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FINANCIAL MARKETS LAW COMMITTEE

ISSUE 173

APPOINTMENT OF ADMINISTRATORS BY COMPANIES AND DIRECTORS

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FINANCIAL MARKETS LAW COMMITTEE

ISSUE 173 WORKING GROUP[1]

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INDEX OF DEFINED TERMS

"CPR" means the Civil Procedure Rules 1998 (as amended)

"Enterprise Act" means the Enterprise Act 2002

"FMLC" or "Committee" means the Financial Markets Law Committee

"FSA" means the Financial Services Authority

"IA 1986" means the Insolvency Act 1986

"IR" means the Insolvency Rules 1986

"QFC" means a qualifying floating charge within the meaning of paragraph 14 Schedule B1 IA 1986

"QFC holder" means the registered holder of a QFC

1 INTRODUCTION AND EXECUTIVE SUMMARY

Introduction

1.1 The role of the FMLC is to identify issues of legal uncertainty, or misunderstanding, present and future, in the framework of the financial markets which might give rise to material risks and to consider how such issues should be addressed.

1.2 This paper, therefore, does not comment on policy issues other than as necessary to deal with issues of potential uncertainty or misunderstanding.

1.3 The FMLC considers that it is important that Parliament addresses the procedural issues which have arisen regarding the process, introduced into the IA 1986 by the Enterprise Act, under which a company in distress or its directors can appoint an administrator in respect of that company without the need to make an application to court (an "out-of-court appointment").[2] The FMLC considers that the law setting out the correct procedure to be adopted for an out-of-court appointment by a company or its directors is unclear, and that this problem has been compounded by a recent series of conflicting judgments. The lack of clarity in this area has resulted in it becoming needlessly difficult for companies in distress and their directors to be sure that they have validly appointed an administrator. It has also led to a corresponding uncertainty over the validity of the appointment of administrators who have taken office pursuant to an out-of-court appointment, which in turn raises doubts over any actions taken by those administrators in purported exercise of their powers as administrator. One result of this has been that unnecessary expense has been incurred, to the detriment of creditors, in applications being made to court for administration orders (where an out-of-court appointment could have been made) or for a declaration that a particular out-of-court appointment was validly made.

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2 Qualifying floating chargeholders can also make out-of-court appointments of administrators. This paper, however, is only concerned with appointments made by companies in distress and their directors.

1.4 The view of the FMLC is that, in the light of the difficulty that the courts have experienced in determining what the correct solution to the issue should be, a legislative clarification would be the most effective remedy.

Executive Summary

1.5 The purpose of this paper is:

a. to highlight the uncertainty in relation to out-of-court appointments caused by the current terms of IA 1986 and IR, and the conflicting approaches adopted by the courts in relation to the interpretation and application of those provisions; and

b. to suggest ways in which IA 1986 and/or the IR may be amended in order to remedy such uncertainty.

1.6 The FMLC's solution is:

a. to amend r.2.20(2) such that the requirement to serve copy notice on additional parties would be engaged only where the interim moratorium applies; and additionally

b. to amend Schedule B1 of IA 1986 (or the IR) to include a paragraph which provides that *bona fide* failures to meet certain requirements make an appointment of an administrator voidable, but not void.

2 THE OUT-OF-COURT PROCEDURE

2.1 This section summarises the key provisions which have caused the uncertainty as to the correct operation of the procedure for out-of-court appointments and which have been discussed in the relevant cases. It does not set out an exhaustive description of the procedure for out-of-court appointments and reference should be made to IA 1986, IR and Forms 2.8B, 2.9B and 2.10B for those full details.[3]

3 Forms 2.8B, 2.9B and 2.10B can be found here.

2.2 There are a number of routes by which a company may be placed into administration under Schedule B1 of IA 1986:

a. by an administration order of the court under paragraph 13;

b. by a QFC holder under paragraph 14; and

c. by the company or its directors under paragraph 22 (this is the procedure for out-of-court appointments).[4]

2.3 The availability of different routes to put a company into administration is important. In particular the appointment of an administrator by a company or its directors is needed where there is no QFC (or the QFC holder does not wish to make an appointment under paragraph 14) and where the appointor does not wish to undertake the expense, complexity and potential delay of a court hearing.

2.4 The procedure for out-of-court appointments is set out in IA 1986, IR and the prescribed statutory Forms 2.8B, 2.9B and 2.10B.

2.5 Paragraph 22 Schedule B1 IA 1986 (*Power to appoint*) states that a company and the directors of a company may appoint an administrator in respect of that company.

2.6 Paragraph 26 (*Notice of intention to appoint*) sets out notice requirements with which any person who proposes to make an appointment under paragraph 22 must comply. Paragraph 26(1) states that at least five business days' written notice must be given to any QFC holder in respect of the company. This period is required so that the person(s) given notice have the opportunity to assess and exercise their own priority appointment rights in

4 In *Re Assured Logistics Solutions and another* [2011] EWHC 3029, Purle J noted that it was "somewhat puzzling" that a distinction was drawn between appointments by a company's directors and the company itself, because in the majority of cases adopting standard articles of association, the only persons who may act for the company are the directors. However, Purle J noted that there may be cases in which the constitutional documents of a company give the shareholders' meeting power to put the company into administration.

respect of the company. During this period an interim moratorium applies under paragraph 44(4).

2.7 Paragraph 26(2) additionally requires that the person proposing to make an appointment under paragraph 22 "shall also give such notice as may be prescribed to such other persons as may be prescribed".

2.8 Paragraph 26(3) requires that any notice under paragraph 26 must be in the prescribed form (which by r.2.20(1) is Form 2.8B).

2.9 Paragraph 28(1) states that an appointment

> may not be made under paragraph 22 unless the person who makes the appointment has complied with any requirement of paragraphs 26 and 27 and –
>
> a. the period of notice specified in paragraph 26(1) has expired, or
>
> b. each person to whom notice has been given under paragraph 26(1) has consented in writing to the making of the appointment.

2.10 R.2.20 sets out the details of the prescribed notice and the prescribed persons for the purpose of paragraph 26(2). R.2.20(1) requires that the notice of intention to appoint for the purpose of paragraph 26 must be in Form 2.8B. R.2.20(2) states that:

> a copy of the notice of intention to appoint must, in addition to the persons referred to in paragraph 26, be given to-
>
> a. any enforcement officer who, to the knowledge of the person giving the notice, is charged with execution or other legal process against the company;

b. any person who, to the knowledge of the person giving the notice, has distrained against the company or its property;

c. any supervisor of a voluntary arrangement under Part I of the Act; and

d. the company, if the company is not intending to make the appointment.

IA 1986 and IR do not expressly indicate what, if any, minimum period of notice is required when serving such copy notice.

2.11 R.2.22 requires that the notice of intention to appoint shall be accompanied by either a copy of the resolution of the company to appoint an administrator (where the company intends to make the appointment) or a record of the decision of the directors (where the directors intend to make the appointment).

2.12 Whether or not notice of intention to appoint has been required to be served, paragraph 29(1) Schedule B1 IA 1986 provides that, following the appointment of the administrator under paragraph 22, notice of that appointment must, *inter alia*, be filed with the court. Paragraph 29 sets out the formal requirements in relation to the notice of appointment, including the requirement under paragraph 29(5) that the notice of appointment must be in the prescribed form (under r.2.23(1) this is Form 2.9B or 2.10B as appropriate).

2.13 Paragraph 30 amends the content of the statutory declarations accompanying the notice of appointment in a case where there is no QFC holder requiring notice of intention to appoint under paragraph 26(1) "(and paragraph 28 therefore does not apply)".

2.14 Paragraph 31 states that the appointment of an administrator under paragraph 22 takes effect when the requirements of paragraph 29 are satisfied.

2.15 The three key forms used in the out-of-court appointment procedure are:

a. Form 2.8B (*Notice of intention to appoint an administrator by company or director(s)*), which is required to be used when giving notice of intention to appoint under paragraph 26 Schedule B1 IA 1986;[5]

b. Form 2.9B (*Notice of appointment of an administrator by company or director(s) (where a notice of intention to appoint has been issued)*) which is required to be given to the court pursuant to paragraph 29 Schedule B1 IA 1986 following an appointment where a prior notice of intention to appoint has been given;[6] and

c. Form 2.10B (*Notice of appointment of an administrators by company or director(s) (where a notice of intention to appoint has not been issued)*) which is required to be given to the court pursuant to paragraph 29 Schedule B1 IA 1986 following an appointment where no prior notice of intention to appoint has been given.[7]

2.16 A number of the cases in this area have considered the application of various provisions which might be of assistance to cure a defect in an out-of-court appointment. These provisions are:

a. paragraph 13, which gives the court its power to grant administration orders and has been used to grant retrospective orders effectively validating a defective appointment;

b. paragraph 104, which provides that the acts of an administrator will be valid "in spite of a defect in his appointment"; and

c. r.7.55, which provides that no insolvency proceedings shall be invalidated by any formal defect or by any irregularity, unless the court

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5 IR 2.20(1).

6 IR 2.23(1).

7 IR 2.23(1).

considers that the defect or irregularity has caused "substantial injustice" which cannot be remedied by any court order.

3 KEY UNCERTAINTIES IN THE CURRENT LAW

3.1 The central issues are:

a. whether there is any requirement to serve any notice at all under paragraph 26(2) and r.2.20(2) if there is no QFC holder requiring notice under paragraph 26(1);

b. if any such notice is required to be served under paragraph 26(2), then how and when it should be served given that (i) Form 2.8B is on its face not applicable (and cannot readily be amended so as to be suitable) and no alternative form is available and (ii) no relevant minimum period of notice is prescribed by IA 1986 or IR; and

c. whether errors relating to service of notice under paragraphs 26(1) or 26(2) are breaches of "mandatory" provisions so that they invalidate the appointment, or whether they are "directory" only so that either r.7.55 or paragraph 104 may be used to remedy the position.

3.2 The consequences of these uncertainties are significant. There have been a considerable number of first instance decisions where parties have been forced to go to court in order to establish whether a purported appointment is effective or not.[8] The validity of an administrator's appointment is highly significant where the administrator is proposing to effect a transaction (such as a sale of the insolvent business and assets) and any concern that the appointment may be invalid is likely to result in delay and reduced value for creditors and may imperil the proposed transaction and with it the achievement of the purpose of administration. Purported administrators face potential personal liability for acts taken by them when they are not actually

8 As noted by Norris J in *Re Virtualpurple Professional Services Ltd* [2011] EWHC 3487, in October 2010 the Insolvency Service advised insolvency practitioners that, in their view, where there is no QFC holder, there is no independent obligation to give notice under paragraph 26(2). Six months later the decision in *Minmar (929) Limited v Khalatschi* [2011] EWHC 1159 held this practice to be incorrect and appointments made following this practice to be invalid.

validly appointed to office. Parties dealing with a purported administrator will be concerned that the relevant dealings may not be valid because the purported administrator does not in fact have the authority, through statutory agency, to bind the company in administration.

3.3 The FMLC understands that some proposed administrators are attempting to serve both forms 2.9B and 2.10B as a safeguard method, although it has not been determined whether this approach works. The FMLC understands that some administrators will not run the risk of accepting a director out-of-court appointment and instead require the directors to go to court for an appointment.[9]

4 RECENT JUDGMENTS

4.1 This paper discusses the relevant decisions with respect to this issue in the order in which they were decided: [10]

a. Re G-Tech Construction Ltd [2007] BPIR 1275 – 29 September 2005. In this case, the company purported to appoint administrators pursuant to paragraph 22 Schedule B1 IA 1986 and gave notice of appointment using Form 2.9B. This was the wrong form to use as no notice of intention to appoint had been issued, so that notice should instead have been given using Form 2.10B. The purported administrator acted successfully as administrator for a year, only identifying the error when he proposed that the company be put into voluntary liquidation. The company applied for an order validating the administrator's appointment with retrospective effect. No creditor made any objection.

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9 See the comments of Mann J in *MF Global Overseas* [2012] EWHC 1091 (Ch) at paragraph 16.

10 This paper does not discuss in detail the line of related cases which address solely the availability and operation of the court's power to grant retrospective administration orders (in particular Re *Blights Builders Ltd* [2008] 1 BCLC 245, *Kaupthing Capital Partners II Master LP/Pillar Securitisation Sarl v Spicer* [2010] EWHC 836, *Re M.T.B. Motors Limited* [2010] EWHC 3751, *Re Frontsouth (Witham) Ltd* [2011] EWHC 1668, *Re Care Matters Partnership Limited* [2011] EWHC 2543), *Re Derfshaw Limited* [2011] EWHC 1565 (Ch) and *Adjei v Law for All* [2011] EWHC 2672 (Ch)). The FMLC's focus is upon a solution to the confusion in the underlying legislation relating to out-of-court directors' appointments rather than a clarification of the court's remedial powers which may be of assistance in fixing defective appointments.

Hart J held that the appointment was invalid because paragraph 29 required that, for the appointment to be effective, a notice of appointment had to be filed with the court in the prescribed form, and paragraph 31 provided that the appointment of an administrator takes place only when the requirements of paragraph 29 are satisfied. The court had never received the correct Form 2.10B which was the "necessary prerequisite" to the appointment taking effect.

Hart J held that the court did not have any power to make an order under r.7.55 on the facts because there were no active insolvency proceedings within the ambit of the rule. Any five business day interim moratorium triggered by the wrongly-filed Form 2.9B had long since expired, and paragraph 31 indicated that the administration itself had not taken effect.

Hart J also decided that paragraph 104 could not validate the acts taken by the purported administrator, because his appointment had never actually commenced.

However, Hart J held that paragraph 13 gave the court power to make a retrospective appointment and to ratify the earlier actions of the purported administrator, although he noted that such power should only be exercised by the court with extreme caution. In the circumstances, Hart J concluded that this was the appropriate course of action and made the retrospective order to appoint the administrator.

b. Hill and another v Stokes [2010] EWHC 3726 (Ch) – 23 November 2010. The directors of a company sought to appoint administrators in respect of the company pursuant to paragraph 22. There was a QFC holder and notice of the intention to appoint administrators in Form 2.8B was served by the directors on the QFC holder, with a copy being sent to the company. However, the directors did not serve a copy of the notice of intention to appoint on four landlords who, to the directors' knowledge, had distained against the company's assets. The directors

gave notice of the appointment using Form 2.9B. The administrators entered into a number of transactions before the concern as to the possible invalidity of their appointment was identified. Once the potential problem was raised, a copy of the Form 2.8B was belatedly served on the four landlords.

The administrators sought confirmation from the court that:

(a) their appointment was not rendered invalid or ineffective by the failure to serve a copy notice of intention to appoint upon the landlords; and/or

(b) such failure constituted a mere defect for the purpose of the paragraph 104 validating provisions.

McCahill J held that the administrators' appointment was valid because the first reference to paragraph 26 in paragraph 28(1) should be read as a reference only to paragraph 26(1). This meant that the paragraph 28(1) bar to the administrations becoming effective should not be construed as being engaged by any failure to comply with paragraph 26(2).

The judge also ruled that, even if he was wrong in this first conclusion (and paragraph 28(1) should be construed as referring to both paragraphs 26(1) and 26(2)), a breach of paragraph 26(2), in a case where the QFC holder has been properly notified and has consented to the appointment "is of a category and quality which is not fatal to an appointment." This meant that paragraph 104 would apply to validate the administrators' acts.

McCahill J gave six grounds for his decision. The first was the stark contrast between the treatment of the persons referred to in paragraph 26(1) and those referred to in paragraph 26(2) and r.2.20(2). The persons referred to in paragraph 26(1) were required to be given five days' notice "for the very sound reason that they can either come to an agreement with the proposed appointors over the identity of the proposed

administrator or to seek to appoint their own." However, the persons referred to in paragraph 26(2) and r.2.20(2) did not have the benefit of a minimum period of notice that had to be given to them. The judge noted that:

> [o]ne could be forgiven for thinking that the reason for notifying them is for information purposes, rather than as a prerequisite for the making of the order, in order to save them from stumbling innocently into an enforceable interim moratorium, once the notice of intention to appoint has been lodged.

The second ground identified by McCahill J was that the requirements of r.2.20 are not absolute. If, for example, the directors had not been aware of the distraint by the landlords, then there would have been no requirement to serve notice upon them. This was in the judge's view inconsistent with a strict construction that failure to notify these classes of persons would render an appointment invalid.

The third ground was that the obligation to give notice was an obligation only to give a copy of the notice of intention to appoint. The Form 2.8B, which contains no reference to the persons prescribed under r.2.20, "proceeds upon the basis that the only material notification are [*sic*] to those persons in para.26(1) of Sch.B1 to the Insolvency Act 1986".

The fourth ground was that r.2.20(2) does not lend itself to distinctions between the effect of non-service on the different persons identified in the Rule. Prescribed persons formed a class and it should be possible to identify a unifying theme applicable to them all. McCahill J noted that:

> it would be surprising if the court were constrained to find that the appointment was rendered invalid, by reason of a failure to give the company notice of that which it already knew.

He considered therefore by extension that it was not the parliamentary intention that failure to serve notice on any of the persons referred to in r.2.20(2) would render the appointment invalid.

The fifth ground was that, in McCahill J's view, paragraph 30 makes clear that if notice of intention to appoint is not required to be given to a QFC holder under paragraph 26(1), then paragraph 28 does not apply. Consequently, if there is no QFC holder then a failure to give notice under paragraph 26(2) and r.2.20(2) did not engage paragraph 28 to prevent the appointment or render it invalid.

The sixth ground was that, in circumstances where there is a QFC holder, there is "no compelling reason" for either construing the paragraph 26(2) obligation as being mandatory in the sense of rendering subsequent steps a nullity in the event of a failure to comply or for construing the reference in paragraph 28(1) to "paragraph 26" as being anything other than a reference to paragraph 26(1) only. McCahill J noted that paragraph 8 of Form 2.9B only contained a confirmation that written notice had been given in accordance with paragraph 26(1). It did not refer to the paragraph 26(2) and r.2.20(2) notice requirement.

McCahill J noted that it was desirable for the court to have a degree of flexibility in deciding whether or not a failure is a mere defect. He referred to *Re a Debtor (N.1 of 1987)* [1989] 1 W.L.R. 271 as an example of the court taking a flexible approach in construing mandatory wording in the IA 1986 and *Re Kaupthing Capital Partners II Master LP Inc; Pillar Securitisation Sarl v Spicer* [2010] EWHC 836; [2011] B.C.C. 338 as a further example of the court taking a "qualitative approach to deficiencies" when analysing the policy of the IA 1986. McCahill J also referred to his unreported decision in *Re Garden Land Ltd* where he ruled that a failure to serve a paragraph 100 statement by each of two administrators (only one had served the statement) was not so fundamental as to invalidate the appointment.

c. Minmar (929) Ltd and another v Khalatschi and another [2011] EWHC 1159 (Ch) – 8 April 2011. This case involved a complicated series of events surrounding a battle between various stakeholders to take control of a company and its assets. The directors of the company sought to appoint joint administrators under paragraph 22. There was no QFC holder and the directors did not serve notice of intention to appoint upon any person. A notice of appointment in Form 2.10B was filed with the court and a copy of the notice was sent to the company's solicitors by email.

The application before the court was to set aside the appointment of the joint administrators.

The Chancellor, Sir Andrew Morritt, decided the case on the basis that the purported appointment was invalid because it did not constitute an act of the majority of the directors of the company (as required by paragraph 105 Schedule B1 IA 1986). The reason for this was that the majority of directors had not held a valid board meeting to approve the appointment.

However, the Chancellor went on to consider *obiter* the question of whether, in the absence of a QFC holder, notice of intention to appoint needed to be served upon the company pursuant to paragraph 26(2) and r.2.20(2) and if so, whether a failure to do so precluded the appointment of the administrators.

The Chancellor concluded that notice was required to be served upon the company and that a failure to do so had prevented a valid appointment.

The Chancellor stated that there was no reason why the parties identified in r.2.20(2) should only be entitled to receive notice of the intention to appoint if there is a QFC holder, but not otherwise. The Chancellor noted that the use of the word "also" in paragraph 26(2) showed that it was an additional obligation and the words "any requirement" in paragraph 28 indicated that the obligation to serve notice under paragraph 26(2) was not dependent upon the existence of an obligation under paragraph 26(1).

Noting that the IR did not prescribe a specific minimum notice period for the r.2.20(2) copy notices, the Chancellor considered that the relevant notice period would "presumably" need to be a reasonable period.

The Chancellor noted that there were contra-indications against this analysis. He noted that paragraph 30 read:

> In a case in which no person is entitled to notice of intention to appoint under paragraph 26(1) (and paragraph 28 therefore does not apply)...

However, the Chancellor reasoned that this wording reflected the draftsman's understanding before the IR prescribed the additional persons requiring notice under r.2.20(2). Once those additional persons had been prescribed, "the draftsman's understanding of the effect of paragraph 26 became incorrect". The Chancellor held that this could not alter the "plain meaning and effect" of paragraph 28. The Chancellor also noted that there was no prescribed form for a situation where there was no QFC holder but notice still needed to be served upon prescribed persons under paragraph 26(2), but considered that this did not support either view as to whether, in the absence of a QFC holder, notice needed to be served upon the company. The Chancellor did not offer any guidance as to what forms to use and what, if any, amendments to the form should be made in these circumstances.

The Chancellor concluded that, given the inconsistency between the words of paragraphs 26 and 28 on the one hand and the parenthetical words in paragraph 30, the correct course was to follow the "clear words" of paragraphs 26 and 28.

d. Re Assured Logistics Solutions Ltd and others [2011] EWHC 3029 (Ch) – 23 September 2011. These joined applications were for declarations as to the validity of out-of-court administration appointments made by directors in circumstances where there was no QFC holder and

consequently the directors did not give notice of their intention to appoint administrators to the company. Instead, they issued a notice of appointment in Form 2.10B.

The judge, Purle J, made orders confirming the validity of the administrations. He reached his conclusion that the appointments were valid relying on the *Hill v Stokes* argument that the alleged defect caused by failure to serve notice on the company (whether it was actually a defect or not, which Purle J did not need to decide) was in any event insufficient to invalidate the appointment and also relying upon the application of r.7.55. He discussed the inconsistencies between *Minmar* and *Hill v Stokes* but his comments in this regard were *obiter*.

Unlike the Chancellor in *Minmar*, Purle J considered that the use of the word "also" in paragraph 26(2) suggested that the requirement to give notice to other persons is additional "and therefore only arises if paragraph 26(1) is first engaged".

The judge noted that there is no prescribed form for giving notice to the r.2.20(2) persons, no period of notice is laid down as regards the r.2.20(2) persons, and paragraph 28 does not provide for their consent. The judge considered also that the reference in r.2.20(2) to a "copy" of the notice being served on the prescribed persons suggests that, where no notice of intention to appoint is required by paragraph 26(1), there is nothing which can be copied and given "in addition" to the r.2.20(2) persons. The judge also noted that paragraph 30 confirms that if no person is entitled to notice under paragraph 26(1) then "paragraph 28 therefore does not apply".

The judge considered that it did no violence to the language of r.2.20(2) to reach a conclusion on this basis that, in the absence of a QFC holder requiring notice under paragraph 26(1), there was no need to serve notice

of intention to appoint upon the company because paragraph 26(2) would not be engaged.

However, Purle J noted that his conclusion would be inconsistent with the *Minmar* decision. He considered both the *Minmar* and *Hill v Stokes* decisions, noting that *Minmar* was decided without the Chancellor being referred to *Hill v Stokes* because it had not then been reported. Purle J did not express a final view as to which decision was correct on the question of whether paragraph 28 could be triggered by a failure to serve notice under paragraph 26(2) when there was no requirement to serve notice under paragraph 26(1).

Purle J considered that, whether or not the failure to serve notice under paragraph 26(2) was a breach of the IA 1986, he was bound to follow *Hill v Stokes* in holding that such failure was not "fatal to the appointment".

The judge stated that he found it difficult to believe that Parliament had intended every defect in the process of appointment, however unimportant, to result in necessary invalidity. Even as regards the r.2.20(2) persons who would be affected by the interim moratorium, it was not easy to see why the failure to give notice to one or more of them should necessarily result in an invalid appointment. Unlike a QFC holder, none of these persons could "get in first and make an appointment of their own."

Purle J noted that *Minmar* involved a background of directors acting in a way which the court would ordinarily regard as improper. The cases that he was considering, however, did not. The judge considered that it would be wrong to regard the failure to give a notice under paragraph 26(2) as necessarily fatal. The court would look at all the circumstances of a case in deciding whether to exercise a discretion to set an appointment aside, and a failure to serve notice would be a material consideration; but if the

appointment had been completed by the filing of the appropriate form and documents, and then sealed by the court, the onus would be on those challenging the appointment to demonstrate why it should be set aside. Mere failure to serve notice to the company, where the directors are acting as a board and there is no conceivable prejudice to the company, would not be enough to invalidate the appointment without more.

In this context Purle J relied also upon r.7.55, reasoning that if an irregularity is not fatal to the administration appointment, then that means that "insolvency proceedings" are on a footing to which r.7.55 applies. Purle J noted that, if necessary, he would have regarded r.7.55 as requiring him not to treat the appointments as invalid because there was no prejudice to any party.

e. Re Bezier Acquisitions Ltd [2011] EWHC 3299 (Ch) – 12 December 2011. In this case, the directors purported to appoint administrators pursuant to paragraph 22. A notice of intention to appoint was served in form 2.8B on the QFC holder, but a copy of the notice was not served on the company at its registered address. Instead, it was handed to an employee of the firm of solicitors retained by the company. It was clear from the evidence that all directors and shareholders of the company were fully aware of, and happy to proceed with, the appointment.

Norris J held that the appointment was valid for two reasons. The first reason was that, although notice was required to be served on the company at its registered address under r.2.8(2), the IR also permitted notice to be served on the company through a solicitor authorised by them to accept service (under r.12A.5 and r.13.4).

The second reason for Norris J holding that the appointment was valid was that Norris J applied the flexible approach advocated by *R v Soneji* for the categorisation of whether imperative statutory provisions were mandatory or were merely directory. The judge held that the requirement

to serve notice on the company by way of delivery at its registered address under paragraph 26(2), r.2.20(2) and r.2.8 was to be construed in the sense that Parliament did not intend that a failure strictly to comply should invalidate the giving of notice where a valid meeting of the directors of the company had resolved that the company enter administration and that a notice of intention to appoint be given, and where an agent was appointed to act on behalf of the company, with this engagement to include receiving documents on behalf of the company. Norris J held that the relevant test, which was whether there had been "such a service as gives full and complete information to everybody to whom information ought to be given", had been satisfied.

Having reached his conclusion on these grounds, Norris J did not need to consider the remaining arguments raised before him that:

(a) under paragraph 22 of Schedule B1 the appointment of administrators took effect when the requirements of paragraph 29 were satisfied, which required only the filing of a notice of appointment in the prescribed form;

(b) the court should hold the acts of the administrators valid pursuant to paragraph 104; and

(c) the court should exercise its discretion (under paragraph 13) to declare that the administrators had been validly appointed, with retrospective effect.

f. National Westminster Bank Plc v Msaada Group (a firm) & Ors [2011] EWHC 3423 (Ch) – 21 December 2011. This case was decided on the same day as *Virtualpurple* (see sub-paragraph g. below), but the judge was not referred to that case.

The partners of a partnership purported to appoint an administrator over it pursuant to paragraph 22 (as it applies to partnerships). There was no QFC holder upon whom notice of intention to appoint was required to be served pursuant to paragraph 26(1). There were persons falling within the category of people required to be given copy notice of intention to appoint in the circumstances set out in paragraph 26(2): the supervisors of a voluntary arrangement in respect of the partnership. No copy notice was served upon them.

Natwest were lenders to the partnership but did not have a QFC. They opposed the appointment of the administrators by the partners and sought orders that the appointments were invalid and for their own nominees to become the replacement administrators.

The question before the court was therefore whether notice of intention to appoint an administrator was required to have been given to the supervisors pursuant to paragraph 26(2), and, if so, whether the consequence of failure to do was that the appointment of administrators by the partners was invalid.

Warren J followed *Minmar* in holding that paragraph 26(2) imposed an independent obligation to give notice which applied whether or not notice was required to be served under paragraph 26(1). The judge concluded, again following *Minmar,* that the failure to comply with paragraph 26(2) had engaged paragraph 28 and had rendered the appointments invalid.

Warren J stated that it was not clear to him how either the prescribed forms for giving notice or r.2.20(2) could be relevant to the construction of Schedule B1 because they post-dated Schedule B1, although he acknowledged that they are "highly relevant to what the draftsman of the amendments [to the IR] thought Schedule B1 meant." He noted that there was no flexibility around the use of the prescribed forms, which would require correction to be suitable for use in some circumstances.

This suggested that "great caution should be used in relying on the Forms when reaching a conclusion about the meaning of the legislation..."

Warren J analysed each of the grounds on which McCahill J had found in *Hill v Stokes* that the appointment of an administrator was valid despite a failure to give notice in breach of paragraph 26(2) and r.2.20(2):

(a) Warren J dismissed as speculation McCahill J's conclusion that the only justification for providing notice to those persons specified by paragraph 26(2) was to stop them from inadvertently breaching the interim moratorium. Also, even if this was the reason for giving notice of intention to appoint, Warren J considered that it did not follow that it rendered compliance with paragraph 26(2) "devoid of commercial significance";

(b) Warren J also rejected McCahill J's suggestion that paragraph 28(1) should be construed as referring only to paragraph 26(1), because this would make it impossible, absent primary legislation, to prescribe a person to whom notice must be given under paragraph 26(2) with the intention that failure to give notice to that person would lead to the appointment being invalid;

(c) McCahill J had attached importance to the fact that Form 2.8B was most clearly appropriate for circumstances where notice had to be given to parties under paragraph 26(1), but Warren J disagreed that this amounted to a reason to construe paragraph 28 as referring only to paragraph 26(1);

(d) Warren J also rejected McCahill J's argument that all four categories of person prescribed by IR 2.20 should be treated in the same way, so that, just as it would be surprising if a failure to notify the company would result in the appointment being invalid, so it

followed that a failure to notify any of the persons prescribed by IR 2.20 should not invalidate the appointment;

(e) Warren J rejected McCahill J's treatment of the parenthetical phrase in paragraph 30 "(and paragraph 28 therefore does not apply)". Warren J concluded that the meaning of paragraphs 26 and 28 is clear and unambiguous and that they should not be overridden by this phrase in paragraph 30; and

(f) McCahill J's final two points centred around the desire for flexibility in the law, so that courts would be able to correct minor procedural errors. Warren J was unable to share this view holding that "the question is what, as a matter of construction, those requirements are; and that is not, I consider, a matter which can properly be decided by reference to what the court might see as a "desirable flexibility"."

Warren J did not agree that it only made sense for notice to be given to paragraph 26(2)/r.2.20(2) persons if paragraph 26(1) required notice to be served upon a QFC holder. Warren J pointed out that on the facts of the case the supervisors of the voluntary arrangement, had they had advance notice of the appointment, may have informed the partnership's lender which may have commenced its own administration application.

The judge noted that where no notice was required under paragraph 26(1), an independent obligation to serve notice under paragraph 26(2) would impose a reasonable time limit for notice which would delay the appointment. However, Warren J did not consider that in practice this would amount to a substantial delay that would undermine the legislative intent of providing a swift implementation of an administration.

Warren J decided the separate question of whether the court would approve the appointment of Natwest's nominees as replacement administrators, or should retrospectively appoint the administrators

purportedly appointed by the partners, in Natwest's favour. The judge clearly favoured the "clearly articulated strategy" of Natwest's proposed appointees, and stated that because Natwest was the major creditor of the partnership, its views about who should be appointed ought ordinarily to prevail where there is a contest between the directors and creditors.

g. Re Virtualpurple Professional Services Ltd [2011] EWHC 3487 (Ch) – 21 December 2011. This case was decided on the same day as *Msaada* (see sub-paragraph f. above) but the judge was not referred to *Msaada*.

Virtualpurple Ltd became insolvent and its sole director attempted to place it into administration pursuant to an out-of-court appointment under paragraph 22. There was no QFC holder. The director gave notice of appointment using Form 2.10B, but did not give notice of her intention to appoint to anyone, including the company. Recognising that the decision in *Minmar* might call the validity of their appointment into question, the administrators applied to court for confirmation that they were validly appointed.

Norris J considered that the issues before the court were:

(a) what the requirements of paragraph 26 were, with which the appointor must comply; and

(b) what the consequences of any non-compliance were.

Norris J held that directors do not have to give notice of intention to appoint to the company where there is no QFC holder, and also that, alternatively, failure to give notice to the company would not automatically render the appointment invalid (so that where there is no evidence of division between the directors and the shareholders, no doubt as to the authority of the directors to act and where it can fairly be taken that the acts of the directors are the acts of the company and that the

knowledge of the directors is the knowledge of the company, failure to give notice to the company does not invalidate the appointment).

The judge considered the position in relation to administrations resulting from a court order (under paragraph 12). It seemed clear to the judge that any defect in the service of such an administration application would not automatically render it null and void. This was because r.12A.16(3) provided that an administration application is to be treated as a "claim form" for the purposes of CPR Part 6, and CPR 6.16 would permit the court to dispense with service of an administration application where there had been a minor departure from the permitted method of service but the respondent knew precisely what the application was about. The judge also referred to r.7.55 in support of his analysis.

Norris J considered that, again in the context of an administration by court order, any defect in service of the application to the persons identified in paragraph 12(2) would not automatically render the application void. Instead the court would have jurisdiction to waive the defect if it was appropriate to do so.

Turning then to the position in relation to the out-of-court directors' appointment process under paragraph 22, the judge noted that he did not agree that it could be argued, as a simple "bright line test", that all that mattered was the satisfaction of paragraph 29 (which does not refer to the service of any notice under paragraph 26(2)). The wording in paragraph 31 to the effect that the appointment would take effect upon paragraph 29 being satisfied could not override the requirement in paragraph 28 that the appointor had complied with paragraphs 26 and 27.

The judge disagreed with *Minmar* that the provisions of paragraphs 26 and 28 were "clear". He considered that the requirement in paragraph 28 for "paragraph 26" to be satisfied was a reference to paragraph 26(1)

alone, and did not include paragraph 26(2). He reached this conclusion for the following reasons:

(a) as a matter of strict construction there was a strong indication that the draftsman had contemplated two scenarios: one where a notice of intention had to be given to a QFC holder, another in which no such notice had to be given. This was borne out by the statement in paragraph 30 that where no person is entitled to notice of intention to appoint under paragraph 26(1), "paragraph 28 therefore does not apply";

(b) when r.2.20(2) refers to a copy of the notice being given "in addition to the persons specified in paragraph 26" to other persons including the company, then the reference to paragraph 26 must be a reference to paragraph 26(1) because no other persons are "specified" in paragraph 26;

(c) r.2.20(1) requires that the notice of intention to appoint "for the purposes of paragraph 26" must be in Form 2.8B. This form is only suitable for giving notice to persons identified under paragraph 26(1), so the reference to "paragraph 26" in r.2.20(1) must be read as meaning paragraph 26(1) only;

(d) r.2.20(2) requires that "a copy" of the notice be given to the persons referred to r.2.20, "in addition to the persons specified in paragraph 26". Unless there is a QFC holder, there is no person as "specified in paragraph 26" and no notice of intention of which a "copy" can "in addition" be sent to the company;

(e) if the reference in paragraph 28 to "paragraph 26" includes paragraph 26(2) as well as paragraph 26(1), then Forms 2.9B and 2.10B are incorrectly headed as they suggest that the directors are not always

bound to give notice to the company, whether there is a QFC holder or not;

(f) if the directors are always bound to give notice to the company, then Form 2.10B is wrong since it suggests as a drafting option that the directors could be completing Form 2.10B which contains a statutory declaration that no notice of intention to appoint had been given. It did not appear that Form 2.8B and 2.10B were intended to be used together;

(g) Form 2.8B is specifically addressed to QFC holders and cannot sensibly be completed to refer to other parties including the company; and

(h) Norris J noted that although in *Minmar* the Chancellor stated that he could see no reason why the persons listed in r.2.20(2) should not receive notice of intention to appoint even if there was no QFC holder, he appeared to have reached this conclusion without the significance of the interim moratorium having been drawn to his attention. Norris J noted that:

> Notice of intention to appoint (with no prescribed minimum period) is without function if the appointment is immediate and notice of the appointment immediate.

Therefore Norris J approved *Hill v Stokes* and disagreed with the *obiter* statements in *Minmar.* In the absence of a QFC holder, he held that there was no need for the director to notify the company that she intended to appoint an administrator.

Norris J held that the combined effect of the relevant provisions of Schedule B1 and IR is that, if there is no QFC holder, there is no

requirement for the directors to notify anyone of a proposed out of court administration appointment.

On the second issue before the court, the question of whether (if Norris J was incorrect on the first issue and notice did need to be served upon the company) a failure to serve that notice would necessarily invalidate the appointment, Norris J held that it would not. He noted that this point was not separately addressed in *Minmar* (where it seems to have been assumed that any failure to comply with Schedule B1 would automatically render the appointment invalid), but was considered in *Hill v Stokes*. The reasons for Norris J's decision on this point were:

(a) the mere use of imperative language in r.2.20(2) did not mean that satisfaction of the rule was an absolute condition precedent necessary to validity. No such indication was given in the rule;

(b) as Norris J had previously indicated in *Re Bezier Acquisitions* the correct construction approach was to "focus intensely" on the consequences of non-compliance, and to ask whether, taking into account those consequences, Parliament intended the outcome to be total invalidity;

(c) the obligation of the party giving notice under r.2.20(2) was in some respects limited to the extent of his knowledge, which was inconsistent with r.2.20(2) imposing a strict obligation leading to invalidity if not complied with;

(d) similarly the absence of a minimum notice period was inconsistent with r.2.20(2) imposing such a strict obligation;

(e) only very rarely would a company be unaware of what its directors were doing, so it seems "odd" to treat a failure to notify the company of what the directors are doing as automatically invalidating the act;

(f) on an administration application before the court an application would not automatically be rendered a nullity simply because the directors overlooked serving notice on someone. There was no reason why the position should be different on an out-of-court appointment process; and

(g) it would be highly undesirable and inconsistent with the objective of facilitating business rescue or enabling administrations to occur without needing to involve the court, for there to be a multiplicity of circumstances in which the appointment of an administrator would be automatically invalidated.

On this basis Norris J considered that on the facts the failure to give notice to the company could not invalidate the appointment.

h. Re MF Global Overseas Ltd ChD [2012] EWHC 1091 (Ch) – 23 March 2012. In this case administration appointments were made by the directors under paragraph 22. There was no QFC holder. A notice of intention to appoint was addressed to the company using Form 2.8B.[11] A notice of appointment was then given using Form 2.9B. The subsequent questions put before the court were:

(a) Was a Form 2.8B necessary in these circumstances?
(b) If not (in which case one was served unnecessarily), was the correct notice of appointment 2.9B or 2.10B?
(c) If the correct answer was that a Form 2.10B should have been used, what were the consequences of a Form 2.9B having been used instead?

11 The FMLC notes that the Form 2.8B appears to have been sworn by the relevant directors notwithstanding that section 2 of the form, which sets out the details of to whom the notice was being given, must have been blank. It does not appear to have been argued before Mann J whether the Form 2.8B was necessarily invalid because, as a notice with no intended recipient, it was incomplete when sworn.

Mann J noted the differing lines of authority: *Hill v Stokes* and *Virtualpurple* on the one hand, *Minmar* and *Msaada* on the other. He preferred not to base his decision on choosing between the two lines of authority although, *obiter*, he noted that he "would be less likely to go down the *Minmar* route."

Mann J concluded that the descriptive wording in the title of Form 2.9B (indicating that the form is to be used "where a notice of intention to appoint has been issued") was sufficiently broad to allow use of Form 2.9B even if the prior intention to appoint had been served in error.

Mann J noted, *obiter*, that he was not convinced by an argument that a mistaken use of Forms 2.8B and 2.9B together would have in any event satisfied a requirement to use Form 2.10B (because the same information would have been conveyed by the combined used of the forms).

i. Re Ceart Risk Services [2012] EWHC 1178 (Ch) – 3 May 2012. This case concerned the appointment of administrators by the sole director of a company under paragraph 22. The company was authorised by the FSA but the director failed to obtain the prior consent of the FSA to the appointments, in breach of section 362A of FSMA 2000. The FSA were subsequently contacted and gave their consent to the appointments.[12]

Arnold J held that this case was analogous to the line of cases in which appointments were challenged based on the failure of directors to serve notices of intention to appoint administrators, and considered the decisions in *Minmar, Hill v Stokes, Virtualpurple and Msaada.*

Arnold J did not express a view as to which line of decisions was correct on the question of whether the failure to give notice where required by r.2.20(2) causes the appointments to be defective.

12 The FSA did not appear to resist the application, which the court noted was "regrettable" as it meant that the judge did not have the benefit of adversarial argument.

However, Arnold J followed *Hill v Stokes* and *Virtualpurple* in deciding that a failure to give notice in accordance with r. 2.20(2) "did not mean that the appointment was incurably invalid, but rather constituted a curable defect." Arnold J noted that *Minmar* did not address this issue and that *Msaada* did address it, but did so without Warren J having had *R. v Soneji* cited to him in argument.

Arnold J noted the rejection by the House of Lord in *R v Soneji* of a strict distinction being drawn between breaches of "mandatory" requirements which render the relevant act incurably invalid, and breaches of "directory" requirements which do not invalidate the relevant act. Instead the judge referred to Lord Steyn's statement that a flexible approach should be taken based on the question:

> whether Parliament can fairly be taken to have intended total invalidity.

Applying this approach, Arnold J held that the failure by the director to obtain FSA consent before making the appointment did not incurably invalidate the appointment, but was something which could be cured subsequently. Consequently the appointments took effect on the date on which FSA consent was actually obtained and filed with the court.

Arnold J then concluded that, following *Care Matters* rather than *G-Tech Construction*, the acts of the purported administrators taken during the intervening period prior to their appointment actually becoming effective were validated by section 104 IA 1986. In choosing between *Care Matters* and *G-Tech Construction*, Arnold J noted that the judge in *G-Tech Construction* did not have the full authorities cited to him.

j. Re BXL Services [2012] EWHC 1877 (Ch) – 10 July 2012. This case concerns the appointment of joint administrators by the directors of a charitable company limited by guarantee under paragraph 22 of Schedule

B1 of the IA 1986. There was no QFC holder and so no notice of intention to appoint an administrator was served on any party, including the company itself (although the directors all consented to the appointment).[13] The question arose as to whether or not the administrators had been validly appointed.

Judge Purle QC considered the tensions between the *Virtualpurple* and *Msaada* decisions and the *Minmar* and *Hill v Stokes* decisions. He noted that these decisions were irreconcilable and that, as a judge of first instance, he was ordinarily bound to follow the most recent High Court decision which

> has fully considered the previous authorities, even if that later authority is in conflict with one or more of those earlier authorities, leaving the Court of Appeal to reverse the later ruling, if appropriate to do so.[14]

Judge Purle QC considered that on this basis the case of *Re Ceart Risk Services* was binding upon him and settled the law on this point at first instance, unless and until it is changed by the Court of Appeal. This meant that the failure to give notice to a paragraph 26(2) person does not invalidate the appointment (even assuming such notice is required). Judge Purle QC also noted that this result coincidentally squared with his own previous decision in *Re Assured Logistics.*

The Judge therefore concluded that the failure to serve notice of intention to appoint upon the company did not invalidate the appointment of administrators pursuant to paragraph 22.

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13 It appears from the case report that no attempt was made to remedy the failure to serve notice.

14 Following *Colchester Estates (Cardiff) v. Carlton Industries plc* [1984] 2 All ER 601 and *Re Cromptons Leisure Machines Ltd* [2007] BCC 214.

5 PROPOSED SOLUTIONS

5.1 The FMLC considers that the current state of the law in this area remains uncertain, notwithstanding the statements of Judge Purle QC in *BXL Services*. The FMLC notes that even if the law is and remains settled, a failure to serve notice under paragraph 26(2) gives rise to greater uncertainty than is desirable. The question remains whether the court will decide, on the particular facts, that the failure to serve notice is one that should nevertheless be regarded as sufficiently serious to invalidate the appointment (so that paragraph 104 and r.7.55 are not of assistance).

5.2 The FMLC considers that it is still not clear when (and how) a director is to serve copy notice under paragraph 26(2). Market participants would benefit greatly from a clarification of the issue. If directors know for certain what notices they are required to serve in any particular circumstances, then that will reduce the need to have to go to court to confirm the validity of appointments and, in particular, the need to rely upon the court determining how it categorises any particular breach, or potential breach, of paragraph 26.

5.3 The primary solution should therefore aim to resolve the uncertainty. The most simple way to achieve this would be to add, at the beginning of r.2.20(2), the words:

> Where notice of intention to appoint is required to be served pursuant to paragraph 26(1).

This would cause the requirement to serve the copy notice on the additional parties to be engaged only where the interim moratorium applies, in line with the statutory purpose of r.2.20(2): to protect third parties from an inadvertent breach of the interim moratorium. The FMLC does not consider that the requirement to serve a copy of the notice of the directors' intention to appoint on the parties listed in r.2.20(2) should apply in circumstances where there is no QFC holder (and thus no interim moratorium will apply), because there is

no mischief that such copy notice would credibly address.[15] Further, there is no reason why the consent of the parties listed in r.2.20(2) should be a pre-requisite to an appointment; the parties listed have no power to intervene in the appointment process (unlike a QFC holder). Where there is a QFC holder, the copy notice should be for information purposes only.

5.4 This solution side-steps the uncertainty as to which form should be used to give notice to the parties listed in r.2.20 where there is no QFC holder (that is, where no notice has been given under paragraph 26(1)). It also avoids otherwise having to make additional, consequential amendments to those forms. Where notice has been given to a QFC holder pursuant to paragraph 26(1), the same notice (in the form of a copy) would be given to the parties listed in r.2.20 in accordance with the current wording of r.2.20(2). For the reasons outlined above, the FMLC is of the view that this copy notice is given for information purposes only. For the sake of clarity and, in particular, to resolve the extant debate regarding the nature and purpose of such notice and whether any minimum notice period is required before the appointment may go ahead, the FMLC would suggest that a new r.2.20(4) is added, as follows:

> Any copy notice given under this Rule -
>
> (a) is given for information purposes only (and without any requirement that the recipient consent to the relevant appointment); and
>
> (b) is not subject to any requirement for a minimum period of notice to be given.

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15 From a drafting perspective, a cleaner alternative approach would be to amend paragraph 28(1) of Schedule B1 to IA 1986 so that it refers only to paragraph 26(1), not to paragraph 26 generally. This alternative approach would render unnecessary the additional wording suggested below for a new r.2.20(4) and would also sit more comfortably with paragraph 30. This approach would require an amendment to the primary legislation, rather than the IR. It would also raise the (largely theoretical) problem that it would not leave a mechanism open for there to be further classes of persons prescribed, to whom a failure to give notice would invalidate an appointment.

5.5 These simple amendments would resolve the uncertainty as to whom notice should be given to if there is no QFC holder, what form that notice should take and whether any minimum notice period is required. The amendments would also accord with the approach taken by Judge Purle QC in the most recent case of *Re BXL Services*. These amendments should accordingly put to an end the unnecessary expense that has been incurred in the various applications made to court to date to resolve defective (or potentially defective) out-of-court appointments which arose out of the uncertainty created by the current wording of the legislation.

5.6 As highlighted by the plethora of cases in this area, the exact circumstances giving rise to defective appointments have, however, been varied and the court's approach to the issue has not been consistent. In some cases, this is because the court has felt constrained by the wording of the legislation and unable to take a pragmatic approach or to exercise discretion. The FMLC considers that it would therefore be helpful if, in conjunction with the proposed amendments referred to above, the law is amended so as to give the court the ability to exercise discretion appropriately in relevant circumstances.[16]

5.7 To achieve this, the FMLC proposes that either Schedule B1 be amended to add a new paragraph 22(3) under "Power to Appoint" or that r.7.55 be amended to include a new r.7.55(2).[17] The FMLC suggests the following drafting for the proposed new wording:

> a *bona fide* failure to give any notice (or copy notice) at all, or to comply with any time limit for doing any act, or

16 Gabriel Moss QC is of the view that amending primary legislation (Schedule B1 IA 1986) using the wording set out at paragraph 5.7 is the more desirable of the solutions set out above and that resort should only be had to amending the IR as set out at paragraphs 5.3 and 5.4 in the event that amendments to primary legislation are unavailable.

17 As noted under footnote 14, the FMLC acknowledges that in practice a change to the IR is easier to effect than a change to the IA 1986 itself. If the other amendments are to be made to the IR, it would make sense for this wording to be added to r.7.55.

to use the correct form, or to fill in any form correctly, in each case in relation to the requirements or provisions of:

(a) Schedule B1, or

(b) the Insolvency Rules 1986 as amended from time to time, or

(c) the Forms required or permitted to be used,

in the case of any appointment of an administrator out of court [by a company or the directors of a company][18] (an "appointment default") shall make such appointment voidable and not void.

No such voidable appointment shall be declared void unless the appointment default has caused material prejudice[19] to a party and an application is made by that party.

5.8 The drafting above retains strict requirements to protect other parties from prejudice, but gives the court discretion in cases where no prejudice is in fact caused.

5.9 The view of the FMLC is that the above proposals will address the current uncertainties in the law and, going forward, will prevent any need for further applications to court. The FMLC notes that the above proposals do not retrospectively address the position in respect of historical administration appointments made under the out-of-court procedure which may be of

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18 The FMLC notes that if this new r.7.55(2) is to be added, rather than a new paragraph 22(3) of Schedule B1 to IA 1986, then it could be helpful for the Rule to apply to out-of-court appointments generally and not just to out-of-court appointments by the company or the directors of the company. If so, then the words in square brackets should be removed.

19 Alternative language might be to use the phrase "substantial injustice", which is the language currently used in r.7.55. However, it has been suggested in a number of cases, most notably in *Re Frontsouth (Witham) Ltd* [2011] EWHC 1668, that it does not make sense to talk of an invalid appointment causing "injustice". Hence, the wording "material prejudice" has been suggested as an alternative.

uncertain validity. The FMLC considers that, given the variety of methodologies that have been adopted when making such appointments, the validity of these appointments will, if necessary, need to be established before the courts in accordance with the existing legislation. The FMLC does not recommend that a single retrospective fix be made to the legislation because this would need to cover all permutations and differentiate appointments that should be validated from those which should not.

5.10 The FMLC considers that certainty will not be provided by reliance on the court's ability to ratify defective appointments, as the extent of that power is currently not clear and, even if its extent were to be clarified, companies and their directors would not have certainty in any particular instance that the court would exercise its discretion.

5.11 Finally, the FMLC considers that the court's flexible ability to differentiate between mandatory and directory provisions (as referred to in *R. v. Soneji* [2006] 1 AC 340) is helpful but does not of itself provide the required solutions since companies and their directors would not have certainty in any particular instance as to how the court would interpret and categorise a "failure" under the currently confused process.

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