

ENGLAND AND WALES / JUDGMENT

MTB Motors Ltd, Re

COURT

IN THE HIGH COURT OF JUSTICE

BEFORE

HIS HONOUR JUDGE HODGE QC
sitting as a Judge of the High Court-----
Re: M. T. B. MOTORS LIMITED (IN ADMINISTRATION)-----
Transcript from a recording by Ubiquis
Clifford's Inn, Fetter Lane, London EC4A 1LD
Tel: 020 7269 0370-----
For the applicant: Mr LOUIS DOYLE instructed by DLA Piper UK

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IN THE HIGH COURT OF JUSTICE

CHANCERY DIVISION

MANCHESTER DISTRICT REGISTRY

Case No: 2290 of 2010

Manchester Civil Justice Centre

1 Bridge Street West

Manchester

M60 9DJ

Date: Friday, 26th November 2010

Before:

HIS HONOUR JUDGE HODGE QC
sitting as a Judge of the High Court-----
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JUDGMENT

JUDGE HODGE QC: 1. This is my extemporary judgment in the matter of M. T. B. Motors Ltd (No. 2290 of 2010). By an ordinary application issued in the Manchester District Registry of the Chancery Division on 23rd November 2010, Mr Andrew Poxon and Mr John Titley, the joint administrators of M. T. B. Motors Ltd, apply for a declaration pursuant to rule 7.55 of the Insolvency Rules 1986, and paragraph 104 of Schedule B1 to the Insolvency Act 1986 (as amended), that the administration of the company, and that all acts undertaken and all decisions made by the joint administrators since 3.30pm on 7th October, should be deemed to be valid, notwithstanding the failure to obtain consent from the Financial Services Authority to the proposed appointment at the relevant time. The application also seeks such further or other relief as the Court sees fit. 2. The application is supported by the witness statement of Mr Andrew Poxon, one of the joint administrators, dated 23rd November 2010, together with exhibit 'AP1'. I have been considerably assisted by a helpful and detailed skeleton argument filed on behalf of the applicant administrators by Mr Louis Doyle, of counsel, and dated 24th November 2010. The application comes on before me in the applications list in Manchester this Friday 26 th November. 3. The administrators were appointed at 3.30pm on 7th October 2010 under paragraph 22 of Schedule B1 by the company's directors. The factual background to the administrators' appointment has no significance to the present application. At the time of the administrators' appointment, and as a result of professional insolvency advice they had received, the directors had ceased to trade the company, and all employees had been made redundant. On 27th October 2010, in response to a letter circulated to all known creditors of the company giving notice of their appointment, the administrators were contacted by email by a representative of the Financial Services Authority indicating that the company was still authorised by the FSA, and was in breach of its regulatory requirements to submit a return. The email went on to state that the administrators would need to apply to the FSA to cancel its permission. It was said that that would simply end the FSA authorisation of a firm that was no longer trading, and that it had no bearing on the liquidation process itself. This was the first indication to the administrators that the company, then in administration, had been registered with the FSA. The administrators made inquiries, and they were advised that the company had been registered with the FSA in order to sell products such as warranties, protected payment policies, and insurance GAP policies, as part of its ongoing business of running car-sale showrooms. The administrators had apparently, and prior to their appointment, made a search of the FSA register to establish whether the company was registered with the FSA. Not unnaturally, they had searched against the correct name of the company, M. T. B. Motors Ltd (with full-stops after each of the capital letters 'M' 'T' and 'B'). That search, conducted in the correct name of the company, had found no matches. It is only if one searches against MTB Motors Ltd (without including full-stops after each of the initials 'M' 'T' and 'B') that one would have ascertained that the company was indeed registered with the FSA. 4. Following discussion with the FSA, the administrators received a letter from the FSA dated 3rd November 2010. That letter referred to the circular to creditors of 20 th October 2010 from the administrators; and it continued as follows, 'M. T. B. Motors Ltd is authorised by the FSA to carry

on insurance mediation activities including holding insurance mediation client money. I understand that the directors of the company wish to place the company into administration and that they ask you, the addressee, Mr Poxon, and Mr J M Titley to act as joint administrators under paragraph 22 of Schedule B1 to the Insolvency Act 1986. You and Mr J M Titley have confirmed to us your suitability to act as such and belief that it is reasonably likely that administration will achieve a better result for the company than would be likely if it were wound up. For the purpose of Section 362A of the Financial Services and Markets Act 2000, and having considered the information provided by the administrators, the FSA gives consent to the appointment.’ 5. That letter of consent, signed on behalf of the FSA, was filed at court by the administrators’ solicitors yesterday, 25th November 2010. The difficulty that has arisen as a result of those background facts is as follows: Section 362A of the Financial Services and Markets Act 2000 is headed, ‘Administrator appointed by company or directors’. It is common ground that it applies to the company in administration, M. T. B. Motors Ltd. By subsection (2), an administrator of the company may not be appointed under paragraph 22 of Schedule B1 to the 1986 Act without the consent of the Authority. By subsection (3), consent under subsection (2) must be in writing, and must be filed with the Court along with the notice of intention to appoint under paragraph 27 of that schedule. No consent was obtained prior to the filing of the notice of intention to appoint, and thus no written consent from the FSA was filed with that notice. 6. The administrators have therefore issued the present application to determine whether or not the appointment of them as administrators is capable of being cured under either Rule 7.55 of the Insolvency Rules, or paragraph 104 of Schedule B1; or whether their appointment is, in fact, a nullity. If it is a nullity, they seek to establish what steps might be taken to cure, and regularise, the position in the face of the FSA’s consent to their appointment, and the fact that the administrators have taken steps in the administration since being appointed; although, on advice, they have refrained from doing so since the problem came to light. In his written skeleton submissions, Mr Doyle has taken me to the decision of Mr Justice Hart in the case of *Re G-Tech Construction Ltd* [2007] BPIR 1275. In that case, Mr Justice Hart held that use of the prescribed form stipulated by the Insolvency Act, and the Rules made under it, was a necessary pre-requisite of an appointment; and that if the prescribed form was not used, the appointment was void from the very beginning. That decision has subsequently been followed by Mrs Justice Proudman in the case of *Pillar Securitisation SARL & Ors v Spicer & Anor (Court Administrators)* [2010] EWHC 836 (Ch). In that case, the judge considered the validity of the appointment of administrators in circumstances where the wrong form had been used; the form appropriate for a company had been completed whereas the appropriate form should have been that prescribed in relation to a partnership. Mrs Justice Proudman indicated that she would not depart from the principle established by Mr Justice Hart in the earlier *G-Tech Construction* decision. At paragraph 55, she declined to distinguish the decision in *G-Tech* on the basis of the fact that there were differences between the prescribed forms in the two cases; she indicated that it would open a can of worms, and would lead to great uncertainties, to say that some forms were, in effect, more ‘prescribed’ than others. If a principle was to be found to distinguish which forms were essential to validity and which were not, it was, in her view, for a higher court to identify it. 7. Mr Doyle has drawn my attention to the fact that *G-Tech* has an added significance in the context of the present application, in that Mr Justice Hart

there also concluded, first, that the proceedings were not ‘insolvency proceedings’, because the administrators had not been validly appointed; and it followed, in his view, that Rule 7.55 of the Insolvency Rules (providing that no insolvency proceedings should be invalidated by any formal defect or by any irregularity unless any substantial injustice caused by it could not be remedied by any order of the court) was of no application or assistance. Secondly, Mr Justice Hart held that paragraph 104 of Schedule B1 (providing that an act of an administrator of a company was valid in spite of any defect in his appointment) could also not assist, because the non-compliance with the Rules meant that, in fact, there was no valid administration. 8. Mr Doyle seeks to distinguish the instant case from the situation that came before Mr Justice Hart and Mrs Justice Proudman in the two authorities I have just referred to. The administrators accept, as they must, that the language of Section 362A(3) of the 2000 Act requires the FSA consent to be filed along with the notice of intention to appoint. The administrators also accept that the consent was not so filed because, not having found the company to have been registered with the FSA, it was not appreciated that its consent was required before the company could be put into administration. Nevertheless, Mr Doyle submits that the present case is distinguishable from the two earlier cases. He draws my attention to paragraph 31 of Schedule B1, headed ‘Commencement of appointment’, which provides that the appointment of an administrator under paragraph 22 takes effect when the requirements of paragraph 29 are satisfied. Paragraph 29 of Schedule B1 provides, by sub-paragraph (1), that ‘a person who appoints an administrator of a company under paragraph 22 shall file with the court

- (a) a notice of appointment, and
- (b) such other documents as may be prescribed.’ 9. Mr Doyle submits that the requirements of paragraph 29 have been satisfied, with the result that the administrators’ appointment took effect from 3.30pm on 7th October. He submits that it cannot be said that there has been a failure to comply with the requirement of paragraph 29(1)(b), requiring, ‘such other documents as may be prescribed’ to be filed with the court, because, he says, the consent provided for by Section 362A(3) of the 2000 Act is not ‘prescribed’, in the sense that such a consent is nowhere mentioned in either Schedule B1 or in the relevant part of the Insolvency Rules governing administration procedures. He therefore submits that, despite what the administrators accept is the mandatory language in Section 362A(3) of the 2000 Act, the requirement for the filing of the FSA consent is something external from the Schedule B1 procedure, such that the requirement for the filing of the FSA consent cannot be read into Schedule B1. He submits that if that is what Parliament had intended, then it would have been reasonable to expect that the requirement would have been expressly stipulated within Schedule B1. He points out that Section 362A of the 2000 Act came into force on exactly the same day as Schedule B1 to the 1986 Act (as amended), on 15th September 2003. He therefore submits that, though a mandatory requirement, the requirement for the filing of the FSA consent is administrative in nature, and cannot render the appointment of the administrators a nullity. Rather, he says, that failure to file the consent amounts to a defect which can be cured, either by paragraph 104 of Schedule B1, or, to the extent that it is still necessary, by Rule 7.55 of the 1986 Rules. In his oral submissions, Mr Doyle made it clear

that it is his contention that 'prescribed', when it is used in paragraph 29(1)(b), should be impliedly limited to documents prescribed, either by the Insolvency Act 1986, or by the Insolvency Rules made thereunder. 10. I reject that submission. I can see no basis for reading such implicit limitation into the source of any prescription. Section 29(1)(b) does not say, 'such other documents as may be prescribed by this Act or the Rules made thereunder'. It provides that the appointer of the administrator is to file with the court a notice of appointment and 'such other documents as may be prescribed', without any limitation expressed upon the source of the prescription. When, in Section 362A of the 2000 Act, subsection (3) requires consent from the FSA to the appointment of an administrator, in relation to a company falling within the scope of the subsection, to be filed with the court along with a notice of intention to appoint, it seems to me clear that Parliament has 'prescribed' that such consent is to be filed with the court. It seems to me that it would defeat the legislative purpose underlying Section 362A of the 2000 Act if the failure to file such consent with the court, along with a notice of intention to appoint, did not operate to invalidate any appointment of an administrator purportedly made pursuant to the notice. I therefore reject Mr Doyle's primary submission that the defect is one capable of being cured, either under paragraph 104 of Schedule B1, or under Rule 7.55 of the Insolvency Rules. It seems to me, based upon my construction of paragraph 29 of Schedule B1, that those provisions have no application in the light of the decision of Mr Justice Hart in the G-Tech Construction case, as followed by Mrs Justice Proudman in the Pillar Securitisation case.

11. Mr Doyle acknowledges that, however inconvenient, the Court cannot make an order which is beyond its jurisdiction, however helpful in practical terms such an order might be. But he submits that the Court should seek to find a solution in respect of which it does have jurisdiction if the practical effect of not doing so is to nobody's advantage, and yet has a corresponding disadvantage, in terms of time and cost, not only to the administrators, but also, and more especially, to the creditors in the administration, and in terms of the uncertainty caused to those parties with whom the administrators have been dealing. Against that background, he draws my attention to paragraph 13 (2) of Schedule B1, under the heading 'Powers of Court'. That provides that an appointment of an administrator by administration order takes effect (a) at a time appointed by the order, or (b) where no time is appointed by the order, when the order is made. In the G-Tech case, Mr Justice Hart identified that paragraph 13(2) of Schedule B1 was sufficiently broad in scope as to allow an administration order to be made retrospectively, - in that case back to a date just less than 12 months before the hearing - thereby avoiding the administration having been terminated by the effluxion of time. In the present case, he invites me to adopt the pragmatism displayed by Mr Justice Hart in the G-Tech case, and to treat paragraph 2 of the application notice, seeking 'such further or other relief as the Court sees fit', as sufficiently broad-based as to enable the Court to make an administration order under paragraph 13(2) of Schedule B1 appointing the administrators as such retrospectively, and with effect from 3.30pm on 7th October 2010. He also invites me to confirm the validity of their acts as administrators in the

period between that time and the making of the order sought; and their entitlement, as administrators, to the remuneration properly claimable by them, and the costs, fees and expenses incurred by them over that period. 12. It is within my own knowledge that the Vice-Chancellor, sitting in the Northern area, has made retrospective appointments of administrators. Following the decision in the G-Tech case, there is power to do so; and I have followed his decision in that regard. The width of paragraph 13(2) of Schedule B1 can usefully be contrasted with the corresponding provision in Rule 40.7 of the Civil Procedure Rules. CPR 40.7, headed 'When judgment or order takes effect', provides, by sub-rule (1), that 'A judgment or order takes effect from the day when it is given or made, or such later date as the court may specify'. CPR 40.7 prevents the making by the court of an order with retrospective effect. There is no such temporal limitation contained within paragraph 13(2) of Schedule B1. Hence the practice that has developed of making administration orders, in appropriate cases, with retrospective effect. Mr Doyle points out that if the Court will not entertain that course, then it would be necessary for the administrators to arrange to make a fresh administration application to the court in the prescribed form seeking their appointment. The regrettable consequence of that course would be to take time, and to incur costs and uncertainty. 13. In my judgment, it is appropriate, on the facts of the present case, and in the exercise of the Court's undoubted discretion, to make the order, which it has jurisdiction to make, namely an administration order with retrospective effect. It was through no fault of the administrators, their advisers, or those appointing them, that the need for FSA consent was not established prior to the filing of the notice of intention to appoint administrators. It was simply because of the way in which the FSA register is searchable online. This present case may serve a useful purpose if it emphasises the need to obtain FSA consent before filing notice of intention to appoint an administrator in a case such as the present; and if it also draws attention to the fact that, where there are initial letters followed by full-stops in a company's name, it may be necessary to search, not only against the correct name of the company, but also against a variant of that name, without the full-stops after each capital letter. In my judgment, however, on the facts of the present case, it is entirely appropriate, convenient and expeditious to make a retrospective appointment; and, in so far as necessary, and in aid of that, to validate the administrators' activities in the meantime. That would be consistent with the overriding objective under the Civil Procedure Rules of saving expense, dealing with the case in ways which are proportionate, ensuring that it is dealt with expeditiously and fairly, and, finally, allotting to it an appropriate share of the court's resources. It will avoid the need for a further application taking up court time; it will save the expense associated with such an application; and it will ensure certainty. 14. I will therefore make an order in that form. In other words, I retrospectively appoint Mr Poxon and Mr Titley as administrators of M. T. B. Motors Ltd with effect from the time of their original purported appointment, even though, for the reasons I have given, that purported appointment was, in my judgment, invalid. Clearly, it is appropriate that the costs of this application should be treated as an expense of the administration. It may be appropriate also to indicate, if the administrators feel it appropriate to do so, that the costs of obtaining and circulating a transcript of this judgment should, if they consider it

appropriate to obtain one, be treated also as an expense of the administration. End of Judgment. 10

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