

ENGLAND AND WALES / JUDGMENT

Blights Builders Ltd, Re

COURT

IN THE HIGH COURT OF JUSTICE

BEFORE

HIS HONOUR JUDGE NORRIS. QC
(Sitting as a High Court Judge)-----
In the Matter of
BLIGHTS BUILDERS LIMITED-----
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1st Floor, Paddington House, New Road, Kidderminster, DY10 1AL.
Tel: 01562 60921/510118; Fax: 01562 743235; Email: info@caterwalsh.co.uk

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IN THE HIGH COURT OF JUSTICE

CHANCERY DIVISION

BIRMINGHAM DISTRICT REGISTRY

Case No: 5071 of 2006

33 Bull Street Birmingham

nd October 2006

Date: Monday, 2

Before:

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JUDGMENT**JUDGE NORRIS:**

1. Blights Builders Limited was effectively a one-man building company. When Mr Blight died on 26th May 2006, the company lost its management, ceased operations and was discovered to be hopelessly insolvent.
2. On 5th July 2006, one of its creditors, Jewson Limited, presented a petition for the winding up of the company. This appears from the petition sealed by the court on 25th July, which is endorsed with a date stamp showing the date of presentation.
3. On 20th July 2006, Mr Blight's executors exercised the votes attaching to his shares and appointed Joint Administrators of the company under paragraph 22 of Schedule B.1 to the Insolvency Act 1986. By paragraph 25 of that schedule, an Administrator may not be appointed under paragraph 22 if a petition for the winding up of the company has been presented and not disposed of. Mr Blight's executors were unaware of the Jewson petition. They accordingly gave notice of their intention to make the appointment on 21st July, obtained the consent of the charge holder to the appointment on 24th July, and filed notice of their appointment at court. On 25th July, the court issued the winding up petition presented on the 5th, and it was served on the registered office of the company. Accordingly, if the winding up petition had been presented on 5th July, the members were unable to appoint an Administrator under paragraph 22. I must therefore consider what is meant by 'presentation of the petition', for if 'presentation' is the same as 'issue', issue having taken place on 25th July, the appointment is valid.
4. In my judgment, and accepting the submissions of Mr Brockman, presentation took place when the petition was delivered to the court for issue. Presentation and filing of a petition is dealt with in Insolvency Rule 4.7. Rule 4.7(1) requires that the petition shall be filed in court. Rule 4.7(2) says that no petition shall be filed unless there is produced on presentation a receipt for the deposit payable. Rule 4.7(5) says that the copies of the petition delivered to the court shall have applied to them the seal of the court and shall be issued to the petitioner. The only further light that is thrown on this language comes from the interpretation provisions in Rule 13.13(3) which says that 'file in court' means is deliver to the court for filing.
5. In my judgment, two stages are involved. The first is the presentation or the filing or the delivery of the petition to the court. The second stage is the issue of the petition by the court for service. When paragraph 25 of Schedule B.1 refers to the 'presentation' of a petition, it means its delivery to the court or its filing notwithstanding that that date may be well in advance of the date when the petition is sealed and issued.

6. This is reflected in the practice of the court. The Practice Direction to CPR Paragraph 5 requires that the date on which a document is filed at court must be recorded on the document, which may be done by a seal or a receipt stamp. (In the case of the presentation of a petition, this is done by the application of a date stamp to the endorsement of the petition dealing with the date of presentation) The particulars of the date of the delivery are to be entered in court records on the court file or on a computer kept in the court office for that purpose. In this court, when a winding up petition is presented, the usual practice is to enter a record of the date of presentation on the court computer system notwithstanding that the petition itself may yet need to be processed and issued. This reflects also the former practice that obtained under RSC Order 9 where Order 9, Rule 3, provided that a petition must be presented 'by leaving it at Chancery Chambers'. So the Insolvency Rules, the current Practice Direction under the CPR, and the former practice under the Rules of the Supreme Court all indicate that a petition is 'presented' when delivered, not when issued.
7. This is important for the purpose of relation back if a winding up order is made, but it is also important for the purposes of paragraphs 22 and 25 of Schedule B.1 and, in the instant case, has the effect of invalidating the appointment of the Joint Administrators, Mr O'Sullivan and Mr Tailby, for the company had no power to appoint them by reason of the existence of an undisposed of winding up petition.
8. Mr Brockman addressed me as to whether it was possible to remedy the invalidity by any order I could today make. He first invited me to consider the regularisation provision in Insolvency Rule 7.55, which states that 'insolvency proceedings' shall not be invalidated by a formal defect or irregularity, provided that the defect has not caused a 'substantial injustice' capable of remedy by order, but I agree with him that this does not provide a means of validating an appointment which the company could not make.
9. First, I do not consider that an appointment by the company or by the directors under paragraph 22 is an 'insolvency proceeding' for the purpose of the rule. As was pointed out by the Vice-Chancellor in *Re. A Debtor* [1992] 2 WLR 1026, a distinction has to be drawn between legal proceedings as such and the doing of acts which are part of the statutorily prescribed procedure for obtaining relief. An out-of-court appointment is part of the statutory procedure that necessary to obtain the remedies and reliefs afforded by Schedule B.1 but does not of itself initiate legal proceedings. Legal proceedings are initiated when the Administrator makes an application under paragraph 63 of Schedule B.1 or otherwise, but until then he is an officer of the court appointed out of court and subject to obligations to report to the court.
10. Secondly, I accept the submission that failure to satisfy the statutory criteria for the exercise of the power to appoint represents a fundamental flaw which cannot be remedied under a regularisation provision, a principle enunciated in *Re. Awan*

[2000] BPIR 241.

11. Thirdly, I accept that it is difficult to see how an invalid appointment could occasion an 'injustice', and if that invalidating does occasion an injustice how that is 'remedied' by an order retrospectively validating the appointment.
12. So I do not consider that Insolvency Rule 7.55 provides an answer. Nor do I think that there is anything to be derived from the decision in *Re. TT*, [2006] BPIR 597 which assists in validating what is an invalid appointment. As Mr Brockman pointed out, the decision in *Re. TT* depends on the proposition that the court could have made the appropriate order had the application that had been presented in time also been adjudicated upon in time. But here the company simply could not make the appropriate appointment because of the extant winding up petition. There is no issue of timing. It follows that I must declare the appointment of Mr O'Sullivan and Mr Tailby to be invalid.
13. I propose to make orders providing them with an indemnity in respect of the actions taken by them whilst acting as Administrators under the invalid appointment pursuant to paragraph 34 of Schedule B.1. This indemnity enables them to look to the persons who made the appointment, namely, Mr Blight's executors, to indemnify them against any liabilities which arise solely by reason of the invalidity of their appointment. I cannot order those executors to indemnify the Administrators against their remuneration earned whilst acting as Administrators because I do not consider that that is a 'liability' which arises solely by reason of their appointment. I think the question there is whether the Administrators should be entitled to look to the assets that they have collected in for the payment of their costs as Administrators and I will make provision for that issue to remain one that is live before the court in the event that no satisfactory arrangement can be reached with the creditors.
14. I will also declare that pursuant to paragraph 104 of Schedule B.1, their acts as Joint Administrators are to be treated as valid in spite of the defect in their appointment.
15. The question is what is now to be done, there being an invalid appointment of Administrators and an undisposed of petition? The petitioning creditor, Jewson, applies as creditor for the making of an administration order in place of the winding up order. No issue is raised as to the standing of Jewson as creditor and accordingly to its right to make such an application. Schedule B.1 provides that a creditor of the company may make an application for an administration order (see paragraph 12.1) but contains no restriction against a petitioning creditor making such an application. Accordingly, I see no reason why Jewsons should not apply for an administration order, the necessary consequence of which, if granted, will be the dismissal of their winding up petition.
16. I am satisfied on the evidence that the company is insolvent, both because it is unable to pay its debts as and when they fall due (as exemplified by its inability to satisfy the petition debt which is undisputed) and because it is insolvent on a balance sheet basis (having a deficiency of just under £246,000).

17. The proposed Joint Administrators are Mr O'Sullivan and Mr Tailby. They have each filed the requisite statement saying that they believe the purposes of an administration are reasonably likely to be achieved. Mr O'Sullivan has in addition filed a witness statement in which he specifically confirms his belief that administration is likely to achieve a better realisation for the benefit of creditors than a liquidation. Although there is no elaboration of that view, I see no reason to doubt the opinion there expressed. First, because an effective continuation of the administration will save any payments to the Insolvency Services Account. Secondly, because this administration in effect amounts to the collection in of book debts and the making of the appropriate distributions to charge holders and unsecured creditors, an administration with a simple exit will almost undoubtedly provide a more cost effective means of distribution and dissolution than would a compulsory winding up.
18. I shall therefore make the requisite administration order with effect from one o'clock today in the terms of the draft order. So the order I make on the first application is a declaration that Mr O'Sullivan and Mr Tailby's appointment was invalid, an indemnity in respect of the actions taken by them whilst acting as Administrators, a declaration under paragraph 104 that their acts as Joint Administrators were valid, and I will give them permission to apply for an order relating to their costs and expenses as Joint Administrators during the period of their appointment. Then I will make the administration order and dismiss the winding up petition.

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