ADMINISTRATORS' APPOINTMENTS – VOID OR DEFECTIVE - LIGHT AT THE END OF THE TUNNEL

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The problem with the requirements in respect of out of Court appointments, as set out in Schedule B1, is that they do not specify the consequence of a failure to comply and this has led to uncertainty.

In Re Tokenhouse [2020] EWHC 003171 (Ch), ICC Judge Jones was concerned with a failure to comply with paragraph 26(1) of Schedule B1. He noted that:

> [31] … the underlying problem is the tension between: (i) the normal meaning of the words used within those provisions strongly suggesting that non-compliance with their out-of-court procedural requirements should prevent an appointment being effective; and (ii) the fact that this may have a disproportionate result when compared with the prejudice caused by breach and, even more importantly, may adversely affect a company's ability to achieve the purposes it would have been likely to achieve had the appointment been valid.
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> [35] The tension has resulted in … "conflict of judicial opinion" in cases which have considered (in the context of the application of principles of statutory interpretation) whether there was power to make an appointment or if an appointment was made and, to the extent that there was an appointment: (i) whether the provisions requiring notice provide for the consequences of breach; or, if not, (ii) the plain meaning overrides any contrary purpose arguments; or (iii) insofar as purpose is relevant, whether non-compliance with the notification requirement(s) must be a fundamental breach because the absence of notice cannot be cured and, certainly in the case of a chargeholder, the rights lost cannot be revived; or (iv) whether the breach is not fundamental taking into consideration it is procedural and/or the overriding purpose of achieving the aims of an administration.

This has caused the editors of Sealy and Milman (25th Ed) to note in the commentary to paragraph 26 that:

> The question whether the failure to comply with the notice requirements of para.26 inevitably invalidates the appointment of the administrator has been much debated in recent cases at first instance, and remains the subject of controversy. Only a ruling of a higher court can resolve the current impasse (without legislative amendment).

A tour of the conflicting authorities would take this article beyond the prescribed word count and well beyond the reader's patience (but for those interested – see the reviews contained in Re ARG Mansfield Limited [2020] EWHC 1133 (Ch) and Re Tokenhouse VB Limited [2020] EWHC 003171 (Ch)). What can be seen from those authorities, however, is that despite conflicting decisions in the past, a consistent line has recently emerged to the effect that:

1. There is now a consensus that the answer to the question whether non-compliance results in invalidity depends on whether Parliament intended that outcome – a question to be answered by first identifying the purpose of the requirement breached and then by identifying the consequences of non-compliance. This follows the approach to statutory interpretation in R v Soneji [2005] UKHL 49 ('the Soneji Approach'). See Re Ceart Risk Services Ltd, Re Assured Logistics Solutions Limited [2011] EWHC 3029 (Ch), Re BXL Services [2012] EWHC 1877, Re Eiffel Tower Steelworks [2015] EWHC 511 (Ch)).

2. Schedule B1 contains a mixture of provisions some of which are naturally read as defining the circumstances in which the appointment arises (paragraphs 22-25) and some of which are naturally read as prescribing procedural requirements that must be fulfilled before the appointment is properly made (paragraphs 26-32). Failure to comply with the former generally renders the appointment void, failure to comply with the latter generally renders the appointment defective. See Re Euromaster Limited, Re Melodius Corporation [2015] EWHC 621 (Ch), Re Spaces London Bridge Limited [2018] EWHC 3099 (Ch), Re Arlington Infrastructure Limited [2020] EWHC 3123 (Ch)).

This approach is consistent with the persuasive decision of ICC Judge Jones in Re Tokenhouse VB Limited [2020] EWHC 3171 (Ch) on the specific issue of a failure to comply with paragraph 26(1). ICC Judge Jones conducted a thorough review of the conflicting authorities and, applying the Soneji Approach, he concluded that a breach of paragraph 26(1) was a breach of a procedural requirement which renders the appointment defective but not void.

This approach was also confirmed in Re Zoom UK Distribution Ltd [2021] EWHC 800 (Ch) where Stuart Isaacs KC (sitting as a Deputy High Court Judge) accepted the submissions made on behalf of the Joint Administrators that, despite the conflicting authorities in this area (none of which are binding on a High Court Judge), a consistent line has emerged in recent cases to the effect that the Court should apply the "Soneji Approach" to statutory construction pursuant to which the Court should first identify the purpose of the requirement in question and then identify the consequences of non-compliance by considering whether Parliament intended the outcome of a failure to comply to be total invalidity.

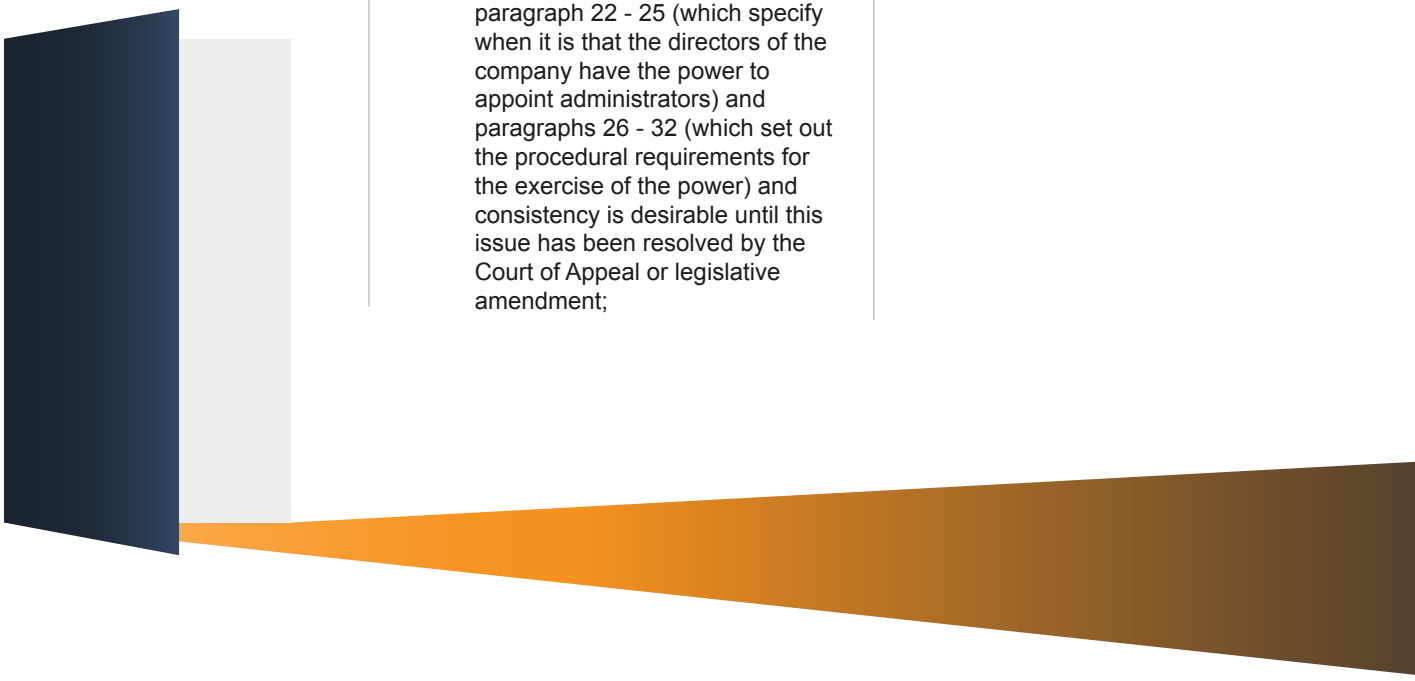
The Court in Re Zoom adopted the reasoning of ICC Judge Jones in Re Tokenhouse and concluded that a breach of paragraph 26(1)(b) of Schedule B1 renders the Administrators' appointment defective only. This is a welcome result for administrators because:

1. the Court's decision is consistent with Euromaster Ltd and the distinction that made between paragraph 22 - 25 (which specify when it is that the directors of the company have the power to appoint administrators) and paragraphs 26 - 32 (which set out the procedural requirements for the exercise of the power) and consistency is desirable until this issue has been resolved by the Court of Appeal or legislative amendment;

2. the consequence of the breach is proportionate: a qualifying floating charge holder who is not given the requisite notice is still be able to apply to the Court for the defect to be cured and have an administrator of its choice put in place but the key consideration is for there to be an administration in the first place; and

3. such a conclusion removes the need for the parties to resort to unattractive applications for retrospective appointments in the event that the purported original appointment was held to be invalid, see Tokenhouse at [39], citing Re Elgin Legal Data Ltd [2016] EWHC 2523 (Ch) and Pettit v Bradford Bulls (Northern) Ltd (in administration) [2016] EWHC 3557 (Ch).

There does therefore appear to be a glimmer of light at the end of the tunnel for administrators, but the current state of the law is still less than ideal and further clarity is needed (whether from the Court of Appeal or by legislative amendment) particularly in relation to which provisions are, properly construed, merely procedural requirements.



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