

Case No: 04850 of 2011

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IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand
London WC2A 2LL

Thursday, 2 June 2011

BEFORE:

MR JUSTICE MORGAN

IN THE MATTER OF
DERFSHAW LIMITED & 6 OTHERS

MS R AGNELLO QC (instructed by Edwin Coe LLP) appeared on behalf of the Claimant

Approved Judgment
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1. MR JUSTICE MORGAN: I have before me applications in relation to seven companies for administration orders in each case. I will not read out the names of the seven companies. The names will appear in the orders which I will make. The application for administration orders in each case is made by the directors of, and in the case of a sole director, the director of the relevant company. That is permissible under paragraph 12(1)(b) of schedule B1 to the Insolvency Act 1986. Paragraph 11 of schedule B1 enables the court to make an administration order only if it satisfied of two matters.
2. The first refers to the company's ability to pay its debts and the second refers to the administration order being reasonably likely to achieve the purpose of administration. If I am satisfied of those matters, then I have a discretion under paragraph 13 which enables me to take a number of steps, one of which is to make the administration order sought.
3. Ms Agnello QC appears on behalf of the applicants in all seven of these cases. I have been given a considerable amount of evidence, quite properly, which deals with the criteria on which I must be satisfied before I have jurisdiction to make such an order and also deals with the desirability of an administration order in each case. I have been taken through that material. The cases in this respect present no difficulty. I find that the company in each case is or is likely to become unable to pay its debts.
4. I also find that the administration order in each case is reasonably likely to achieve the purpose of administration. The relevant purpose of administration is, so far as I need describe it, the one described in paragraph 3(1)(b) in schedule B1 that an administration order is reasonably likely to achieve a better result for the creditors as compared with liquidation. I am also satisfied on the evidence that it is entirely right and proper that the court should make these administration orders. So far as I have indicated, the case presents no difficulty, nor anything unconventional.
5. However, the circumstances in which it has become necessary to make these applications to the court should be briefly described. In each case, some weeks or months ago, there was a purported appointment of administrators out of court. The appointments out of court were on the basis that it was open to the directors of the company to appoint out of court under paragraph 22(2) of schedule B1. With an appointment out of court, certain pre-conditions must be satisfied. Paragraph 26 of schedule B1 provides for a notice of an intention to appoint. Paragraph 26(1) is not directly in point but paragraph 26(2) provides that:

“A person who proposes to make an appointment under paragraph 22 shall also give such notice as may be prescribed to such other persons as may be prescribed.”
6. The prescribed notice and the prescribed persons are dealt with in the Insolvency Rules 1986, in particular in Rule 2.20(2) where it is provided that a copy of the notice of intention to appoint must be given to four classes of person so far as material, in addition to the persons specified in paragraph 26 (and I comment that perhaps was intended to be a reference to paragraph 26(1)). Rule 2.20(d) refers to the company, if the company is not intending to make the appointment.

7. In this case and, indeed, as has been common practice as I understand it, no notice of intention to appoint was given by the directors who were intending to appoint to the company in respect of which they were intending to appoint. What is the effect of that omission? Paragraph 28(1) of schedule B1 states:

“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 ...”

and then further provision is made, although the further provision cross-refers to 26(1) and does not cross-refer to 26(2). There is some authority on the answer to the question I have just posed. I was shown the case of Hill and Pope v Stokes Plc [2010] EWHC 3726 (Ch) and also the recent case, decided by the Chancellor, of Minmar (929) Ltd v Khalatschi and another [2011] EWHC 1159 (Ch) on 8 April 2011.

8. In the second of these cases, the Chancellor read paragraph 28(1) of schedule B1 literally. He held that an appointment may not be made under paragraph 22, that is including an appointment by the director of a company, unless the director has complied with any requirement of paragraph 26 and one of the requirements of paragraph 26 is the requirement in 26(2) which is, when supplemented by the relevant Rule, a requirement that a copy of the notice of intention to appoint must be served on the company. The actual decision of the Chancellor was that the appointment of the administrators was invalid for other reasons. However, the point as to paragraph 28 of schedule B1 was fully argued before him and he expressed his conclusion in relation to it.
9. The seven cases before me show that the decision in Minmar is likely to call into question the validity of the appointment of administrators in many cases where administrators have been appointed in recent times. Already in the short period since the decision in Minmar, the experienced administrators in this case have been able to identify seven companies where a question as to such invalidity could arise.
10. The directors could take the view that they should argue that Minmar is wrongly decided and they should seek a declaration that the earlier appointments out of court were, all the time, valid. In this case, for reasons that I fully understand, leading counsel for the directors has taken the view that the better and more practical course in terms of speed, expense and certainty is to accept faithfully the decision in Minmar, to accept that the appointments out of court were invalid and to effectively start again, this time seeking court appointments. I have already indicated that the way forward to making orders under the court procedures is a straightforward one.
11. However, there is one final point that needs attention. In the ordinary case, when the court is asked to appoint an administrator, the court usually appoints the administrator from the moment that the order is pronounced. It is of course open to the court to specify a future date after the date of the order from which the order will take effect. So much is clear from paragraph 13(2) of schedule B1. In particular, 13(2)(a) says that:

“An appointment of an administrator by administration order takes effect:

(a) at a time appointed by the order.”

12. As I have indicated, these administrators were purportedly appointed out of court some weeks or months ago. They have been active in the apparent or purported administrations. Significant steps have been taken. It would be very unfortunate, to say the least, if the result of the directors accepting the decision of Minmar that there was no valid administration in place for the last weeks or months, would produce the result that all those steps were not validly taken. I do not say it would be obvious that all the steps would be invalid but there would certainly be a serious question as to their validity. That suggests that, if the court has power to do so, the proper response to the difficulty is to make the administration orders retrospectively to the very moment when the purported appointments out of court were intended to take effect. The question then is does the court have power to make an administration order retrospectively?
13. On that question, I have been shown the decision of Hart J in Re G-Tech Construction Ltd [2007] BPIR 1275. The judge was persuaded that the court did have power under paragraph 13 of schedule B1 to make a retrospective appointment and, indeed, to declare that the earlier actions of the persons who were purportedly administrators at the earlier time should be ratified and treated as valid in all respects and indeed to make ancillary orders as to fees and expenses.
14. The decision in G-Tech Construction Ltd followed argument from one side only; there was no opposing argument. I am told by counsel, and I am aware, that orders have been made in other cases to similar effect to the order made in G-Tech Construction Ltd. G-Tech Construction Ltd has been referred to in a number of cases where there has been argument on both sides and so far as I am aware, it has not been suggested that G-Tech Construction Ltd was wrongly decided.
15. One can see scope for argument as to the correctness of G-Tech Construction Ltd. It is, in my judgment, quite a significant thing to make an administration order with retrospective effect and one would have liked ideally to have had clearer statutory language than the statutory language in paragraph 13, schedule B1. On the other hand, in the case before me, the desirability of making retrospective orders is considerable. The authority for making such orders exists. The authority has been applied in a number of cases. That authority has not been called into question in a later case, nor indeed, so far as I am aware, in any textbook commenting on the point.
16. It seems to me in those circumstances that I ought to follow the lead of G-Tech Construction Ltd to assume for myself jurisdiction to make a retrospective order and if I have the jurisdiction, I have no hesitation in exercising it. Accordingly, for all those reasons, I will make administration orders in these seven cases. Counsel has prepared detailed orders dealing with a number of features of the cases including orders dealing with the retrospective effect of the order. I will make those orders as drafted subject to minor amendments which have been discussed.