Re Seabrooke Road Ltd; Security Trustee Services Ltd and others v Seabrooke Road Ltd

[2021] EWHC 436 (Ch), [2021] All ER (D) 105 (Jan)

Administration – Appointment of administrator. The receivers of a property, which the respondent company owned, succeeded on their application under the Insolvency Act 1986 for orders that: (i) notices of intention to appoint an administrator (NOITAs), (filed by, or on behalf of, the respondent) be removed from the court file; (ii) the appointment of two individuals (M and N), as joint receivers of the property be declared valid; and (iii) notwithstanding the filing of the first and second NOITAs, the appointment and subsequent actions of M and N, as joint receivers of the property, would be permitted. The Chancery Division, in granting the relief sought, held that the NOITAs constituted an abuse of process, in circumstances where the requisite notice had not been given to the qualifying floating charge holder. The court considered that the requirement of prior notice was an important check or balance in the process under IA 1986 Sch B1 before a company could, itself, in those circumstances, appoint an administrator. Further, it held that, on the present facts, there had never been the necessary intention required before a valid notice could have been given under Sch B1 para 26, that the notices filed in court were not valid notices and that the interim moratorium, which resulted from such notices, if valid, had never come into effect.

Catchwords

Administration — Appointment of administrator — Receivers application for removal of notices of intention to appoint administrator from court file and, among other things, for appointment of joint receivers of freehold property to be declared valid

Background

In August 2019, a facilitation agreement was entered into between the respondent company (Seabrook), Retail Money Market Ltd, known as 'Ratesetter', and STS for the refinancing of Seabrook's property development in Kent (the property). STS acted as agent and security trustee for Ratesetter. Seabrook gave a charge over the property by way of legal mortgage and a floating charge over what were called 'the chattels'.

The facilitation agreement was extended, by agreement between the parties, until 15 November 2020. Seabrook failed to pay the monthly instalments of interest for August, September, October and November on time.

The parties held discussions, concerning possible refinancing. However, no agreement was reached in that regard. In the course of those discussions, on 12 November, Seabrook sent communications saying that it wished to avoid administration. Thereafter, it continued to seek to agree an extension of time for the repayment of the sums due under the facilitation agreement.

On 16 November, a default and demand letter was sent, declaring the charge to be enforceable and stating that, if Seabrook failed to pay the outstanding amounts, STS would commence recovery proceedings. Further discussions took place until 4 December, and it appeared that agreement might be possible, but in the end, the conditions required for that agreement were not met.

On 7 December, STS appointed the receivers. As receivers of the property, they notified Seabrook, the same day. Later that day Mr A, an insolvency practitioner, told them and STS that Seabrook had filed a NOITA (namely a notice of intention to appoint an administrator) with the court on 27 November (the first NOITA). That was the first that Ratesetter or STS had known of any such notice. The first NOITA stated that it was being given to STS in accordance with para 26 of Sch B1 to the Insolvency Act 1986 (IA 1986). That had not, in fact, happened. Although the first NOITA had made clear that Seabrook had understood that STS was a qualifying floating charge holder, no notice had been given to STS. The solicitors for STS and the receivers contended that the first NOITA was of no effect because it had not been served as required by IA 1986 and/or it was an abuse of process.

Seabrook's solicitors also disclosed the existence of a second NOITA, dated 10 December. Again, STS had not been given notice in accordance with Sch B1. Further, the second NOITA had been sent after the appointment of the receivers, which had taken place on 7 December.

The receivers applied under IA 1986 for orders that: (i) the notices of intention to appoint an administrator be removed from the court file; (ii) the appointment of M and N, as joint receivers of the freehold property, be declared valid; and (iii) notwithstanding the filing of the first and second NOITAs, the appointment and subsequent actions of M and N, as joint receivers of the property, would be permitted.

Issues and decisions

Whether the orders sought should be granted.

Consideration was given to IA 1986 Sch B1, which allowed a company to appoint an administrator. By para 22: 'A company has power to appoint an administrator out of court.'

Paragraph 26 obliged a person who proposed to make an appointment under para 22 to give at least five business days' written notice to any person, who might be entitled to appoint an administrative receiver or administrator under para 14.

Paragraph 44 provided for an interim moratorium in terms of paras 42 to 43 to arise from the time when the copy of notice of intention to appoint an administrator was filed with the court under para 27(1), until (a) the appointment took effect; or (b) the period specified under para 28(2) expired. Paragraph 43(2) stated that, when the moratorium applied, no step could be taken to enforce security over the company's property, except with the permission of the court.

It was settled law that, in order to give a notice under Sch B1 para 26, the person had to propose or intend unconditionally to make such an appointment. A conditional proposal or intention to appoint an administrator neither entitled nor obliged a company to give a notice under para 26. Therefore, (previous authority held that), a NOITA given by a person entitled to appoint under para 14 had not been validly given, nor had a copy of it been validly filed with the court, with the result that the interim moratorium had not been validly invoked and, accordingly, that a copy of the NOITA would be removed from the court file (see [21] of the judgment).

In the present case, the notice to the qualifying floating charge holder had not been given in either of the two NOITAs which were in issue on the application (nor in the two earlier ones). There had been no explanation for that. On the face of it, it had been a serious and inexcusable breach on the rules. The relevant NOITA forms referred to the need to provide notice to STS and the forms, as completed, stated that notice was being given that had not been true. That alone rendered the notices an abuse of process (see [22] of the judgment).

The procedure contained important protections for the qualifying floating charge holder. The purpose of giving notice to such a charge holder was to enable it, if it so considered fit, to appoint its own administrator. The requirement of prior notice was, therefore, an important check or balance in the process under Sch B1 before a company could, itself, in those circumstances, appoint an administrator (see [23] of the judgment).

Equally, the interim moratorium imposed by para 44 presupposed, in circumstances of a case like the present, that notice had been given to the qualifying floating charge holder. If that was not done, the company was unable, effectively, to protect itself against that floating charge holder and that was contrary to the scheme of IA 1986 (see [24] of the judgment).

Accordingly, on that point alone, the notices constituted an abuse of process. However, the matter did not rest there (see [25] of the judgment).

A notice might only be given under para 26 if the company had a genuine and settled intention to appoint an administrator. In the present case, the company had not had such an intention at the time of the two notices which were in issue, or at the time of the two earlier notices. Accordingly, there had never been the necessary intention required before a valid notice could have been given under para 26. It appeared to be clear that the notices had been served in an attempt to obtain a moratorium and to arm the company with an argument against the appointment of the receivers, or steps being taken by Ratesetter to enforce the facilitation agreement. The timing of the various notices strongly supported the inference that what was really being done was to give the company leverage in negotiations. Further, the notices which had been filed in court were not valid notices and the interim moratorium, which resulted from such notices, if valid, had never come into effect [26]-[32] of the judgment).

It followed that it was appropriate to order that the copy of the NOITAs be removed from the court file. The other relief referred to at the outset of the judgment would be granted (see [32] of the judgment).

R (on the application of Nafees) v SSHD (2017) [2017] EWCA Civ 276 applied.

Carla Dougan-Bacchus, Barrister.

Judgment date

25 January 2021

Judge

Mr Justice Miles

Representation

Mr C Boardman QC (instructed by Katten Muchin Rosenman UK LLP) appeared on behalf of the Applicants.

Mr R Hocking (instructed by Furley Page LLP) on behalf of the Respondent.

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