**Neutral Citation Number [2024] EWHC 1944 (Ch)**

**Case No. CR-2024-BRS-000065**

**IN THE HIGH COURT OF JUSTICE**
**BUSINESS AND PROPERTY COURTS IN BRISTOL**
**INSOLVENCY AND COMPANIES LIST (ChD)**
**IN THE MATTER OF THE INSOLVENCY ACT 1986**
**IN THE MATTER OF THE INSOLVENCY (ENGLAND AND WALES) RULES 2016**
**AND IN THE MATTER OF QM SYSTEMS LIMITED (IN ADMINISTRATION)**

Bristol Civil Justice Centre
2 Redcliff Street, Bristol, BS1 6GR

**Before:**

**HHJ MICHAEL BERKLEY**
**(sitting as a Judge of the High Court)**

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Between :

**(1) MATTHEW ROBERT HAW**
**(2) DIANA FRANGOU**
**(As joint administrators of QM Systems Limited (in administration)**

**Applicants**

**-and-**

**QM SYSTEMS LIMITED (IN ADMINISTRATION)**

**Respondent**

**Mr Govinder Chambay (**instructed by **DAC Beachcroft LLP**) **for the Applicants**
The Respondent was not present and was not represented

Hearing date: 25th July 2024

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# JUDGMENT

This judgment was handed down remotely at 10.00am on 29 July 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

**HHJ Berkley:**

## Introduction

1. By an application dated 22.07.2024 ("the Application") Matthew Robert Haw and Diana Frangou ("the Applicants") seek an order under paragraph 63 of Schedule B1 to the Insolvency Act 1986 ("IA") and r.12.64 of the Insolvency (England and Wales) Rules 2016 ("IR") confirming the validity of their appointment as joint administrators of QM Systems Limited (In Administration) ("the Company") on 15.07.2024 at 15:12 notwithstanding:

    1.1. that the heading of the notice of appointment form ("the NOA") incorrectly suggested that the Company appointed the Applicants rather than the directors of the Company;

    1.2. that only one, as opposed to three copies of the NOA were filed at court; and

    1.3. the NOA failed to exhibit the consent given by National Westminster Bank Public Limited Company ("NWB"), being the holder of a qualifying floating charge over the Company's property ("the QFCH").

## Background

2. On 05 July 2024, due to cash flow challenges and accumulated rent arrears, the Company's directors entered into discussions with RSM Restructuring Advisory LLP ("RSM").

3. On 11 July 2024, RSM was formally engaged to assist the Company in entering administration.

4. At 10:37 on 12 July 2024, a Notice of Intention to appoint the Applicants was filed at court ("the NOI"). The NOI served pursuant to paragraph 26 of Schedule B1 IA and r.3.23 IA included a signed written consent from NWB to the appointment of the Applicants.

5. At 15:12 on 15 July 2024, a Notice of Appointment of administrators ("the NOA") was filed at court together with consents to act executed by the Applicants. The NOA was sealed by the court on that day.

6. The NOA is erroneously headed:

    "*Notice of Appointment of an administrator by* <u>*the company*</u> *(where a notice of intention to appoint has been given)*" [emphasis added].

7. It is erroneous because it was in fact the directors of the Company who made the appointment, such that the heading of the NOA should have read:

    "*Notice of appointment of an administrator by the* <u>*directors of a company*</u> *(where a notice of intention to appoint has been given)*" [emphasis added].

8. In the witness statement in support of the Application, Ms Frangou (the First Applicant) stated that the electronic filing process for filing the NOA did not permit the solicitors for

the Applicants (DAC Beacroft LLP) to file three copies of the NOA or a separate consent by NWB. Accordingly, neither three copies of the NOA were filed nor was a separate consent by NWB filed.

**The Relevant Law**

9. By paragraph 63 of Schedule B1 to the IA:

> *"The administrator of a company may apply to the court for directions in connection with his functions."*

10. That provision can form the basis of an application seeking an order confirming the validity of an administrator's appointment which is implicit in the decision of Marcus Smith J in, *Eason & Anor v Skeggs Beef Ltd* [2019] EWHC 2607 (Ch).

11. By r.12.64 IR:

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

12. By r.3.24 (1) IR, (insofar as relevant):

> *"(1) Notice of an appointment under paragraph 22 of Schedule B1 (when notice of intention to appoint has been given under paragraph 26) must be headed "Notice of* appointment *of an administrator <u>by a company</u> (where a notice of intention to appoint has been given)" or "Notice of appointment of an administrator <u>by the directors of a company</u> (where a notice of intention to appoint has been given)" and must contain …"* [Emphasis added].

And it goes on to list at (a) to (j) the prescribed substantive pieces of information including at (b):

> *"a statement that the company has, or the directors have, as the case may be, appointed the person named as administrator of the company."*

13. By r.3.26 (1) IR, (insofar as relevant):

> *"(1) Three copies of the notice of appointment must be filed with the court, accompanied by—*
>
> *(a) the administrator's consent to act; and*
>
> *(b) the written consent of all those persons to whom notice was given in accordance with paragraph 26(1) of Schedule B1 unless the period of notice set out in paragraph 26(1) has expired."*

14. I bear in mind and respectfully endorse the over-arching consideration set out by Norris J in *Re Euromaster Ltd* [2012] BCC 754 at [26]:

*"26. … in my judgment considerable weight should be given to the consideration that the object of introducing out-of-court appointments was to streamline the process of business rescue: I adhere to the view which I expressed in Re Virtualpurple Professional Services Ltd that it is highly undesirable to have a multiplicity of circumstances in which the appointment of an administrator is automatically invalidated."*

15. Cases concerning defective out-of-court administration appointments can be divided into 3 categories: *Eason & Anor v Skeggs Beef Ltd* [2019] EWHC 2607 (Ch) at [21]:

*"(1) Cases where the defect is fundamental. In such cases, the purported administration appointment is a nullity. There are no insolvency proceedings on foot, and so there is nothing that the court can cure.*

*(2) Cases where the defect is not fundamental and causes no substantial injustice. Rule 12.64 of the Insolvency (England and Wales) Rules 2016 provides […]*

*Thus, provided the defect is not fundamental (i.e. not falling within paragraph 21(1) above), so that there are indeed insolvency proceedings on foot, the court must first satisfy itself that the defect or irregularity has caused no "substantial injustice". If so satisfied, then the proceedings will not be invalidated by any formal defect or irregularity.*

*(3) Cases where the defect is not fundamental, but substantial injustice is caused. If the defect – again, not being a fundamental defect within paragraph 21(1) above – is found to cause "substantial injustice", then the court must ask itself whether that substantial injustice can be remedied by an order of the court. Of course, the court will consider, in light of all the circumstances, whether it is appropriate to make a remedial order. If so, then the defect is cured on the court making the order. If the court cannot make a remedial order or does not consider that it is appropriate to do so, then the defect remains uncured."*

Marcus Smith J went on to focus on notices of appointment at paragraph 22:

*22. The case law draws a distinction - in the case of notices of appointment of administrators - between:*

*(1) The failure to file a notice of appointment in the prescribed form. This appears to amount to a fundamental flaw which renders a purported out-of-court appointment a nullity: Re G-Tech Construction Ltd, [2007] BPIR 1275 ; Re Kaupting Capital Partners II Master LP Inc, [2010] EWHC 836 (Ch) ; Re MTB Motors Ltd, [2010] EWHC 3751 (Ch) ; and Re Frontsouth (Witham) Ltd, [2011] EWHC 1668 (Ch) .*

*(2) The filing of a notice of appointment, in the prescribed form, in the wrong manner. This appears to amount to a "defect" or "irregularity" that is not fundamental, and that can be dealt with in one of the two ways set out in paragraphs*

*21(1) and 21(2) above: Re Assured Logistics Solutions Ltd, [2011] EWHC 3029 (Ch) ; Re Euromaster Ltd, [2012] EWHC 2356 (Ch).*

16. It is important to note that the new rules do not require the use of a statutory "Form", but instead prescribe the contents of the notice (see e.g. *Sealy & Milman, Annotated Guide to the Insolvency Legislation 2024* @744 (the notes to paragraph 26 of Schedule B1 to the IA (in relation to notices of intention to appoint))).

17. In *Gregory v A.R.G. (Mansfield) Ltd* [2020] EWHC 1133 (Ch), in the context of out of court appointments, the court endorsed what is known as the *Soneji*[1] approach, namely, when considering the effect of a breach of the rules, the court should determine whether as a matter of statutory construction Parliament intended that a breach of the provisions would result in the appointment being a nullity or irregular but valid. HHJ Davis-White QC (sitting as a Judge of the High Court) at [91] reviewed the authorities and suggested that a court should approach this task by asking 5 questions:

    *i) Question 1: What [is the purpose]*[2] *of the statutory requirements?*

    *ii) Question 2: If they have been breached, is the consequence, as a matter of construction of the provisions, that there is only a procedural defect or is the appointment a nullity?*

    *iii) Question 3: if the appointment is subject to a procedural defect, is substantial injustice caused by what would otherwise be the validation under r12.64 ?*

    *iv) Question 4: If there is such substantial injustice, can this be remedied by court order?*

    *v) Question 5: If the appointment is a nullity, can and should the defect be cured by a retrospective order?*

18. In *Euromaster*, Norris J (at [27]) also observed that there is a distinction to be drawn between provisions which define the circumstances in which a power to appoint arises and those which prescribe procedural requirements which should be fulfilled before an appointment is properly made. Failure to meet the former will render the appointment a nullity, whereas if the matter is more of a minor procedural matter, the appointment is irregular, but valid.

19. In *Adjei v Law for All* [2011] EWHC 2672 (Ch), another decision of Norris J, he held (at [8]) that a failure to properly (i.e. completely) fill out a notice of intention to appoint an administrator was a defect which was capable of remedy under the predecessor of r.12.64 IR, namely, r.7.55 of the Insolvency Rules 1986.

20. Similarly, in *Re Kaupthing Capital Partners II Master LP Inc, Pillar Securitisation SARL v Spicer* [2010] EWHC 836 (Ch) at [49 & 52] the court held that errors in filling out a notice of appointment were not matters which by themselves invalidated the appointment. Further, the court indicated that errors in a heading were trivial and also incapable of invalidating an appointment:

[1] R v Soneji [2005] UKHL 49.
[2] These words reflect Barling J's approach referred to at ¶84 but are missing from ¶91 of this report.

> *"49. I will deal with the two other alleged deficiencies in turn. I do not think that the conflict between paragraphs 7 and 8 of the Form caused by the error in paragraph 8, is a matter which by itself invalidates the appointment. Further, while there was certainly an error in the description of the general partner as "Sole Member", that was in my view part and parcel of the fact that the Form was the wrong one in any event. The appointor was trying to fit the membership into a framework of the resolution of the Board or the membership of a company. If KCP had, or is to be taken for present purposes to have had, actual authority to bind the other members, it was the sole member with power to bind Master, and this misdescription was not in my view a fatal one.*
>
> *52. I asked Mr Todd QC to make a side-by-side comparison of the completed Form 2.10B with Form 1B, as in blank, the two forms are very similar. I was concerned to see whether it was merely the heading to the Form which was wrong, or whether, as completed, it was substantively the wrong form. It seems to me that the latter was indeed the case. The Form as completed stated in effect that Master was a company. Was there any room for doubt on the basis that the attached resolution corrected that error by its reference to a partnership? In my judgment, no. The resolution does not say in terms that Master is not a company. Additionally, as I have said, it incorrectly refers to KCP as the sole member. (Emphasis added).*

## The Incorrect Heading

21. Having considered the authorities and taking this error in context, I have concluded that the erroneous heading is no more than a procedural defect which I am content to order does not have the effect of invalidating the Applicants' appointment, pursuant to r.12.64 IR for the following reasons.

22. The error has no connection with the defined circumstances in which a power to appoint arises, but relates to the prescribed procedural requirements which should be fulfilled before an appointment is properly made (see *Euromaster*, *supra*).

23. The substance of the form is correct and no-one reading it could be misled by the wrong heading. Indeed, Paragraph 1 commences with the words "*The directors of the Company (the appointer) have appointed the following named persons …*" and then refers throughout to "*the appointer*".

24. The structure of r.3.24 is such that the heading is dealt with separately from the substance of the prescribed content, implying that it is the substantive material in sub-paragraphs (a) to (j) which are important because they inform the reader that the steps required for the substantive appointment have been complied with. (Indeed arguably, though perhaps facetiously, the literal requirement is simply to have one or other of the two headings in the notice).

25. In former times, the two different headings to the notices of appointment (reflecting the two methods of appointment) may have been in different statutory forms and the use of the wrong one might have been more problematic (see *Skeggs Beef* (as set out above) and *Kaupthing* [51-56]). However, the change in the rules has removed such draconian

consequences for what might be regarded as an arbitrary failure if, in the event, the substance of the information has been provided. The approach I have adopted reflects that relaxation in procedure.

26. As set out above, the court has already on two occasions held that mere errors in filling out a form are not sufficient by themselves to invalidate an appointment. In *Adjei* such errors were considered capable of cure under the predecessor of r.12.64 IR (and, had the only error been the contradiction in the form in *Kaupthing*, I read Proudman J's remarks at [49] as reflecting the same view). There is no reason in this case why that logic should not be followed. Indeed, I note that Proudfoot J in *Kaupthing* clearly regarded errors in a heading as being less serious, and clearly not a matter which he regarded as fundamental: "*I was concerned to see whether it was merely the heading to the Form which was wrong"*.

27. That that is the right position can be tested in this way. It is not obvious what the statutory purpose behind the opening words of r.3.24 IR is. Under r.3.27 IR and paragraph 46 of Schedule B1 to the IA, an administrator is required to send a document entitled 'Notice of administrator's appointment' to Companies House which is form AMO1. That document contains a field to confirm who appointed the administrator. It does not appear that a notice of appointment within the meaning of r.3.24 IR is required to be filed at Companies House or that it is usual practice to do so. It seems highly unlikely therefore that the statutory purpose of the heading provisions in r.3.24 IR is to provide any interested party with information about who made the appointment.

28. The purpose behind the heading provisions is, I find, for the plain and obvious reason to enable a reader to identify the relevant document: in this case the notice of appointment, no matter who made it. In my judgment it is plain that it cannot have been intended that a breach of that specific provision would render an appointment a nullity. R.3.24 IR starts from the position that a person/entity has the power to make the appointment and is merely a record of that appointment which in order to be valid, must comply with the rules. R.3.24 IR therefore fits much more comfortably within the category of a procedural requirement which should be fulfilled to render the appointment properly completed. That, as per *Euromaster*, points to an appointment which is irregular, but valid and capable of cure.

29. Standing back, that is consistent with a real-world view of the heading requirements in r.3.24 IR – they are prescriptive procedural requirements, the breach of which one would, applying common sense, regard as trivial and incapable of nullifying an appointment. It would be remarkable if such a trivial matter would have such an effect. Such a position is consistent with the prevailing theme that there should not be a multiplicity of circumstances in which appointments can be invalid.

30. Even if the statutory purpose behind r.3.24 IR was to provide interested parties with information about the identity of the appointor, it is plain that no prejudice in this case is capable of being caused or indeed has been caused. After the heading, the NOA is internally consistent that the directors appointed the Applicants. Any reasonable reader of the NOA would simply and correctly deduce that the heading was merely an error and that the directors made the appointment. Even if there were any doubts, the form AMO1 appearing in Companies House records would dispel any such doubts.

31. Having concluded what the purpose of the statutory requirement is; that its breach was procedural, I finally conclude that its remedy would not cause any injustice, and therefore I am prepared to make the appropriate order under r.12.64 IR.

**R.3.26 IR: Filing in Triplicate and Absence of Notice of Consent of QFCH**

32. The single notice of appointment was filed electronically via CE-File at 15:12 on 15 July 2024, i.e. within normal court hours.

33. There is no doubt that NWB had in fact consented to the appointment of the administrators: its written consent is endorsed on the NOI.

34. The reasons for the inability to file the notice of appointment in triplicate and/or NWB's written consent are unclear to me. I accept the Applicant's word that she was told by her solicitors that they were unable to file these documents for present purposes, but I cannot at present understand why that should have been. In particular, the written consent of the QFCH, being a stand-alone document, should have been fileable in the normal way. I intend to order that a detailed explanation of the steps taken and the recorded reasons for these inabilities is provided to the court. This is not for potentially 'disciplinary' reasons, but out of genuine concern that others wishing to electronically file such documents might be being prevented from doing so in the future. I will then make the necessary enquiries and, if necessary, raise the issue at an appropriate level of HMCTS administration.

35. Returning to the substantive application, I consider that the failure to file three copies of the NOA and the failure to exhibit the QFCH consent are no more than procedural defects which do not have the effect of invalidating the Applicants appointment, and am willing to cure them pursuant to r.12.64 IR. This is for the following reasons.

36. Standing back, it is plain that such matters are procedural defects as opposed to matters which, in this case, concern the circumstances in which the power to appoint arises. Fundamentally, the QFCH gave its consent and it is inconceivable that any prejudice has or will be caused either by the error or its cure.

37. I pose myself the question, what is the statutory purpose behind the requirement for filing a NOA in triplicate and the requirement to exhibit the consent of the written consent of all those persons to whom notice was given in accordance with paragraph 26(1) of Schedule B1 to the IA which is what r.3.26 IR requires? The answer can be gleaned from rr.3.26(3) and (4) IR which require the court to seal each copy, endorsing the date and time of filing and then deliver two of them to the appointer who, in turn, must deliver one of those two to the administrator themselves. It seems to me that these provisions are in place to provide the appointer and the administrator with proof, for those that might be interested, that the requisite procedural steps have been taken following the appointment of the administrator and that the court is so satisfied. The court retains one copy on file for obvious reasons in respect of matters that may arise in the course of the administration. No other third party is directly involved.

38. Accordingly, in my judgment, this aspect of the rules is very much in the category of administration. Each of the parties to be served knows full-well that the appointment has been made and the relevant consents have been obtained. If they were challenged by an interested third party, they ought to be able to provide the relevant information or, given that the documents are CE-Filed, simply download the sealed copy of the document(s) they require and print it/them out. There can be no conceivable prejudice to anyone other than the appointer and the administrator, and even that would not be prejudice, but instead would amount to a very minor inconvenience. Similarly, curing the defect could cause no injustice.

39. Because consent was given by the QFCH it would be remarkable that the failure to exhibit the same would cause the appointment to be invalid. As Mr Chambay put it, one can think of no better example of form defeating substance.

## Conclusion

40. For all the reasons given, I grant the Application in the terms of the updated draft Order provided by Mr Chambay.

41. Costs were not sought by the Applicants which, as Norris J said in *Euromaster*, is the appropriate course. Mistakes were made, the costs of which should not be visited on the creditors in any distribution.