …*
>
> *9.1.4 take any step to enforce any Junior Security Interest, whether by appointing a Receiver, exercising its power of sale or otherwise; or*
>
> *9.1.5 present, or join in, an application for an administration order or a petition for a winding-up order to be made in relation to [AIL] or initiate, or support or take, any step with a view to any voluntary arrangement or assignment for the benefit of creditors or similar proceeding involving [AIL] or issue a notice of intention to appoint an administrator or appoint an administrator of [AIL]*."

17. "*Junior Security Interest*" is defined by clause 1.1 as *"any Security in favour of a Junior Creditor created by a Junior Security Document"*. Junior Security Document is in turn defined as including *"any document referred to in Part 2 of Schedule 3"*. The

documents referred to in Part 2 of Schedule 3 include the Junior Creditors' QFCs over AIL and the Subsidiaries.

Outline of the Applicants' main submissions

The meaning of "enforceable"

18. The Applicants submit that the question whether the floating charge is or is not "enforceable" within the meaning of paragraph 16 is to be assessed objectively. Such assessment involves consideration of all the circumstances including the terms of the debenture or other security document between the parties, any collateral contract or agreement, whether between the parties or between the floating chargeholder and a third party, any promissory estoppel, and any statutory provision. They further submit that the surrounding circumstances can point both ways. Thus, in *Re Carson Country Homes Ltd* [2009] 2 BCLC 196, it was held that a chargeholder could enforce an invalid (by reason of a forged signature) charge in circumstances where section 44(5) of the Companies Act 2006 applied. I was also referred to *Closegate Hotel Development (Durham) Limited v McLean* [2013] EWHC 3237 where Mr Richard Snowden QC (sitting as a High Court judge) considered whether the chargeholder was prevented from exercising any of the rights under its security by the doctrine of promissory estoppel.

19. The Applicants emphasise that this application is concerned solely with the out of court appointment of administrators over a company by a holder of a floating charge under paragraph 14 of Schedule B1 and, in that context, the meaning of the word "enforceable" in paragraph 16. They say that, even where a floating charge is not enforceable, a chargeholder can make an application to the court, in its capacity as creditor, for the appointment of administrators under paragraph 12 of schedule B1. Their submission is that a floating chargeholder is not able to take advantage of the out of court appointment procedure in circumstances where it is not entitled at that time, for whatever reason, to enforce its floating charge.

20. Both the Applicants and SASPC referred me to the Court of Appeal's decision in *SAW (SW) 2010 Ltd v Wilson* [2017] EWCA Civ 1001 where paragraph 16 of Schedule B1 was considered. In order to decide that case, the court merely had to find that a floating charge was enforceable regardless of whether there were assets against which it could be enforced. The guidance should be approached on that basis, but what is said by the court with regard to the need for a floating charge to be "enforceable" would seem to be applicable more generally. Briggs LJ said at [33] "*that the requirement in paragraph 16 of Schedule B1 that the floating charge relied upon for the appointment of administrators "be enforceable" is concerned with the question whether the chargee has a right to enforce, rather than with the question whether there are free assets to which the chargee can have recourse for the purposes of enforcement. A floating charge is in my judgment enforceable if any condition precedent to enforcement has been satisfied (such as an event of default) and there remains a debt for which the floating charge stands as security*". Arden LJ said at [51]: "*The word "enforceable" clearly means "capable of being enforced"... The significant point for paragraph 16 purposes is that in this case [the debenture holder] had not then taken any step to*

enforce the Debenture. There is no suggestion that its contractual right to take such steps had not arisen. In my judgment, that means that the charge was enforceable for paragraph 16 purposes."

21. I was also referred to the recent case of *In re Secure Mortgage Corporation Limited* [2020] EWHC 1364, where HHJ Halliwell (sitting as a High Court Judge) considered *SAW (SW) 2010 Ltd v Wilson* and commented at [28] that Briggs LJ's "*analysis is consistent with established principles and persuasive as a statement of the law. I am satisfied that a floating charge will generally be enforceable if the criteria identified by Briggs LJ are satisfied."*

22. On the facts of this case, the Applicants submit (applying Briggs LJ's analysis) that two conditions precedent had to be satisfied before the Junior Creditors' QFCs became enforceable. The first was that an Event of Default had occurred, and it is accepted that this condition precedent was satisfied. The second was that the written consent of the Senior Creditors had to be obtained before the Junior Creditors could take any steps to enforce any of their QFCs over the Subsidiaries. The Applicants say that since no written consent was sought or obtained from the Senior Creditors, a condition precedent to enforcement has not been satisfied and the Junior Creditors' QFCs were not therefore enforceable. They submit that the approach of Arden LJ leads to the same conclusion because the fact that no written consent from the Senior Creditors has been obtained means that the QFCs are not capable of being enforced by the Junior Creditors.

The significance of the Deed of Priority

23. The Applicants submit that they are not attempting to enforce the Deed of Priority (to which at least one of the Applicants, AIL, was a party for only limited purposes). They submit that the Deed of Priority merely forms part of the surrounding circumstances in which the question of enforceability is to be judged. Thus, they say, if each of the Senior Creditors waived the consent requirement, or if each was estopped for whatever reason from enforcing the Deed of Priority, then, regardless of whether or not the Deed of Priority was otherwise in force, there would be no bar to the enforcement of the Junior Creditors' QFCs. The QFCs would be enforceable within the meaning of paragraph 16, and an out of court appointment under paragraph 14 would be permitted. The exercise to be undertaken in each case is the identification of the objective position at the relevant time.

24. When considering that objective position, the Applicants submit that the meaning and effect of clause 9.1.4 of the Deed of Priority could not be clearer. It prohibits the Junior Creditors from taking "*any step*" to enforce "*any Junior Security Interest*" (which it is accepted includes their QFCs over the Subsidiaries) "*whether by appointing a Receiver, exercising its power of sale or otherwise*" except with the prior written consent of the Senior Creditors (emphasis added). The Applicants contend that the words "*or otherwise*" include the appointment of administrators. To the extent necessary, the Applicants rely on clause 1.2.13 of the Deed of Priority which states: "*any words following the terms including, include, in particular, for example or any similar expression shall be construed as illustrative and shall not limit the sense of the words, description, definition, phrase or term preceding those terms*". The Applicants therefore say that the words "*any step*" and "*or otherwise*" should not be read down but should be given a wide construction.

The consequence of a floating charge being unenforceable

25. The Applicants submit that, on the natural reading of paragraph 16, this is a "capacity" provision, defining the circumstances where the power to appoint arises. They refer to paragraph 14 which, under the heading "Power to Appoint", states that a qualifying floating chargeholder "may appoint" and then to paragraph 16 which, under the heading "Restrictions on power to appoint", states that "an administrator may not be appointed…". They submit that, where the charge is not enforceable, there is simply no power to appoint administrators. The purported appointment is null and void.

26. The Applicants refer to *BCMPS (Europe) Ltd v GMAC Commercial Financial Plc.* [2006] EWHC 3744 (Ch) where Lewison J stated at [62]: "*It is perfectly true that a purported appointment of an administrator in circumstances where a charge is not enforceable will turn out to be invalid. That was always the law*". They submit that the approach the court takes in determining whether breach of a statutory provision gives rise to a nullity or a potentially forgivable defect is accurately summarised by HHJ Davis-White QC (sitting as a High Court Judge) in *Gregory v ARG (Mansfield) Limited* [2020] EWHC 1133 (Ch) as follows:

> "[44] *In short, …, where a certain procedure or requirement is laid down by Parliament, then that requirement or procedure is mandatory and must be followed. If it is not followed, it will be a matter of statutory construction whether the result is automatic invalidity or whether there can be circumstances in which the irregularity will not result in a nullity. There is then a factual question as to whether, in the particular circumstances, the validity of the relevant steps should be upheld.*
>
> [47] *… a point comes at which it may be said that a defect has moved from being one of procedure to being one of a more fundamental nature, and, in my view "capacity" or provisions laying down the circumstances in which a power to appoint arises are likely to be such an area. In that area it seems to me that it is more likely that a relevant "breach" will result in the relevant actions taken being a nullity rather than a mere irregularity.*"

27. In support of this conclusion, Judge Davis-White QC relies upon what was said by Norris J in *Re Euromaster Limited* [2012] EWHC 2356 (Ch) at [27]:

> "…*Schedule B1 contains a mixture of provisions, some of which are naturally read as defining the circumstances in which the power to appoint arises and some of which are naturally read as prescribing procedural requirements that must be fulfilled before the appointment is properly made. If an appointment is made in circumstances where there is no power to appoint then the purported appointment would naturally fall to be treated as a nullity. I will give two examples. In Re Minmar (929) Ltd [2011] EWHC 1159 (Ch) the appointment was a nullity because there was no quorate meeting of the directors, the board had never properly resolved to do anything and those who attended the meeting had no power to appoint. In Re Blights Builders [2006] EWHC 3459 the appointment was a nullity because the company had no power to appoint administrators by reason of the existence of an undisposed of winding up petition."*

28. I was also referred by both the Applicants and SASPC to *Re Care People Limited* [2013] BPIR 959; [2013] EWHC 1734 (Ch), where HHJ Purle QC (sitting as judge of the High Court), faced with a case where a floating chargeholder had not (he assumed)

left sufficient time after serving a demand for the charge to become enforceable, decided that the "premature appointment" was a defective exercise of an undoubted power and was not an automatic nullity. He held that an appointment made in breach of paragraph 16 was not a nullity, stating at [15]:

> *"In my judgment, that premature appointment is properly characterised as a defective exercise of an undoubted power of appointment, which is procedural in nature but not fundamental to the existence of the power. I do not consider that the requirement of paragraph 16 is of such fundamental importance as to render the appointment a nullity. It is undoubtedly a factor I should have very much in mind when considering whether or not to set the appointment aside, along with the Rule 7.55 criteria of substantial irremediable injustice.*"

29. The correctness of that decision was questioned by Judge Davis-White QC in *Gregory* (supra) where he stated (obiter):

> *"*[77] *... I have my doubts about the correctness of the reasoning in Re Care People Limited. In my assessment, this was not an example of the defective exercise of an undoubted power of appointment. The power of appointment had not arisen. If characterised as a defective exercise of an undoubted power of appointment in Care People, it is difficult to see why the same could not have been said of the position in Minmar. The directors undoubtedly had a power to appoint but, the argument would run, they exercised it defectively. ...*
>
> [117] *I should also add that I consider that the decision in Care People is questionable. It is difficult to see why the charge not being enforceable (if that was the case) was not as much a substantive fundamental failing leading to nullity as the board not having authorised the appointment in Minmar. True in both cases there was a failure of procedure, but the result was that a substantive condition for the making of an appointment (action by the board/company in Minmar and the charge being enforceable in the case of Care People) was not met."*

30. The Applicants submit that, whether or not *Care People* was correctly decided, there is a significant difference between a failure of procedure, such as a failure to leave adequate time after service of a demand (in which case a valid appointment could have been made in a matter of days thereafter), and a failure at any point to obtain written consent from the Senior Creditors as required by the Deed of Priority. They submit that the latter cannot be characterised as a mere "premature appointment", and even if invalidity was not automatic, it would be the appropriate order on the facts of this case.

Outline of SASPC's main submissions

31. SASPC makes five principal submissions.

(1) The effect of appointment of administrators

32. First, SASPC submits that the appointment of an administrator does not constitute "enforcement" of security. It submits that administration is not an enforcement procedure, referring to paragraph 43 of Schedule B1 which applies to a company in administration and provides that *"no step may be taken to enforce security over the company's property"* except with the leave of the administrator or the court. Administrators are officers of the court and owe a duty to all creditors. The statutory purposes of administration are hierarchical. By paragraph 3(4) of Schedule B1, an

administrator may perform his functions in accordance with objective (c) (distribution to secured creditors) only if he thinks that it is not reasonably practicable to achieve either of objectives (a) and (b). Accordingly, upon taking office, administrators are duty bound to consider whether it is reasonably practicable to rescue the company as a going concern and, if so, to conduct the administration with such objective. Moreover, the duties of an administrator are to be contrasted to those of a receiver. In *Re B Johnson & Co (Builders) Ltd* [1955] Ch 634 Jenkins LJ explained (at 661) that: "*The primary duty of the receiver is to the debenture holders and not to the company. He is receiver and manager of the property of the company for the debenture holders, not manager of the company*".

33. SASPC also points out that the power to appoint administrators is not reserved to qualifying floating chargeholders. The company or its directors can itself appoint administrators. The same hierarchical statutory purposes apply regardless of whether the appointment is made by a chargeholder or some other person, and whether it is made by court order or out of court. SASPC referred to two cases where the House of Lords has summarised the general scheme and purpose of administration: *Centre Reinsurance International Co v Freakley* [2006] 1 WLR 2863, per Lord Hoffmann at [6]-[7] and *Powdrill v Watson* [1995] 2 A.C. 394, per Lord Browne-Wilkinson at 441F-442A. The scheme and purpose of administration has been helpfully summarised by ICC Judge Jones in the recent case of *Re Tokenhouse VB Ltd* [2020] EWHC 3171 (Ch): at [17]:

> "[17] *The scheme as a whole is for administrations to be a potential rescue route for companies who are unable or likely to become unable to pay their debts and to avoid, for the ultimate benefit of creditors and the company, the all too frequent consequence of a liquidation resulting in a "fire-sale" before dissolution. The purpose and aim of an administration is to act with speed to enable an independent insolvency practitioner as administrator to present proposals to be approved or rejected by creditors to achieve: (i) the rescue of a company which is or is likely to become unable to pay its debts as a going concern; or (ii) a better result for such a company's creditors as a whole than will be likely if the company is wound up; or (iii) to realise its property to make a distribution to one or more secured or preferential creditors (see paragraphs 3, 11, 49 and 53(1) of Schedule B1).*
>
> [18] *The [Enterprise Act 2002] when introducing out of court appointments into the [1986 Act] also applied significant changes to the rights of qualifying floating chargeholders otherwise entitled to appoint administrative receivers under a floating charge. Section 72A of the [1986 Act] prohibits such an appointment subject to the exceptions within sections 72B-72H of the [1986 Act]. Although qualifying floating chargeholders were conferred the right to appoint administrators, there are differences less favourable for them:*
>
> *a) An administrative receiver would be appointed (normally as an agent of the company) with the function of achieving the realisation of the secured assets now the subject of a crystallised floating charge for the benefit of the floating chargeholder. This process would start upon appointment rather than require a proposal and vote of creditors in accordance with the procedure for all administrations, albeit that a "pre-pack" sale may be an option.*
> *b) In contrast, all administrations have the purpose and aim summarised in*

paragraph 17 above, even if the qualifying floating chargeholder makes the appointment. An administrator must act in the interests of the creditors as a whole, subject to the administrator's function being to make a distribution to one or more secured or preferential creditors. That function will only arise if the administrator thinks it is not reasonably practical to achieve either of the other two objectives and if it will not unnecessarily harm the interests of the creditors as a whole (see paragraphs 3(2) and 3(4) of Schedule B1).

c) Whilst a receiver may still be appointed over less than a substantial part of the company's secured assets, that may well be unattractive commercially and the appointee would be required to vacate office if an administrator is appointed (see paragraph 41(2) of Schedule B1)."

(2) Construction of the Deed of Priority

34. Second, SASPC submits that on a true construction of the Deed of Priority, taking a step to *"enforce*" security for the purpose of clause 9.1.4 does not include the appointment of administrators. It says the fact that clause 9.1.5 contains an express prohibition on the appointment of administrators makes it clear that appointing administrators does not constitute *"enforcement"* for the purpose of clause 9.1.4. Otherwise, clause 9.1.5 would be otiose. It also points to the fact that, in the debentures over the Subsidiaries, SASPC's right to appoint administrators is contained under clause 9 ("Powers of the Lender"), rather than clause 11 ("Enforcement of Security"). It submits that the appointment of administrators in respect of the Subsidiaries does not circumvent the priority afforded to the Senior Creditors because the Senior Creditors have no security over the Subsidiaries (and therefore no right to appoint their own administrators over the Subsidiaries) and the Senior Debt will be paid in priority to the Junior Debt in any event. It also says that if and to the extent there is any doubt as to the construction of the words "*take any step to enforce*" in clause 9.1.4, such doubt ought to be resolved in the favour of the Junior Creditors, because a party to a contract *"is unlikely to have agreed to give up a valuable right that it would otherwise have had without clear words"*: *Federal Republic of Nigeria v JP Morgan* [2019] EWHC 347 (Comm); [2019] 1 CLC 207 per Andrew Burrows QC (sitting as a High Court judge) at [34(iii)].

(3) If the Junior Creditors' appointment of administrators over the Subsidiaries constituted a breach of clause 9.1.4 of the Deed of Priority, did that render their QFCs unenforceable for the purpose of paragraph 16 of Schedule B1?

35. Third**,** SASPC submits that paragraph 16 of Schedule B1 is concerned with the enforceability of "a floating charge on which the appointment relies" and that the question to be asked is whether the floating charge is enforceable against the chargor company (i.e. the company whose assets are secured by the QFC as defined by paragraph 14(3) of Schedule B1), not whether the appointment of an administrator or the enforcement of the charge would constitute a breach by the chargeholder of its contract with a third party. SASPC says that the Deed of Priority does not affect the enforceability of the Junior Creditors' QFCs against the Subsidiaries because the Subsidiaries were not parties to the Deed of Priority; and in any event clause 9.1.4 does not provide that the QFCs are not enforceable. At the most, clause 9.1.4. constitutes a

promise by Junior Creditors to the Senior Creditors not to enforce the QFCs save with consent.

36. SASPC relies on the same passages in the Court of Appeal's judgment in *SAW (SW) 2010 Ltd v Wilson* as those relied on by the Applicants (see paragraph 20 above) in submitting that the court's view was that enforceability is a question as to whether the chargeholder has a contractual right to enforce the QFC, (e.g. because of the occurrence of an event of default) which is a matter of contract as between the chargeholder and the company and is not concerned with the contractual rights of any third party against the chargeholder.

37. In this context, SASPC referred to a passage in the respected textbook Goode and Gullifer on Legal Problems of Credit and Security 6th Ed. (2019) at [1-85] which considers the nature of deeds of priority and their effect on third parties:

> *"The holders of successive security interests are free to vary the priority of their interests inter se without the consent of the debtor, who has no right to insist on the order in which successive secured debts are satisfied. This does not result in an exchange of the security interests, which could affect the ranking of the subordinated interest in relation to an intermediate security interest in favour of a third party. All that happens is that the priorities are reversed - so that if the subordinated creditor enforces his security he holds what he receives on trust for the senior creditor up to the amount due to the latter or any lower sum fixed by the subordination agreement - but that in other respects each of the two mortgagees retains exactly the same interest as he had before. No exchange of security interest is intended to result from the subordination and none is effected.*"

38. I was also referred to *Re SSSL Realisations (2002) Ltd* [2004] EWHC 1760 (Ch); [2005] 1 BCLC 1, where Lloyd J said at [25]:

> *"Mr Randall QC., appearing for the liquidators of Group, identified three distinct types of transaction, which he said could have different consequences. The true subordinated debt, he submitted, is one where the terms on which the debt is incurred, by agreement between the creditor and the debtor, provide for repayment to be subordinated to other payments to be made by the debtor, as in the two cases before Vinelott J. He contrasted this with a priorities agreement, namely a contract between two or more creditors of the same debtor by which they agree to alter the priority in which they would otherwise receive payment as between themselves. He submitted that in the case of a priorities agreement, persons who are not parties to the contract and have not agreed to its terms should not be prejudiced by it, especially as creditors in a later insolvency. He characterised this as no more than a contractual obligation binding on the particular parties to the contract. Subject to the question whether any security or other proprietary right is conferred over a particular asset of the debtor, this is a fair comment, but it does not seem to me that it leads to any particular consequence or conclusion relevant to the debate. He identified a third type of transaction, a trust arrangement, whereby one creditor, A, agrees to hold on trust moneys received from a common debtor for the purpose of paying or securing payment of another creditor, B. He said that there was nothing inherently wrong with such a transaction, which does confer proprietary rights, but that if A later*

became insolvent, the arrangement was likely to be a charge over its book debts, and accordingly void against other creditors unless registered."

39. The Deed of Priority in this case, so submits SASPC, is no more than a mere "*priorities agreement*" (as indicated by clause 2.3), and any promises made by the Junior Creditors within clause 9.1 are no more than mere contractual promises to the Senior Creditors. The parties to the Deed of Priority are the Junior Creditors, the Senior Creditors and AIL. Although AIL is a party, recital D records that it is a party to the Deed to *"acknowledge its terms and give certain covenants"* and clause 16.2 provides that *"[AIL] further acknowledges that none of the provisions entered into by the Creditors in this deed are for the benefit of [AIL], nor may they be enforced or relied on by [AIL]"*.

40. Accordingly, SASPC submits that the promise made by the Junior Creditors under clause 9.1 of the Deed of Priority was a promise made to the Senior Creditors which cannot be relied on or enforced by AIL and, in any event, even if the promises were enforceable by AIL, that would not affect the enforceability of the QFCs as against the Subsidiaries. Since the Subsidiaries are not parties to the Deed of Priority, they have no right at common law to set up a defence to the enforceability of the QFCs based on the terms of the Deed of Priority to which they are not a party. See Chitty on Contracts 33rd Ed. (2019) at 18-021 to 18-022. SASPC also relies on clause 22 of the Deed of Priority which provides: *"A person who is not a party to this deed shall not have any rights under the Contracts (Rights of Third Parties) Act 1999 to enforce, or enjoy the benefit of, any term of this deed"*. By section 1(2) of the Contracts (Rights of Third Parties) Act 1999, clause 22 of the Deed of Priority prevents the Subsidiaries from attempting to enforce in their own right any terms of the Deed of Priority that might purport to confer a benefit on them.

41. SASPC submits that clause 9.1.4 does not provide that the Junior Security is not enforceable. At best it constitutes a mere contractual promise to the Senior Creditors that the Junior Creditors will not enforce the Junior Security except with the consent of the Senior Creditors. It does not create any security interest, or any interest in the assets of the Subsidiaries.

(4) Senior Creditors estopped from challenging the enforceability of the QFCs

42. Fourth**,** SASPC submits that, by clause 2.6 of the Deed of Priority, the Senior Creditors are precluded from contesting the enforceability of the Junior Creditors' QFCs over the Subsidiaries. Clause 2.6 is headed "*No challenge to security*" and provides:

> "*2.6. Neither Creditor shall challenge or question:*
> *2.6.1 the validity or enforceability of any Security constituted by a Security Document;*
> *2.6.2 the nature of any Security constituted by a Security Document;*
> *2.6.3 without prejudice to the generality of the foregoing, whether any Security constituted by a Security Document is fixed or floating.*"

43. Security Document is defined by clause 1.1 as including "*any Junior Security Document*" which includes the Junior Creditors' QFCs over the Subsidiaries. Accordingly, says SASPC, the Senior Creditors are precluded by clause 2.6.1 from

challenging or questioning the enforceability of the Junior Creditors' QFCs over the Subsidiaries.

(5) If the Junior Creditors' QFCs are "unenforceable" for the purpose of paragraph 16 by reason of their failure to comply with clause 9.1.4 of the Deed of Priority, an appointment made in breach of paragraph 16 is merely an irregularity and not of such fundamental importance as to render the appointment a nullity.

44. Fifth, SASPC submits that if the Junior Creditors' QFCs are rendered "unenforceable" for the purpose of paragraph 16 of Schedule B1 on the ground that enforcing these charges would constitute a breach of a promise by the Junior Creditors to third parties (i.e the Senior Creditors), the appointing of administrators in breach of that promise and paragraph 16 does not constitute a "fundamental" breach (such that the appointment is invalid), but merely an irregularity.

45. SASPC relies on what Judge Purle QC said in *Re Care People* (see paragraph 28 above). It submits that if, contrary to its primary position, a promise by a chargeholder to a third party not to enforce a charge (save with the third party's consent) renders the charge "unenforceable" for the purpose of paragraph 16, then Parliament cannot have intended breach of paragraph 16 to result in automatic invalidity in circumstances where: (1) the companies over which appointments are made (i.e. the Subsidiaries) are clearly insolvent, and there is a concern that their assets may be at risk; (2) the third parties to whom the promise not to enforce has been made (i.e. the Senior Creditors) include persons connected to the Subsidiaries who have a vested interest as interested purchasers of the Subsidiaries' shares and/or assets; (3) the chargeholder appoints administrators in order to protect its security (here to the benefit of both itself and the Senior Creditors who will be paid first in any event); and (4) if a creditor of the company believes the chargeholder to have acted with an improper motive, then a separate right of recourse is available under para 81 of Schedule B1.

46. Both SASPC and the Applicants referred to *Re Tokenhouse VB Ltd* (see paragraph 33 above). In that case, ICC Judge Jones decided that the applicant was a qualified floating chargeholder and should have been given at least 5 days' notice of the director's intention to appoint an administrator as required by paragraph 26(1)(b) of schedule B1 of all intended appointments under paragraph 22. Although Judge Jones' decision was concerned with the consequences of non-compliance with paragraph 26 as opposed to paragraph 16, there are passages in his judgment which give wider guidance as to the suitable approach to be taken:

> [40] *... e) Mr Justice Marcus Smith in Re Skeggs Beef Ltd [2019] EWHC 2607 (Ch), [2020] B.C.C. 43 has identified three categories of case to be applied when deciding the consequences of a breach of the requirements for an out-of-court appointment. Namely, cases where (i) the breach is fundamental, (ii) not fundamental but have caused no injustice, and (iii) not fundamental but have caused substantial injustice.*
>
> *f) When answering the question of Parliamentary intention and for the purpose of categorising the breach, the provisions concerning the appointment of administrators out of court are to be interpreted within the context of the statutory scheme for administrations "as a whole" (Re Virtual Purple Professional Services*

Ltd (above)).

[46] *Nor should the loss of the right to appoint or agree the appointment during the 5 business days be considered a consequence of such significance in the light of the role of administrators, the requirement that they are licensed insolvency practitioners and the role of the court (see paragraphs 18-21 above). It is relevant to consider those matters when addressing the scheme as a whole for the purpose of construing the provisions of Schedule B1 … . In particular, whoever appointed the administrators: they will be independent insolvency practitioners; they will be officers of the court; they will be required to act in the interests of the creditors as a whole if they can; they will need to prepare a proposal bearing in mind that the first two purposes of paragraph 3(1) of Schedule B1 will have priority over the third. …*

[47] *In addition, the Chargeholder can seek the directions of the court to cure the breach immediately it is discovered. Further, if the appointment is not automatically void or ineffective, no such application to "cure" will need to be made if the Chargeholder is content.*

[48] *The resulting, limited prejudice is to be contrasted with the potential danger that the main purposes of the administration may no longer be capable of being achieved at the time the breach is identified if the appointment is found to be automatically void. It cannot have been intended that breach of the requirement to give notice to enable the Chargeholder to agree the appointee or to appoint their own administrator would mean the administration was invalid and incurable. It must have been intended that the breach should be treated as an irregularity allowing the Chargeholder to apply to the court for appropriate, discretionary relief. For example, to apply to terminate the administration and/or replace the administrators appointed under paragraph 22 of Schedule B1 . The consequence of automatic invalidity would not fit the purpose of the requirement to give notice. It would be at odds with the need for there to be an administration and the intention of the Chargeholder to appoint an administrator, whether by agreement or through their own appointment. The purpose of paragraph 26(1) of Schedule B1 and the consequence of breach do not lead to the answer that Parliament intended automatic invalidity. They lead to the conclusion of irregularity, consistent with the existence and breach of a procedural requirement. The requirement to give notice is not linked to the issue of validity.*

[49] *That conclusion is entirely consistent with the reasoning of Mr Justice Norris in Re Euromaster Ltd (above). Namely, that paragraphs 26-32 of Schedule B1 are procedural and "naturally fall to be treated as irregular" . It is also consistent with the fact that the purpose of out of court appointments was to "streamline the process" (see paragraphs 15-16 above), not to add a new layer of formality which invalidates proceedings for want of compliance in a multiplicity of circumstances (adopting the words of Mr Justice Norris in Re Euromaster Ltd at paragraph (26) of the Appendix). It is also consistent with the speech of Lord Bingham in Seal v Chief Constable of South Wales [2007] UKHL 31, [2007] 1 W.L.R. 1910 at [7], referred to by HH Judge Davis-White Q.C. in Gregory v A.R.G. (Mansfield) Limited above (see paragraph (33) of the Appendix). Equally, it produces a result consistent with the consequences for a court appointment (see paragraph 28(b) above).*

[50] *Reference can also be made to the fact that the general intention of Parliament is for defects in appointment not to affect the validity of actions taken. This intention can*

be found in section 232 of the Act , paragraph 104 of Schedule B1, Rule 12.64 of the Insolvency Rules 2016 (formerly Rule 7.55 of the Insolvency Rules 1986) and the general power to rectify errors of procedure conferred by CPR Rule 3.10. ... Whilst their specific application to the First Issue depends upon its outcome, on current authority, account should be taken of this general approach when determining that outcome. ...

[52] *However, in my judgment the most important feature establishing Parliament's intention is that a statutory construction which concludes that a breach means automatic invalidity may have a disproportionate result when compared with the prejudice caused by breach, would not reflect the purpose of the requirement for notice and, most importantly, may adversely affect a company's ability to achieve the purposes it would have been likely to achieve had the appointment been valid. This is particularly the case when administration is a remedy to be implemented quickly and the breach may not be appreciated even, albeit as the extreme end of the spectrum, until after the company is in liquidation (see paragraphs 32-33 above). The consequence of invalidity, as opposed to irregularity, would be at odds with the Chargeholder's protected right to agree the appointee or to make their own appointment.*"

47. SASPC submits that, if the Junior Creditors' QFCs were not enforceable at the time they appointed administrators over the Subsidiaries with the result that paragraph 16 applies, the court should not treat the appointment as invalid but as an irregularity which should be cured by allowing the administrators to remain in post as administrators to the Subsidiaries while the administrators of AIL appointed by the Senior Creditors should also remain in post. They say that each set of administrators for the respective companies, as officers of the court, can be expected to carry out their functions in a neutral and responsible manner.

Discussion

48. I start my consideration of the parties' rival submissions by indicating that I do not accept SASPC's submission that the appointment of an administrator under paragraph 14 of Schedule B1 does not constitute enforcement of security. As Briggs LJ said in *SAW (SW) 2010 Ltd v Wilson* at [35]: "*The power to appoint administrators is in my judgment itself a means of enforcement*". SASPC's reliance upon paragraph 43 of schedule B1 (see paragraph 32 above) is misplaced. The terms of paragraph 43 do not mean that the appointment of administrators does not amount to enforcement of the charge. In my view, an out of court appointment of an administrator under paragraph 14 amounts to enforcement of the floating charge. Otherwise, it would make no sense for paragraph 16 to provide that an administrator may not be appointed under paragraph 14 while the floating charge on which the appointment relies is not enforceable. Moreover, SASPC's position is not advanced by relying on the undoubted facts that (1) the power to appoint administrators is not reserved to qualifying floating chargeholders and (2) the statutory purposes of administration are hierarchical with an administrator being duty-bound upon taking office to consider whether it is reasonably practicable to rescue the company as a going concern and, if so, to conduct the administration with such objective. The question to be addressed in the context of an application under paragraph 16 of Schedule B1 is not whether administration is an enforcement procedure but whether the floating charge on which the appointment relies is or is not enforceable.

49. The relevant question to be asked in respect of paragraph 16 is therefore whether or not the floating charges relied on by the Junior Creditors in making their appointments on 28 September 2020 were or were not enforceable at the time. For the reasons I give below, I consider that those charges were not enforceable and that such appointments were invalid.

50. I accept the Applicants' submission that the question whether the floating charge is or is not enforceable within the meaning of paragraph 16 is to be assessed objectively and that such assessment involves consideration of all the circumstances including the terms of the debenture or other security document between the parties, any collateral contract or agreement, whether between the parties or between the floating chargeholder and a third party, any promissory estoppel, and any statutory provision.

51. It follows that I do not accept SASPC's submission that, in determining the issue of enforceability under paragraph 16, it is not permissible to look outside the floating charge itself and the relationship between chargor and chargee. If the chargee has made a promise to third party that it will only enforce its charge if a certain condition has been met, that is a matter the court is entitled to take into account in determining the question under paragraph 16 of whether the charge pursuant to which the chargee purported to appoint an administrator is or is not enforceable.

52. In my view the Deed of Priority is part of the surrounding circumstances in which the question of enforceability for the purposes of paragraph 16 has to be determined. It cannot be ignored. It is one of the matters which needs to be considered in deciding whether at the relevant time the floating charges on which the Junior Creditors relied in appointing their administrators were enforceable. I see no reason to limit the determination of that question, as SASPC submitted, to a consideration of the charge itself and the relationship between chargor and chargee. If the chargee has acted in a way which prevents it from enforcing the charge, even though the terms of the charge itself may not have been altered in any respect, that is a matter which the court is entitled to take into account in deciding whether or not the charge is enforceable.

53. Nor do I accept SASPC's submission that AIL's and the Subsidiaries' inability to enforce the promises made by the Junior Creditors in clause 9.1 of the Deed of Priority is the relevant question. I agree with SASPC that AIL, though a party to the Deed of Priority, is unable to bring such a claim (although the Second Applicant may be able to do so as one of the Senior Creditors named in Schedule 1 Part 1). I also agree that since the Subsidiaries were not parties to the Deed of Priority, they are unable to bring any such claim, not least by virtue of clause 22 which prevents them from enforcing in their own right any terms of the Deed of Priority that confer a benefit on them.

54. However, I do not consider that AIL's or the Subsidiaries' inability to bring a claim for damages in respect of the Junior Creditors' breach of clause 9.1.4 is relevant to this issue. Nor is it correct, as SASPC suggests, that by bringing this application the Applicants are attempting to enforce the Deed of Priority. No doubt different tests might have been applied if the Senior Creditors had applied for injunctive relief to restrain the Junior Creditors from committing an anticipatory breach of contract by threatening to appoint administrators under their QFCs without first obtaining the Senior Creditors' written consent under the Deed of Priority. On this application under

paragraph 16, the Deed of Priority is an important document that needs to be considered in ascertaining the objective position as to whether or not the charges were enforceable at the relevant time.

55. The meaning and effect of clause 9.1.4 of the Deed of Priority is clear. The Junior Creditors agreed that they would not take any step to enforce their QFCs against the Subsidiaries without first obtaining the prior written consent of the Senior Creditors. This agreement represented a condition precedent to the enforcement of their QFCs.

56. What matters is that the Junior Creditors, by entering into the Deed of Priority in terms which included clause 9.1.4, willingly chose to fetter their ability to enforce their security. Looking at the matter objectively and taking account of all relevant circumstances at the time the appointments were made, including the absence of written consent from the Senior Creditors under clause 9.1.4 of the Deed of Priority, I have concluded (applying Briggs LJ's analysis) that there remained a condition precedent to enforcement of the Junior Creditors' QFCs which had not been satisfied. Put another way, applying Arden LJ's analysis, the Junior Creditors' QFCs were not capable of being enforced because prior written consent from the Senior Creditors had not been obtained.

57. I cannot accept SASPC's submission (see paragraph 34) that construing the Deed of Priority by treating the appointment of administrators as involving the taking of a step to enforce a Junior Security Interest for the purposes of clause 9.1.4 (as I believe to be the correct construction) renders clause 9.1.5 otiose. Clause 9.1.5 is concerned with (amongst other matters) the presentation of an application for an administration order, the issuing of a notice of intention to appoint an administrator or the appointment of an administrator, all in relation to AIL. The short point is that none of its provisions apply to the appointment of administrators over the Subsidiaries whereas clause 9.1.4 is concerned with "*any step*" taken to enforce "*any Junior Security Interest*" (which includes the Junior Creditors' QFCs over the Subsidiaries). Clause 9.1.5 fulfils a separate purpose as it relates only to AIL and, whilst it refers to the appointment of an administrator in respect of AIL, its provisions extend beyond enforcing a security interest.

58. Nor do I accept SASPC's submission (see paragraphs 42 and 43 above) that the Senior Creditors are precluded by clause 2.6 of the Deed of Priority from contesting the enforceability of the Junior Creditors' QFCs over the Subsidiaries. Clause 2.6 constituted an agreement by both the Senior and Junior Creditors that they would not challenge or question the validity or enforceability of any security constituted by a Security Document. But the question for this Paragraph 16 Application is not whether a floating charge is enforceable under clause 2.6 of the Deed of Priority but whether a floating charge is capable of being enforced under paragraph 16 of Schedule B1 or, put another way, is enforceable because it is not subject to any condition precedent. To be enforceable in the terms intended by paragraph 16, two conditions precedent had to be satisfied, namely, there had to be an event of default and, in light of clause 9.1.4 the Deed of Priority, the prior written consent of the Senior Creditors had to be obtained.

59. Having concluded that the Junior Creditors' QFCs were unenforceable for the purpose of paragraph 16 schedule B1, I have to consider whether the Junior Creditors' appointment of administrators pursuant to those unenforceable QFCs was a nullity or

merely an irregularity which can be cured. On this issue, I prefer the submissions of the Applicants (see paragraphs 25 to 30 above). This is not a case where there has been a failure of procedure, as there had been in some of the cases to which I have referred. There is no dispute that the Senior Creditors' written consent was neither sought nor obtained. This was a fundamental defect which it is difficult to describe as procedural. Moreover, it is clear that if the Senior Creditors' written consent were now to be sought, it would not be provided. In those circumstances, in view of my conclusion that the Junior Creditors' QFCs were not enforceable at the time of their purported appointment of administrators over the Subsidiaries, I must also conclude that such purported appointments were a nullity and cannot be cured. I am not persuaded that there is a proper basis for acceding to SASPC's invitation to treat the Junior Creditors' QFCs as enforceable on the grounds identified in paragraph 45 above. Certain of those grounds are strongly contested by the Applicants and none of them justifies treating the Junior Creditors' failure to comply with clause 9.1.4 of the Deed of Priority as an irregularity capable of being cured or ignored.

Conclusion

60. For the above reasons I declare that the purported appointments of administrators made by the Junior Creditors over the Subsidiaries were invalid. It follows that it is not necessary for me to determine the Applicants' alternative Paragraph 81 Application.

61. I am grateful to all counsel for the quality of their written and oral submissions.