IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)
[2023] EWHC 522 (Ch)

No. CR-2022-004350

Rolls Building
Fetter Lane
London, EC4A 1NL

Monday, 27 February 2023

Before:

MR JUSTICE RICHARD SMITH

B E T W E E N :

GURUPARAN CHANDRASEKARAN — Applicant

- and -

(1) NICOLA JAYNE FISHER
(in her purported capacity as Joint Administrator of
Scentrics Information Security Technologies Limited)
(2) CHRISTOPHER HERRON
(in his purported capacity as Joint Administrator of
Scentrics Information Security Technologies Limited)
(3) JOHN RICHES
(in his capacity as Executor of the estate of Ian Taylor (Deceased))
(4) ANDREW LAW
(in his capacity as Executor of the estate of Ian Taylor (Deceased))
(5) SCENTRICS INFORMATION SECURITY TECHNOLOGIES LIMITED
(purportedly in administration) — Respondents

J U D G M E N T

(via Microsoft Teams)

A P P E A R A N C E S

MR B ISAACS KC and MR J MUSTAFA (instructed by Quinn Emanuel Urquhart & Sullivan UK LLP) appeared on behalf of the Applicant.

MR M GIBBON KC and MR D CONNELL (instructed by Osborne Clarke LLP) appeared on behalf of the First and Second Respondents.

MR N PEACOCK KC and MR E GRANGER (instructed by Watson Farley & Williams LLP) appeared on behalf of the Third and Fourth Respondents.

(Transcript prepared without the aid of documentation)

MR JUSTICE RICHARD SMITH:

Introduction:

1 Last Tuesday, I heard the application ("**the Application**") made on an expedited basis by Mr Chandrasekaran, ("**the Applicant**"). I am grateful to the parties for their patience while I considered my decision. The Applicant sought declarations that:

(a) the purported appointment of Ms Nicola Fisher and Mr Christopher Herron under paragraph 14 of schedule B1 to the Insolvency Act 1986 ("**Schedule B1**") as joint administrators of Scentrics Information Security Technologies Limited ("**Scentrics**") ("**the Administrators**") by the executors of the estate of the late Mr Ian Taylor ("**the Executors**") was void and of no effect; and

(b) all steps taken by the Administrators in their purported capacity as administrators of Scentrics and in relation to Scentrics, its business, affairs and property are void and of no effect.

2 The Administrators, Executors and Scentrics are Respondents to the Application, the first two actively so.

Background

3 Scentrics was incorporated in England and Wales on 19 March 2008. It was founded by the Applicant, who is a mathematician and a computer scientist. As described by the Applicant, Scentrics' business was a pre-revenue intellectual property company which, prior to entering administration, had been developing a mass security and privacy platform with a view to its global launch.

4 The majority of Scentrics' shares (50.05%) are owned by Bireme Investments Limited ("**Bireme**") and Pione Nominees Limited ("**Pione**"). Bireme and Pione are nominee companies for Epona Trustees Limited ("**Epona**"). Epona is the trustee of the Applicant's family trust, the Vanma Trust, which owns the issued share capital of Bireme and Pione. Epona is therefore the indirect majority shareholder of Scentrics. The Executors hold 2.6% of Scentrics' issued share capital.

5 On 8 June 2012, Epona entered into a loan agreement with Scentrics by which Epona lent an initial principal amount of £460,590.42 to Scentrics ("**the Scentrics Loan**"). The Scentrics Loan was secured by debenture, also dated 8 June 2012, between Scentrics and Epona by which Scentrics granted Epona fixed and floating charge security over substantially all of its property, business and undertaking to secure its liabilities under the Scentrics Loan ("**the Debenture**").

6 The Debenture provided, in schedule 4, paragraph 14.1, that the lender may appoint an administrator of Scentrics pursuant to paragraph 14 of Schedule B1 if the Debenture becomes enforceable. The Debenture also provided, in schedule 4, paragraph 14.2 that "any appointment under this paragraph shall be in writing by a duly authorised signatory of the lender and take effect, in accordance with paragraph 19 of schedule B1 to the Insolvency Act 1986 when the requirements of paragraph 18 of that Schedule B1 are satisfied."

7 On the same day, Scentrics also granted Epona a charge over certain patents as security for repayment of the Scentrics Loan.

8 On 28 July 2014, Mr Taylor entered into a loan agreement by which he lent Epona the principal amount of £1.33 million ("**the 2014 Loan**"). On the same day, Epona assigned absolutely to Mr Taylor the Scentrics Loan, the Debenture and the charge over patents pursuant to the terms of a security assignment agreement ("**Security Assignment Agreement**"). On the same day, Scentrics also entered into a negative pledge agreement ("**Negative Pledge Agreement**") with Mr Taylor relating to the material assets of Scentrics' business.

9 On 28 May 2015, the 2014 Loan was amended and restated, with Scentrics also confirming that all negative pledge obligations owed by it under the Negative Pledge Agreement would remain in full force and effect, and Epona confirming likewise in relation to the Security Assignment Agreement.

10 Mr Taylor died on 8 June 2020. Probate was subsequently granted to the Executors on 15 October 2020.

11 Epona having defaulted in repayment of the sums due under the 2014 Loan, the Executors demanded repayment of the Scentrics Loan on 1 February 2021. This too was not repaid.

12 Finally, by Notice of Appointment dated 22 November 2022, "Mr Ian Taylor, acting by his executors" as the "appointer", purported to appoint the Administrators to Scentrics.

The Dispute

13 Against that background, the Applicant says the appointment of the Administrators was invalid on either or both of two grounds asserted. The first ground of alleged invalidity relied on by the Applicant was said to follow from the terms of the Negative Pledge Agreement which provided at clause 4(c) that Scentrics:

> "shall not repay or prepay the Scentrics Loan Agreement until Epona Trustees Limited has repaid the loan made to it by Ian Taylor under the [2014 Loan]".

That undertaking was stated, in clause 3, to:

> "remain in force for so long as any amount is outstanding under the [2014 Loan] or any commitment under the [2014 Loan] is in force".

14 Clause 9 of the Negative Pledge Agreement states that:

> "No waiver by the beneficiary of any of its rights under this Agreement shall be effective unless given in writing".

15 The Applicant's position is that Scentrics was prevented, by the mandatory restriction in clause 4(c) of the Negative Pledge Agreement, from repaying the Scentrics Loan. As such, it is said by the Applicant that the Debenture never became enforceable, the underlying loan it secured not becoming repayable unless and until the 2014 Loan had itself been fully discharged.

16 In his skeleton argument for the hearing, the Applicant asserted that this restriction could not be waived by the Executors, whether unilaterally or under clause 9.1. Apparently recognising the force of the Respondents' argument that the Security Assignment Agreement would have been of no value to Mr Taylor if he had been unable to require payment of the Scentrics Loan, the Applicant changed his position at the hearing, accepting

that the Executors *could* effect a *contractual* waiver of clause 4(c) by invoking clause 9.1, albeit not a unilateral waiver. As a result of this 'concession', a potential further argument relied on by the Respondents, estoppel by convention, fell away and was not argued before me. Despite that "concession", the Applicant also asserted that there had been no effective contractual waiver here under clause 9.1 such that the Debenture remained unenforceable and the purported appointment of the Administrators was also of no effect.

17 The second ground of alleged invalidity concerns the Notice of Appointment itself. As to this, the Applicant says the notice filed by the Executors dated 22 November 2022 failed to comply with paragraph 18 of Schedule B1 such that it did not take effect in accordance with paragraph 19. In short, the Notice of Appointment, and the statutory declaration it contained, were said to be fundamentally defective in wrongly identifying the appointer and holder of the relevant qualifying floating charge as Ian Taylor, Mr Taylor having died by the time of the purported appointment of the Administrators.

18 I address the two grounds separately, starting with ground 1.

Ground 1 – the relevant contractual documents

19 During oral submissions, both parties referred me to what they considered the admissible factual matrix for the purpose of the proper construction of the Negative Pledge Agreement. It is fair to say that the Executors invited me to have regard to a wider horizon than did the Applicant. However, in my judgment, the proper construction of clause 4(c) of the Negative Pledge Agreement can be readily discerned from a somewhat narrower perspective, principally comprising the underlying contractual and security documents themselves. Starting with the Scentrics Loan:

(a) This provided, in clause 7.1, that the loan was to be repaid with all accrued interest on the twelve months anniversary of that agreement;

(b) It also provided, in clause 7.2, that the repayment date of the loan could be extended, by prior mutual consent, by successive periods of six months;

(c) Clause 7.3 regulated the circumstances in which Scentrics could prepay the loan, whether in whole or in part;

(d) Clause 11.1 provided that it was an "Event of Default" to fail to pay any sum under the Scentrics loan when due; and

(e) clause 11.15.2 provided that, at any time after an "Event of default" had occurred, the lender could, by notice to Scentrics, declare (i) the loan and all interest to be immediately due and payable; (ii) alternatively, the loan due and payable on demand; and (iii) the security documents, including the Debenture, to be enforceable.

20 As I have already noted, as security for the Scentrics Loan, Scentrics also granted the Debenture in favour of Epona. This provided:

(a) At clause 2.1, that Scentrics would pay on demand all sums due under the Scentrics Loan when they became due; and

(b) At clause 8.1, that the security constituted by the Debenture would be immediately enforceable in any of the circumstances described in schedule 4, para.1. These included: (i) if sums due under the Scentrics Loan had not been paid when they ought to have been paid or discharged by Scentrics (whether on demand or at scheduled maturity) (clause

1.1.1) and (ii) an "Event of Default" had occurred under the Scentrics Loan (clause 1.1.8).

21 As also noted, the security package for the Scentrics Loan included a charge over certain patents.

22 In 2014, the Scentrics Loan and related security package I have described were, as I have said, assigned to Mr Taylor to stand as security for the 2014 Loan to Epona. Repayment of the 2014 Loan was to be made no later than 31 July 2015, or such later date as the parties might agree in writing. The 2014 Loan was to be used only for the purpose of settling certain disputes between the Applicant and his lawyers. Repayment of the 2014 Loan was to be made either by the transfer of certain Scentrics shares to Mr Taylor or, alternatively, in cash. Conditions precedent to the 2014 loan included the execution of: (i) a personal guarantee by the Applicant; (ii) certain Scentrics share pledges granted by the Applicant, his family and family trust; (iii) the Negative Pledge Agreement; and (iv) the Security Assignment Agreement.

Ground 1 - discussion

23 The Security Assignment Agreement assigned absolutely to Mr Taylor all Epona's rights, title and interest in the Scentrics Loan, the Debenture and the patents charge, including all present and future claims thereunder. By clause 2, Epona covenanted to discharge its obligations under the 2014 Loan on their due date. It was an "Event of Default" within the meaning of clause 1.1 of the Security Assignment Agreement for Epona not to pay any sum due under the 2014 Loan on the due date. Such an "Event of Default" under the Security Assignment Agreement entitled Mr Taylor immediately to enforce all or any part of the security created by the agreement (clause 8.1). By clause 3.3, once satisfied that the 2014 Loan had been discharged in full, Epona could request Mr Taylor to re-assign to it the Scentrics Loan, the Debenture and the patents charge.

24 Pausing there, and before considering the Negative Pledge Agreement, a number of matters are readily apparent from the contractual and security position as it subsisted at July 2014: first, the Scentrics Loan agreement was, on its terms, in default, the relevant twelve month repayment anniversary having passed and there being no suggestion, let alone evidence from the Applicant, that it had been extended by mutual agreement in accordance with its terms or otherwise (or indeed later by Mr Taylor); second, under the terms of the Scentrics Loan, there was therefore an "Event of Default", entitling the lender, on its terms, to declare the Scentrics Loan immediately payable; third, there being an "Event of Default" under the Scentrics Loan, the Debenture was, on its terms, immediately enforceable; fourth, the security compromising the Scentrics Loan and the Debenture having been assigned to Mr Taylor absolutely, he was therefore entitled, by the Security Assignment Agreement, immediately to enforce that security if the 2014 Loan was not paid on its due date. It is also evident, more generally, that these security arrangements were far-reaching, extending to the assets of others, including the Applicant, his family and Scentrics, affording Mr Taylor recourse to a wide range of security if the 2014 Loan was not timely repaid.

25 Against that background, I must now turn to the Negative Pledge Agreement. There was some discussion at the hearing about the "mutuality" or otherwise of that agreement. As to that, although described in some of the contractual documents as a "deed of covenant", it was expressed on its face as an agreement, and contained rights and obligations binding on both Scentrics and Mr Taylor, perhaps most obviously so the jurisdiction agreement. That said, the substance of the Negative Pledge Agreement was, to use the vernacular, very much one-way traffic, the principal obligations thereunder being on Scentrics not to take various

actions, including not to: (i) allot new shares; (ii) create security over its material assets; and (iii) dispose of its material assets. These restrictions were obviously intended to avoid steps being undertaken by Scentrics which might have had the effect of undermining or diminishing the security afforded to Mr Taylor by the Security Assignment Agreement. The same is true of the restriction not to repay or prepay the Scentrics Loan agreement until the 2014 Loan had been repaid, enabling Mr Taylor, through the auspices of the assignment of the unpaid and overdue Scentrics Loan, to have recourse to the security afforded by the assignment of the related Debenture in the "Event of Default" under the 2014 Loan.

26 The Applicant appears to suggest that the effect of the restriction at clause 4(c) and the undertaking period at clause 3 meant that the Scentrics Loan did not in fact become repayable or prepayable until either the 2014 Loan had been repaid or until Mr Taylor had expressly waived that restriction in writing under clause 9.1. However, I am unable to accept that construction for a number of reasons:

(a) First and most generally, in circumstances in which extensive security was afforded to Mr Taylor, with ease of recourse against a variety of assets (not limited to those of the borrower under the 2014 Loan), it makes no sense to place an obstacle in the form of a requirement for written waiver in the way of immediate recourse to the relevant security in the event of default" under the 2014 Loan;

(b) Second, in a similar vein, but more specifically, the Security Assignment Agreement provided that non-payment of the 2014 Loan allowed Mr Taylor immediately to enforce the security thereunder. The applicant's construction of the Negative Pledge Agreement, itself intended to reinforce the security afforded to Mr Taylor, would militate against that;

(c) Thirdly, and more specifically still, on its terms, the Negative Pledge Agreement at clause 4(c) did no more than prevent Scentrics from making payment or prepayment under the Scentrics loan before the 2014 Loan had itself been repaid. In other words, Scentrics was prevented from taking steps to cure its existing breach. Clause 4(c) did not, itself, purport to stipulate whether and/or when the Scentrics loan was repayable or prepayable or due or owing or when it would mature. That had already been provided for in the Scentrics Loan agreement itself, which the Negative Pledge Agreement did not purport to vary in any way. Nor indeed did the restriction at clause 4(c) purport to cure Scentrics' existing default under the Scentrics Loan.

27 In my judgment, the clear effect of the restriction at clause 4(c) was to ensure Scentrics' existing default under the Scentrics Loan was maintained, thereby ensuring that Mr Taylor had immediate recourse to the security under the Security Assignment Agreement in the "Event of Default" under the 2014 Loan. This was achieved in two ways: first, through the Security Assignment Agreement itself, preventing Epona from calling in the Scentrics Loan; second, by separate agreement with Scentrics through the restriction at clause 4(c), preventing voluntary repayment or prepayment of the Scentrics Loan, in neither case disturbing Scentrics' existing default under the Scentrics Loan, but keeping that state of affairs "alive" so that the gateway to enforcement of this part of the security package remained open to Mr Taylor throughout.

28 Finally, clause 9.1 of the Negative Pledge Agreement was a further protection afforded to Mr Taylor, permitting him, if so minded, to ease any of the restrictions imposed on Scentrics by the Negative Pledge Agreement, but such indulgence would only be effective as against Mr Taylor if made in writing. In that way, Scentrics would be prevented from asserting that it enjoyed the benefit of waivers said to have been given orally or by conduct. Clause 9.1 did

no more than that. As I have found, based on the terms of the Negative Pledge Agreement itself and the other contractual documents, as a matter of commercial sense, there is no warrant for saying that clause 9.1 was itself the trigger or mechanism for Mr Taylor to require repayment of the Scentrics loan. That trigger had already been pulled much earlier, the Scentrics Loan was already in default and repayment long overdue.

29 In conclusion, therefore, I reject the Applicant's construction and argument under ground 1 and therefore his contention that the Debenture was unenforceable.

Ground 2 – the parties' arguments

30 I now turn to ground 2, as to which, the Applicant says the Notice of Appointment of administrators was not merely formally irregular but was fundamentally defective and therefore a nullity. Paragraph 18 of Schedule B1 provides relevantly that:

> "(1) A person who appoints an administrator of a company under paragraph 15 shall file with the court–
>
> (a) a notice of appointment; and
>
> (b) such other documents as may be prescribed.
>
> (2) The notice of appointment must include a statutory declaration by or on behalf of the person who makes the appointment–
>
> (a) that the person is the holder of a qualifying floating charge in respect of the company's property,
>
> (b) that each floating charge relied on in making the appointment is (or was) enforceable on the date of the appointment, and
>
> (c) that the appointment is in accordance with this Schedule."

31 Insolvency rule 3.171(f) of the Insolvency Rules 2016 also provides that a notice of appointment under paragraph 14 of schedule B1 must contain:

> "a statement that the appointer is the holder of the qualifying floating charge in question and that it is now enforceable."

32 In this case, the Applicant points to paragraph 1 of the Notice of Appointment which defines the appointer as:

> "Mr Taylor, acting by his executors".

33 The Applicant then points to paragraph 3 of the Notice of Appointment which identifies the qualifying floating charge relied upon to make the appointment in the following terms:

> "The appointer is the holder of a qualifying floating charge that is now enforceable. The qualifying floating charge was dated 8 June 2012 and registered on 27 June 2012, and was assigned by Epona Trustees Limited to the appointer by way of security assignment dated 28 July 2014."

34 Finally, the statutory declaration in paragraph 10 of the Notice of Appointment is signed by:

> "John Riches, an authorised representative and an executor of the estate of Ian Taylor".

35 And he:

> "solemnly and sincerely declares that the appointer is the holder of a qualifying floating charge in respect of the company's property".

36 According to the Applicant, on its clear and unambiguous terms, the Notice of Appointment defined the appointer and the holder of the Debenture as Mr Taylor. Mr Taylor was not, however, the holder of a qualifying floating charge in respect of Scentrics within the meaning of paragraph 14 of Schedule B1 at the time of the purported appointment of the Administrators to Scentrics. Nor could he have been the appointer. He had died.

37 The Applicant also says the Respondents' contention that, when read as a whole, the Notice of Appointment identifies the Executors as the appointers of the Administrators to Scentrics, is unsustainable. The "appointer", a defined term (repeated in the statutory declaration) is clearly identified as "Mr Taylor, acting by his executors". As such, the Notice of Appointment failed to comply with paragraph 18(2)(a) of Schedule B1 and was defective.

38 The Applicant also notes that Marcus Smith J explained in *Re Skeggs Beef Limited* [2020] BCC 43 at [21] that defective out of court appointments of administrators can be divided into three categories:

(a) cases where the defect is fundamental, with the consequence that the purported administration appointment is a nullity;

(b) cases where the defect is not fundamental and causes no substantial injustice, in which case, the administration proceedings will not be invalidated by the defect; and

(c) cases where the defect is not fundamental but substantial injustice is caused, in which case, the court must consider whether the substantial injustice can be remedied by an order of court and, if so, whether it would be appropriate to make a remedial order.

39 The Applicant submits that a defect in the statutory declaration in a notice of appointment of administrators under paragraph 14 of Schedule B1 is a fundamental defect of the first kind identified by Marcus Smith J, rendering a purported appointment of administrators null and void. Although accepting that a myriad of circumstances in which a purported appointment might be found to be a nullity is undesirable, the Applicant emphasises that this is not a "warrant for a lax approach to the construction of a statute (or statutory instrument)" as did Norris J in *Re Euromaster* [2013] 1 BCLC 273 at [16].

40 The Applicant also referred to *Re A.R.G. (Mansfield) Limited* [2020] EWHC 1133 (Ch), in which the judge reviewed the authorities concerning the consequences of breach of statutory requirements where these are not set out in the statutory provisions themselves. As to these, the distinction between mandatory and directory provisions has been abandoned, the relevant inquiry having become what Parliament intended to be the consequence if the requirement was not followed. As *R v Soneji* [2005] UKHL 49 noted, this focuses intensely on the consequences of non-compliance and whether, taking those consequences into account, Parliament intended the outcome to be total invalidity. As *McGrath v London Borough of Camden* [2020] EWHC 369 (Admin) held, the court must first construe the statute to determine whether Parliament intended total invalidity to follow. If not, the question then becomes whether circumstances indicate that invalidity should be the

consequence. The answer to that question may be whether there has been substantial compliance with the requirement or whether non-compliance has caused significant prejudice to the purpose of the legislation.

41 In this case, the Applicant says it is clear from paragraphs 18 and 19 of Schedule B1 that the legislature intended total invalidity to follow, the necessary implication at paragraph 19 being that the appointment of an administrator only takes effect when paragraph 18 is satisfied. To that end, the applicant relies on *Secure Mortgage Corp. v Harold* [2020] EWHC 1364 (Ch). This concerned the required statutory declaration confirming that the person who makes the appointment is the holder of the floating charge. In that case, the declaration signed by Mr Tierney denoted the appointer and holder of the floating charge as "the Estate of the Late Mr Peter Nolan", even though the estate was not a person. The executors were not named as such, nor were their names and addresses identified. As the court in that case noted, paragraph 19 provides that no such appointment takes effect until the requirements are satisfied. There is no test of materiality and where the right of appointment was vested in a person who died, it was all the more important, in the absence of a grant of representation, to identify the person or persons who made the appointment.

42 The Applicant also relied on *Fliptex v Hogg & Ors* [2014] EWHC 1280 (Ch) to the same effect; see, for example, paragraph 32 where the judge stated that:

> "Para 19 plainly indicates that the appointment is only effective when para 18 is satisfied."

43 The Applicant says that, accordingly, the purported appointment of the Administrators to Scentrics never took effect as a result of the Executors' failure to comply with paragraph 18(2)(a) of Schedule B1. That defect was fundamental and the purported appointment of the Administrators to Scentrics null and void. As such, relying on *Re Frontsouth (Witham) Ltd* [2012] 1 BCLC 818 at [23], the defect cannot be remedied under rule 12.64 of the Insolvency Rules 2016.

44 The Administrators say that the idea that the Notice of Appointment was fundamentally defective is a bold submission. They rely on *Euromaster* and the discussion of the relevant Schedule B1 provision in that case and how this might be characterised either as a limitation on the exercise of the power, alternatively a procedural requirement, the question to be addressed being whether the breach of the relevant restriction has no legal effect because it is a nullity or if it has some conditional effect because it is a defect or an irregularity capable of cure, the answer to that question being a matter of construction.

45 It is significant, say the Administrators, that the court in *Euromaster* was concerned with the use of the words "an appointment may not be made", which preceded the requirement at issue in that case. Those words did not compel the conclusion that such a paragraph imposed a fundamental requirement, nor do the different words in paragraph 19 at issue in this case, concerning the appointment taking effect when the requirements of paragraph 18 are satisfied, compel that outcome either. The facts of this case, it is said, are also far removed from those in *Secure Mortgage Corporation.*

46 The Administrators also say that relevant to the proper construction is the policy objective of avoiding technical traps which might otherwise discourage out of court administrator appointments, albeit the Administrators accept that, as the Applicant noted, this broad context is no warrant for laxity. Where there is no power to appoint, the purported appointment would naturally fall to be treated as a nullity, but if the defect is of a more procedural nature, the purported appointment would more naturally fall to be treated as

irregular. That distinction was approved by Etherton C (as he then was) in *Re Melodious Corp.* [2015] EWHC 621 (Ch). The modern approach of the authorities is flexible and purposive (see, for example *Re Zoom UK Distribution Limited (In Administration)* [2021] EWHC 800 (Ch), which endorsed the approach adopted by the ICC court in *Re Tokenhouse VB Limited (Formerly VAT Bridge 7 Limited)* [2020] EWHC 3171 (Ch)).

47 Finally, the Administrators say, paragraph 18(2)(b) of Schedule B1 is not concerned with defining the circumstances in which the power to appoint arises, but it prescribes procedural requirements that must be fulfilled before an appointment is properly made. As such, non-compliance would naturally fall to be dealt with as an irregularity which, in the circumstances of this case, including the absence of any injustice identified by the Applicant, let alone substantial injustice, is capable of waiver under rule 12.64 of the Insolvency Rules 2016.

Ground 2 - discussion

48 As a preliminary matter, I must decide whether there was, in fact, a defect in the Notice of Appointment and the statutory declaration it contained which engages the debate between the parties I have just summarised concerning compliance or otherwise with paragraph 18 of Sschedule B1. It is quite clear that the reference in the notice to Mr Taylor as the appointer of the Administrators is erroneous. Mr Taylor could not have been the appointer – sadly, he had already died before the appointment. Nor did he hold a qualifying floating charge - the rights to the qualifying floating charge in issue here had vested in Mr Taylor's executors upon his death. Nor were the Executors acting on Mr Taylor's behalf. There was no agency for Mr Taylor or his estate - the Executors acted in their own right, albeit in their capacity as executors of Mr Taylor's will from which their authority to appoint administrators arose.

49 These errors notwithstanding, I have come to the view that the Notice of Appointment was nevertheless compliant with paragraph 18 of Schedule B1. According to Arnold LJ in *Pease v Carter & Anor* [2020] 1 WLR 1459 at [1472G]:

> "A statutory notice is to be interpreted … as it would be understood by a reasonable recipient reading it in context. If a reasonable recipient would appreciate that the notice contained an error … and would appreciate what meaning the notice was intended to convey, then that is how the notice is to be interpreted."

50 In my judgment, disregarding any particular knowledge of the Applicant about Mr Taylor, Mr Taylor's death or how his estate might have devolved, a reasonable recipient of the notice in this case would readily appreciate from how matters were expressed in the notice and statutory declaration it contained that Mr Taylor had been the original qualifying floating charge holder, that Mr Taylor had died, that Mr Riches had been appointed as one of the executors of his estate, that the floating charge and right to deal with matters arising from it, including the appointment of administrators, therefore now vested in the Executors, that Mr Riches was acting in furtherance of that right and that Mr Taylor was self-evidently not so acting because he obviously could not do so. On that basis, I am satisfied that the Notice of Appointment complies with paragraph 18 of Schedule B1 and that it was valid and effective.

51 However, even if I am wrong about that and the question of compliance with paragraph 18 did arise, I would still have found that the defects relied on by the Applicant were in the nature of a procedural irregularity and not so fundamental as to give rise to a nullity. I say that for a number of reasons:

(a) In my view, it does not follow from paragraph 19 of Schedule B1, whether on its express terms or by implication, that any non-compliance with paragraph 18 automatically results in the nullity of the relevant appointment. That would be a far-reaching outcome reflecting an intention I am unable to impute to Parliament. I did not understand *Secure Mortgage Corp* or *Fliptex* to be saying otherwise.

(b) I accept that the correct approach requires consideration of the relevant defect in the context of the statutory purpose sought to be achieved by the relevant provision.

(c) I also accept that in the context of cases arising under Schedule B1, the court should consider whether the relevant defect concerns the circumstances in which the power of appointment arises or whether the defect is more of a procedural nature.

(d) In this case, as I have found, the Debenture was enforceable and there was no substantive impediment to the Executors making the appointment. The Executors were entitled to do so. The relevant shortcoming was their failure properly to describe in the notice the circumstances of intended appointment.

(e) In my view, that shortcoming would clearly fall on the side of the line concerned with procedural requirements and, as such, is an irregularity more amenable to waiver. Moreover, although there are some superficial similarities with the facts, the shortcomings in this case fall well short of the deficiencies present in *Secure Mortgage Corp.*

(f) Indeed, I am satisfied that the irregularity in this case would have fallen within the second category identified by Marcus Smith J in *Re Skeggs Beef Limited*, namely a case where the defect is not fundamental and causes no substantial injustice such that the administration proceedings will not be invalidated by the defect.

(g) In this regard, even though the Executors explained incorrectly the circumstances of intended appointment in the notice, it was readily apparent what they were seeking to achieve and on what basis, not least to the Applicant. As such, the defect could not be described as fundamental, nor could it have caused the Applicant, or any other person, injustice, let alone substantial injustice.

52 For all these reasons, had it been necessary to consider the compliance question, I would still have found that the defects relied on by the Applicant were procedural irregularities capable of waiver under rule 12.64 of the Insolvency Rules 2016, and I would have waived them.

Conclusion/disposal

53 Having reached the conclusions I have on grounds 1 and 2, I therefore dismiss the application. That concludes my judgment. I am content to deal with consequential matters arising from it.

LATER

54 Let me deal with the consequential matters which I have heard today. I will start with the last point. I am not willing to give permission to appeal. There were two grounds for the application. As for ground 1, I found that the Applicant's construction was not sustainable and, in my judgment, any appeal would have no real prospects of success. As for ground 2, I found as a matter of fact that the reasonable recipient would have understood the meaning of the Notice of Appointment. That finding was well within the ambit or reasonable range of

findings open to me and, again, I consider any appeal would have no real prospects of success. So, if Mr Isaacs wishes to pursue that, he will have to make the appropriate application to the Court of Appeal.

55 As for the terms of the order, as I have already said and already ordered, the Application should be dismissed, and I agree, given what was very much the live issue between the parties, that a counter-declaration in terms of the validity and effectiveness of the appointment, a declaration should be made in those terms, and I will leave it to the parties to try and agree between themselves, within short order, what the terms of that declaration should be.

56 In terms of costs, there is no opposition to an order for costs in favour of both sets of Respondents. I therefore order that the Applicant should pay the costs of each of the first, second, third and fourth Respondents. There was an application that the costs of a particular element or a particular issue in the case, namely the estoppel by convention argument, which, as a result of how I described it in my judgment as the 'concession' made by Mr Isaacs, was not pursued at the hearing. The Executors say that, given the costs of the exercise of dealing with that issue were entirely wasted because the issue no longer needed to be pursued at the hearing last Tuesday, the successful Administrators should have their costs of that issue on an indemnity basis.

57 I am not going to make that order. All of the costs to be paid will be paid on the standard basis. I say that for two reasons. Firstly, there is some debate between the parties as to how that issue came about and how it arose and who raised it which it is not meaningfully possible for me to resolve today, but even if the Administrators were right, in my view, the circumstances are not such as to not take the matter outside of the norm to warrant a costs order on that specific issue on an indemnity basis, let alone having regard to the unattractiveness of making separate costs orders in relation to separate issues.

58 In relation to the question of a payment on account, no party seeks summary assessment of their costs, despite the filing of summary assessment schedules, but payment on account is requested. The successful Respondents effectively pitch their requests at, I believe it is, for both of them, 80 per cent of the sum claimed in their schedules of assessment. The Applicant says it should be much lower; nearer 50 per cent would be more appropriate.

59 It seems to me that the appropriate figure to pitch the payment on account should be 60 per cent, and I would ask the parties to calculate what 60 per cent of the respective figures in their summary costs assessment schedules are and to insert those into the draft order.

60 Finally on the issue of costs, I am also asked to make an order that the applicant identifies the funder who it is said, based upon, I think, certain written evidence which has been served in these proceedings, stands behind the Applicant, the Applicant based upon the apparent position at the hearing not having the funds himself to fund these proceedings.

61 The Applicant resists a disclosure order being made, straightaway at least, without further application to the court, on the basis of various grounds, including that no application is yet before the court to make a third-party costs order and it is said that there is no suggestion, even if a funder is involved, that the funder is in sufficient control of these proceedings to warrant a third-party costs order being made against it.

62 I have come to the view that it would not be appropriate at this stage for me to make an order disclosing the identity of the funder, but what I am going to do is, it seems to me that there is a lot for the parties to discuss after this hearing, including on the question of costs

and the like and how, if at all, matters are to be pursued going forward as between them, so I am going to say that if the Respondents wish to pursue their application for me to disclose or make an order disclosing the identity of the funder, then they can do so and can make an application, I would say, no sooner than fourteen days' time, to me in writing, so that application is reserved to me, obviously copied to all of the other parties, with the Applicant and any submissions from a third-party funder, if indeed there is one, to be made within seven days thereafter, and I will then make my order, in all likelihood on paper as well, but if a hearing is required, then I am happy to convene a hearing at relatively short notice, if necessary over Microsoft Teams rather than in court.

63 I make that order because, at present, I am not sufficiently satisfied that the role of the funder in this case is certainly sufficiently well-known to me or understood by me for me to be able to deal with an application like this at a consequentials hearing immediately after judgment, and I think I require a little bit more information, but I should say that it may well be that if further submissions are made, I may make an order for the disclosure of that funder's identity.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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This transcript has been approved by the Judge