



Neutral Citation Number: [2020] EWHC 317 (Ch)

Case No: CR-2020-000857

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

**IN THE MATTER OF SYMM & COMPANY LIMITED**

**AND IN THE MATTER OF THE INSOLVENCY ACT 1986**

7 Rolls Building  
Fetter Lane, London  
EC4A 1NL

Date: 5 February 2020

**Before:**

**MR JUSTICE ZACAROLI**

Judgment pursuant to Rule 3.25 of the Insolvency Rules 2016 and the order of Mr Justice Zacaroli dated 5 February 2020

**Penningtons Manches Cooper LLP** for the Applicant/Directors of the Company

## **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.

.....

MR JUSTICE ZACAROLI

**Mr Justice Zacaroli :**

1. The solicitors for the directors (the “Directors”) of Symm & Company Limited (the “Company”) filed a notice of appointment of administrators (the “Administrators”) of the Company pursuant to Rule 3.25 of the Insolvency Rules 2016 by CE-File at 17:36 hours on Tuesday 4 February 2020. Rule 3.25 applies where there has been no prior notice of intention to appoint an administrator.
2. The matter was alerted to me on Wednesday 5 February 2020 by the administrative staff at the court, pursuant to the practice in relation to out-of-hours appointments of administrators which was announced by The Chancellor on 30 January 2020. That practice was announced in circumstances where there are conflicting decisions at first instance as to the effect of filing notices of appointment of administrators out of hours by CE-file. The practice is designed to ensure that in a case of an out-of-hours filing by CE-file, until a rule change is made which clarifies the position, a High Court Judge will make a determination on the papers or after hearing submissions as to the validity and correct date and time which should be endorsed upon the notice of appointment of administrators.
3. On Wednesday 5 February I made an order in the following terms:
  - (1) the notice of appointment be treated as having been validly filed at Court at 10:00 hours on Wednesday 5 February 2020 and that it be endorsed as having been filed and accepted by the Court at that time and date; and
  - (2) in consequence it is declared that the appointment of the Administrators of the Company took effect at 10:00 hours on Wednesday 5 February 2020.
4. These are my reasons for doing so.
5. The confusion that has developed in this area is the result of differing approaches being taken in a number of cases to the interaction between the Insolvency Act 1986 (the “1986 Act”), the Insolvency Rules 2016 (the “2016 Rules”), the Electronic Working Pilot Scheme, and amendments to the Insolvency Practice Direction described below.

*The Insolvency Act and Rules*

6. The ability of a company or its directors to appoint administrators out of court stems from Schedule B1 to the Insolvency Act 1986 (the “1986 Act”), inserted by the Enterprise Act 2002, s.248(2) and Schedule 16.
7. Paragraph 22 of Schedule B1 provides that a company or the directors of a company may make an appointment. Paragraph 26 provides for the giving of notice of intention to appoint an administrator (which does not apply in the circumstances of this case). Paragraph 29(1) provides that a person who appoints an administrator under paragraph 22 shall file with the court a notice of appointment and such other documents as may be prescribed. Paragraph 31 provides that the appointment of an administrator under paragraph 22 takes effect when the requirements of paragraph 29 are satisfied.

8. Paragraph 14 of Schedule B1 also makes similar provision for appointment out of court of an administrator by the holder of a qualifying floating charge (a “QFC Holder”). Paragraph 18(1) provides that a person who appointed an administrator under paragraph 14 shall file with the court a notice of appointment and such other documents as may be prescribed. Paragraph 19 provides that the appointment of an administrator under paragraph 14 takes effect when the requirements of paragraph 18 are satisfied.
9. For present purposes, the critical requirement (whether in paragraph 18 in relation to QFC Holders or in paragraph 29 in relation to directors) is the requirement to file with the court a notice of appointment.
10. The Insolvency Rules 1986 (the “1986 Rules”, being the relevant rules in force at the time of the enactment of Schedule B1) made further provision for the appointment of administrators out of court.
11. In the case of QFC Holders, Rule 2.16 of the 1986 Rules identified the prescribed form and made other provisions relating to the notice of appointment. By Rule 2.17(1), “three copies of the notice of appointment shall be filed with the court and shall have applied to them the seal of the court and be endorsed with the date and time of filing.”
12. The provisions of Rule 2.16 were, however, by sub-rule (6), made subject to Rule 2.19 “...the provisions of which apply when an appointment is to be made out of court business hours.”
13. Rule 2.19(1) provided as follows:

“The holder of a qualifying floating charge may file a notice of appointment with the court, notwithstanding that the court is not open for public business. When the court is closed (and only when it is closed) a notice of appointment may be filed with the court by faxing that form in accordance with paragraph (3). The notice of appointment shall be in Form 2.7B.”
14. By Rule 2.19(5) the appointment “shall take effect from the date and time of that fax transmission”. Rule 2.19(6) required a copy of the faxed notice of appointment to be forwarded to the court specified in the notice as the court having jurisdiction in the case, to be placed on the relevant court file. Rule 2.19(7) obliged the appointor to take three copies of the notice of appointment that had been faxed to the designated number, together with the transmission report showing the date and time of transmission, to the court on the next day that the court was open for business. The appointor also (by sub-rule (8)) had to attach notice providing full reasons for the out of hours filing.
15. The court would then (by sub-rule (9)) seal the copies and endorse them with the date and time when, according to the fax transmission report, the notice was faxed and the date and time when the notice and accompanying documents were delivered to the court.

16. Rule 2.19(10) provided that the appointment would cease to have effect if the requirements of sub-rule (7) were not completed within the time period indicated in that paragraph.
17. Rule 2.19(11) created a rebuttable presumption that the date and time shown on the appointor's fax transmission report was the date and time at which the notice was filed.
18. In the case of appointments by the company or its directors, Rule 2.23 contained detailed requirements relating to the notice of appointment. Rule 2.26(1) provided:

“Three copies of the notice of appointment shall be filed with the court and shall have applied to them the seal of the court and be endorsed with the date and time of filing.”
19. Importantly, there was no provision in the 1986 Rules for appointment by the company or its directors out of court hours.
20. As a result of amendments introduced by rule 2 and paragraph 41(2) of Schedule 1 to the Insolvency (Amendment) Rules 2010, a QFC Holder is now entitled to appoint an administrator out of court hours by sending the notice of appointment and accompanying documents to a designated email address instead of the designated fax number.
21. With effect from 6 April 2017, the relevant parts of the 1986 Rules were replaced by the Insolvency Rules 2016 (the “2016 Rules”). Appointment of administrators by the company and its directors (formerly Rules 2.20 to 2.26 of the 1986 Rules) now appear in Rules 3.23 to 3.26 of the 2016 Rules. Appointment by QFC Holders (formerly Rules 2.15 to 2.19 of the 1986 Rules) now appear in Rules 3.16 to 3.22 of the 2016 Rules.
22. The 2016 Rules were not intended to make substantive changes to the relevant parts of the 1986 Rules. The 2016 Rules thus continue to distinguish between, on the one hand, a QFC Holder and, on the other hand, the company or its directors. The Rules provide that only the former can appoint an administrator out of court hours, and they continue to apply the safeguards on such appointments (including that it ceases to have effect if the obligation to take copies of the notice of appointment, and other documents, to court when it is next open is not complied with).
23. Rule 1.46 of the 2016 Rules provides as follows:

“(1) A document may not be delivered to a court by electronic means unless this is expressly permitted by the CPR, a Practice Direction, or these Rules. A document delivered by electronic means is to be treated as delivered to the court at the time it is recorded by the court as having been received or otherwise as the CPR, a Practice Direction or these Rules provide.”

24. This rule was derived from Rule 12A.14 of the 1986 Rules which had been introduced by the Insolvency (Amendment) Rules 2010, rule 4, schedule 3. This was enacted in anticipation of the introduction by the court of electronic working schemes (being schemes permitting “insolvency proceedings” to be delivered electronically to the court as set out in a Practice Direction).

*The Electronic Working Pilot Scheme*

25. Pursuant to CPR Practice Direction 51O, an Electronic Working Pilot Scheme (the “Pilot Scheme”) came into force on 16 November 2015. It originally applied for one year, but has been the subject of successive extensions, currently being extended to 20 April 2020.
26. Paragraph 1.2(1) of the Pilot Scheme provides that “Electronic Working works within and is subject to all statutory provisions and rules together with all procedural rules and practice directions applicable to the proceedings concerned, subject to any exclusion or revision within this Practice Direction.”
27. Paragraph 2.1 of the Pilot Scheme originally provided that “Electronic Working enables parties to issue proceedings and file documents online 24 hours a day every day all year round, including during out of normal court office opening hours and on weekends and bank holidays...” except where there was planned, or unplanned, “down-time”.
28. Paragraph 2.2 of the Pilot Scheme provided that, “For the avoidance of doubt, Electronic Working applies to and may be used to start and/or continue...insolvency proceedings...”
29. The Pilot Scheme was subsequently amended to provide an additional exception to paragraph 2.1 so as to provide that Electronic Working enables parties to issue proceedings and file documents online 24 hours a day, except (in addition to the existing two exceptions relating to down-time) “(c) where the filing is of a notice of appointment by a qualifying floating charge holder under Chapter 3 of Part 3 of the IR 2016 and the court is closed, in which case the filing must be in accordance with Rule 3.20 of the IR 2016.”

*The Insolvency Practice Direction*

30. On 25 April 2018, the 2018 Insolvency Practice Direction (*Practice Direction: Insolvency Proceedings* [2018] BCC 241) came into force. The only material paragraph for present purposes is 8.1, which states:

“Attention is drawn to paragraph 2.1 of the Electronic Practice Direction 51O - The Electronic Working Pilot Scheme, or to any subsequent electronic practice direction made after the date of this [Insolvency Practice Direction], where an application is made, or intention to appoint an administrator is made, using the electronic filing system. For the avoidance of doubt, and notwithstanding the restriction in sub-paragraph (c) to notices of appointment made by qualifying floating charge holders, paragraph 2.1 of the Electronic Practice Direction 51O shall not apply to any filing of a notice of

appointment of an administrator outside court opening hours, and the provisions of Insolvency Rules 3.20-3.22 shall in those circumstances continue to apply.”

31. This clearly indicates that, so far as appointments by QFC Holders were concerned, paragraph 2.1 of the Pilot Scheme did not apply. In *Re HMV Ecommerce Ltd* [2019] EWHC 903 (Ch), Barling J considered, in light of the fact that paragraphs 3.20 to 3.22 of the 2016 Rules apply only to appointments by QFC Holders, that the Insolvency Practice Direction arguably did not preclude the company or its directors from CE-filing notices of appointment outside of court hours.
32. In *Re Skeggs Beef Limited* [2019] EWHC 2607 (Ch), Marcus Smith J, having conducted a review of more of the legislative history than was before Barling J, concluded, *obiter* (since the application before him concerned an appointment by a QFC Holder) that it was “absolutely clear” that the notice of appointment of administrators must be pursuant to the 2016 Rules and not pursuant to Practice Direction 51O. He said, at [16], “If the Insolvency Rules provide for out-of-court notification of an administrator, then (provided those rules are followed) the appointment will be valid. But if there is no such provision in the Insolvency Rules, then the absence cannot be made good by resort to Practice Direction 51O.” In relation to the matter before him, he concluded that a purported filing by CE-file of a notice of appointment by a QFC Holder was defective, but capable of being cured pursuant to Rule 12.64 of the 2016 Rules.
33. In *Re SJ Henderson & Company Limited* [2019] EWHC 2742 (Ch), decided after Marcus Smith J’s judgment in *Skeggs Beef* was finalised, but before it was published, ICCJ Burton construed paragraph 8.1 of the Insolvency Practice Direction as providing that paragraph 2.1 of the Pilot Scheme did not apply to *any* out of court appointment of administrators out of hours. She noted that Rule 3.20(1) of the 2016 Rules strictly permits only a QFC Holder to file a notice of appointment out of court hours. She accepted that neither the 1986 Act nor the 2016 Rules expressly prohibited the company or its directors from filing a notice of appointment out of court hours, but considered that there “...has been no demonstration of an intention on the part of the legislature to permit the extraordinary power held by QFCHs to appoint administrators out of court hours to become available to companies or their directors.”
34. In *Re Keyworker Homes (North West) Limited* [2019] EWHC 3499 (Ch), HHJ Hodge QC, albeit *obiter*, took a different view. In his view, Marcus Smith J’s conclusion (that the only way properly to give notice of an appointment of an administrator was by way of the 2016 Rules) was wrong:

“...because it does not have any regard to the provisions of Insolvency Rule 1.46 which expressly contemplates that a document may be delivered to a court by electronic means where this is expressly permitted by a Practice Direction. It seems to me that the Practice Direction 51O is such a Practice Direction. Save in the cases of notice of appointment by qualifying floating charge holders, which are subject to specific regimes set out in Insolvency Rules 3.20 to 3.22, in my judgment the Insolvency Rules do not prevent the electronic filing of notices of appointments. In particular they do not apply to the filing of notices of appointment by a company or its directors.”

35. In *Re All Star Leisure (Group) Ltd* [2019] EWHC 3231 (Ch), HHJ Cooke, in a case concerned with an appointment by a QFC Holder, was also inclined to disagree with both ICCJ Burton and Marcus Smith J. In light of the clear application of paragraph 8.1 of the Insolvency Practice Direction to an appointment by a QFC Holder he found that an out of hours purported filing by CE-file was defective, but could be cured by an order under Ruel 12.64. At [24], however (and again strictly obiter) he disagreed with the analysis of Marcus Smith J that notice of appointment must be pursuant to the 2016 Rules.
36. As I have noted above, it is likely that an amendment to the 2016 Rules to clarify the position in relation to appointment of administrators out of hours will be made relatively soon. In the meantime, the practice announced by the Chancellor in January 2020 is intended to enable clarity to be obtained in a particular case at an early stage, recognising that uncertainty as to the validity of an appointment can have serious consequences in an administration. As Snowden J noted recently in *Re Carter Moore Solicitors Limited* [2020] EWHC 186 (Ch), the expedient course until the 2016 Rules are clarified is to ensure that a notice of appointment of an administrator is effected so far as possible within the hours the court is open for business.
37. I consider that the preferable interpretation of paragraph 8.1 of the Insolvency Practice Direction, in agreement with ICCJ Burton in *SJ Henderson & Company* and the reasoning of Marcus Smith J *Skeggs Beef*, is that paragraph 2.1 of the Pilot Scheme does not apply to *any* notice of appointment of an administrator outside court opening hours. It is accordingly not permissible for the company or its directors to effect an appointment of an administrator out of court hours.
38. This conclusion is supported by the following:
- i) The 2016 Rules (and the 1986 Rules before them) provide for the appointment of administrators out of court hours in one case only, that is where the appointment is made by a QFC Holder.
  - ii) That reflects a deliberate policy that the ability to appoint an administrator out of court hours is *limited* to an appointment by a QFC Holder. At the time the 1986 Rules were enacted, it was not practically possible for a notice of appointment to be filed outside court hours, unless special provision for an alternative method was made, because the act of filing necessarily required the court office to be open. It was therefore unnecessary specifically to prohibit appointments out of hours by the company or its directors. The absence of specific prohibition, however, should not be interpreted as the rules *permitting* an appointment out of hours by directors or the company. The absence of any of the safeguards surrounding appointments out of hours by QFC Holders, in the case of appointments by the company or its directors, is a compelling indication that the drafter did not intend it to be possible for the company or its directors to make such an appointment out of hours.

- iii) The difference in treatment is readily explained by the fact that the provisions enabling a QFC Holder to appoint an administrator replaced, in substance, the previous entitlement of the holder of such a charge to appoint an administrative receiver. There had never been any restriction on the time at which an administrative receiver could be appointed. No equivalent entitlement had ever previously existed for the company or its directors.
  - iv) I do not think that the drafter of the Insolvency Rules, when enacting Rule 1.46, which introduced the possibility of electronic delivery of documents to the court under a future pilot scheme, intended that it would extend the ability to appoint administrators out of hours to the company or its directors. Rule 1.46 is concerned with the mechanics of delivery (generally) of documents to the court. It would be surprising if a provision concerned with such mechanics was intended to alter a long-standing policy concerning the *time* at which an appointment of administrators could be appointed out of court. The absence of equivalent safeguards to those referred to above surrounding the appointment out of court by a QFC Holder is again a compelling indication that it was not intended to create an ability for the company or its directors to appoint an administrator otherwise than during the court day when none had existed before.
39. That leaves the question as to the consequences which flow from a purported filing of a notice of appointment by directors outside court hours. In agreement with Marcus Smith J (at [22-24] of his judgment in *Skeggs Beef*), I consider that the defect in this case is properly categorised as an irregularity that has caused no substantial injustice and is capable of being cured pursuant to Rule 12.64.
40. The appropriate cure, however, is not simply to declare that the appointment was effective at the time the notice of appointment was purportedly filed by CE-file. That was the appropriate course in *Skeggs Beef* because it was an appointment by a QFC Holder and the 2016 Rules permit such appointments to be effected out of hours. In the case of CE-filing by the directors, to adopt the same course would cut across the prohibition in the Insolvency Rules (as I have interpreted them above) on appointing an administrator out of court and out of hours otherwise than by a QFC Holder.
41. Accordingly, I consider the better approach is to cure the defect by treating the notice as filed at the time the court opened for business on the next working day, in this case 10:00 am on 5 February 2020. This solution treats the CE-filing after hours as analogous to a hard-copy notice which was left on the (closed) counter of the court at, say, 8:00 am, but was physically accepted over the counter only when the court office opened for business at 10:00am. Such a filing would be effective, but only from the time the court office opened.