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# Croxen & Ors v Gas And Electricity Markets Authority & Ors [2022] EWHC 2826 (Ch)

## Overview

This case concerned a number of directions sought by the administrators and liquidators of ten failed UK energy suppliers (the "Applicants"). The judgment deals with novel issues regarding the rights of the regulator and suppliers of last resort to claim in the insolvencies of energy supply companies.

Broadly speaking, the court held that the nature of the liabilities for renewable obligations were either contingent or actual liabilities and therefore provable in the liquidation/administration, notwithstanding the existence of a mutualisation fund to meet any shortfalls. Furthermore, it concluded that the supplier of last resort had a claim against the failed supplier for unjust enrichment if it had honoured credit balances on customers' bills.

## Background

The companies were formerly licensed under the Electricity Act 1989 and the Gas Act 1986 to supply electricity and gas to domestic customers in the UK. Each company's licence was revoked following a determination by a court that it was unable to pay its debt (together, the "Failed Suppliers"). Upon revocation of each licence, another supplier, known as a supplier of last resort ("SoLR"), was appointed to supply electricity and gas to the customers of the company whose licence was revoked.

The Applicants sought clarification on a number of issues, mainly regarding the rights of the Office of Gas and Electricity Markets ("Ofgem") and SoLRs to claim in the insolvencies of the Failed Suppliers. These issues were determined into two groups: (i) the renewables obligations and, (ii) a possible claim in unjust enrichment by a SoLR against a Failed Supplier.

(i) renewables obligations

This group of issues concerned the construction of statutory provisions relating to obligations imposed on licensed suppliers of electricity, by the Renewables Obligation Order 2015, to provide certificates certifying that they have acquired electricity from renewable sources, or to make payment in lieu. The certificates, provided by Gas and Electricity Markets Authority ("GEMA"), are then sold by the operators to suppliers who purchase electricity from them.

Liabilities arise from the certificates if a supplier fails to discharge its renewables obligation before 1 September, each year, and fails to discharge their renewable obligations in full by the late payment deadline of 31 October (interest accrues in the interim period). When there is a failure to pay by a supplier, and there is a shortfall in the renewables fund from which GEMA's expenses are paid, the shortfall is mutualised among suppliers.

The Failed Suppliers had accrued these liabilities from failing to discharge their renewables obligations. The question before the court was to determine the nature of the renewables obligation, and therefore the extent to which liabilities arising out of it were provable in the administration or liquidation of a Failed Supplier.

(ii) unjust enrichment

The applications also raised the question whether the SoLRs could claim in the insolvencies of the Failed Supplier's estates for the cost of honouring credit balances of customers that the SoLRs took on. Related to this was the issue whether the SoLRs' honouring of customer credit balances discharged the obligations owed by the Failed Suppliers to customers.

**Court Decision**

(i) renewables obligations

The court confirmed that prior to 1 September, the renewables obligation was a contingent liability. With the contingency being that the supplier had not satisfied its renewables obligation as it had not produced the required number of certificates. After 1 September, the supplier was under an actual obligation to make a payment, and to pay interest for every day it failed to pay, up until 31 October.

The proper interpretation of the legislation was that the renewables obligation was imposed on a designated electricity supplier in respect of a relevant obligation period. The critical requirement, therefore, was that the supplier was licensed during that obligation period. If it was licenced, the supplier incurred a liability. The liability continued despite the subsequent revocation of its licence.

The court confirmed that the payment liability arising out of the renewables obligation continued notwithstanding either the coming into effect of the mutualisation scheme, or payment obligations under it being triggered, on 31 October and therefore were provable in the liquidation/administration.

(ii) unjust enrichment

The court ultimately concluded that the payment of each of the Failed Supplier’s customer credit balances by the relevant SoLR was implicitly requested or ratified by the Failed Supplier, in circumstances where the SoLR could reasonably expect to be entitled to claim reimbursement from the Failed Supplier. That was sufficient both to cause the Failed Supplier’s debt to customers to be discharged and to give rise to the requisite unjust factor. Alternatively, if that was wrong, the court considered that the SoLRs were, following their appointment, under sufficient legal compulsion to give rise both to the discharge of the Failed Supplier’s obligation to customers and to the requisite unjust factor.

The court confirmed that the Failed Suppliers did not have a defence for unjust enrichment. The enrichment of the Failed Supplier by the discharge of its debt to customers was the essential consequence of the thing done by the SOLR at its cost. It was far from incidental to the SOLR's expenditure. Furthermore, the court confirmed that the defence of passing-on was not part of the English law of unjust enrichment. Therefore, the SOLR could claim in the insolvencies for the cost of honouring credit balances that it took on.

# Re Active Wear Ltd [2022] EWHC 2340 (Ch)

### Overview

The case concerned the determination of whether a sole director of a company adopting the model articles for private companies limited by shares ("**Model Articles**") had validly appointed administrators out of court. The application arose following the uncertainty the earlier High Court decision in Re Fore Fitness Investments Holdings Ltd [2022] EWHC 191 (Ch) had caused regarding the validity of decisions taken by companies with a sole director.

### Background

Active Wear Limited ("**AWL**"), was incorporated on 1 June 2015. On its incorporation, the company adopted the Model Articles in their entirety and these were never modified.

After successfully trading for several years, by March 2022 it was apparent that AWL was unable to continue in its existing state. Marion Rebate was AWL's sole director since incorporation. On 22nd April 2022, Ms. Rebate appointed Hugh Jesseman and Claire Howell as joint administrators of AWL.

The joint administrators were appointed pursuant to signed board minutes of a purportedly quorate meeting of the directors of AWL. However, in reality, there was no meeting and the joint administrators were appointed by Ms. Rebate in her capacity as sole director.

Ms. Rebate and the joint administrators applied to the court to determine whether the appointment was valid and in accordance with AWL's articles.

### Applicable Model Articles & Section 154 of the Companies Act 2006

The different provisions of the Model Articles are grouped under various headings. Relevant to this case, Model Articles 7 to 16 are collectively headed "**decision-making by directors**". The statutory instrument which enacted the Model Articles contains no provision stating that the cross-headings are not to be used as an aid to construction. The most relevant Model Articles are set out in full below.

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### Model Article 7 “Directors to take decisions collectively”

“(1) The general rule about decision-making by directors is that any decision of the directors must be either a majority decision at a meeting or a decision taken in accordance with article 8.

(2) If

(a) the company only has one director, and

(b) no provision of the articles requires it to have more than one director,

the general rule does not apply, and the director may take decisions without regard to any of the provisions of the articles relating to directors’ decision-making.”

### Model Article 11 “Quorum for directors’ meetings”

“(1) At a directors’ meeting, unless a quorum is participating, no proposal is to be voted on, except a proposal to call another meeting.

(2) The quorum for directors’ meetings may be fixed from time to time by a decision of the directors, but it must never be less than two, and unless otherwise fixed it is two.

(3) If the total number of directors for the time being is less than the quorum required, the directors must not take any decision other than a decision –

(a) to appoint further directors, or

(b) to call a general meeting so as to enable the shareholders to appoint further directors.”

Section 154 of the Companies Act 2006 provides that a private company must have at least one director. It is only public companies which must have at least two directors.

## Decision of the High Court

Judge John Martin QC held that the joint administrators were validly appointed. He took the view that the unambiguous meaning of the unamended Model Articles meant “a sole director of a private company may take on his or her own any decision relating to the conduct of the affairs of the company.” The Judge held that Model Article 7(2) had the effect that the other Model Articles that related to “directors’ decision-making”, in Model Articles 7 to 16, did not apply when the company only had a sole director, and there was no provision in the Model Articles requiring there to be more than one director. As the decisions relating to quorum are set out in Model Article 11, which falls within those articles relating to "decision-making by the directors", the Judge considered that Model Article 7(2) disapplied those provisions in circumstances where there is only one director and there is no other article requiring there to be more than one director.

The Judge accepted that, on the face of it, this view of the construction of Model Article 7 contradicted the earlier decision of the High Court in *Re Fore Fitness Investments Holdings Ltd*. In that decision, where the principal question was whether a counterclaim in an unfair prejudice was properly authorised by a decision of a sole director, the court held that the company's articles required decisions to be taken by at least two directors.

In the present case, Judge John Martin QC distinguished the facts from *Re Fore Fitness* on the basis that in that case, the company's articles were a mix of Model Articles and bespoke articles. Whilst Articles 7 and 11 were taken from the Model Articles, there was also a bespoke article, which amended Model Article 11(2), and required the company to have at least two directors, one of which had to be an "Investors' Director" (if there was one) and one the "Executive" (each defined in the company's articles) in order for a meeting of the directors to be quorate. The judge's interpretation in Re Fore Fitness of the inclusion of the bespoke article regarding quorum as requiring the company to have at least two directors to make valid decisions meant that a sole director did not have sufficient authority to act, notwithstanding the provision in Model Article 7(2). Judge John Martin QC held that the inclusion of this bespoke article was the crucial aspect of the decision in *Re Fore Fitness*, but that there were no parallels in the Model Articles.

The judge in *Re Active Wear* Ltd did however acknowledge (albeit *obiter*) that there is an apparent tension between Model Articles 7(2) and 11(3). He was of the opinion that where the number of directors falls to one having previously been higher, it is Model Article 11(3) that applies and that Model Article 7(2) only applies where there has never been more than one director.

## Considerations for R3 members

The decision in *Re Active Wear* provides welcome guidance for practitioners regarding the decision-making ability of sole directors in companies with unmodified Model Articles. However, given the judge's obiter remarks in *Re Active Wear* on the effect of Model Article 11(3), there is still uncertainty when it comes to considering authority of a sole director in respect of a company which previously had multiple directors. Whilst the judge in *Re Active Wear* distinguished but did not expressly disagree with the decision in *Re Fore Fitness*, his obiter comments cast doubt on some of the reasoning in *Re Fore Fitness.* However, the High Court, when sitting as a court of first instance, is not bound by other first instance decisions and, as such, it is not safe to assume that *Re Fore Fitness* no longer has any relevance.

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The decision does also underscore the importance of properly reviewing a company's articles, and perhaps also the history of amendments to the articles and the number of directors over time, when preparing both appointment documents and advising the company on taking any other decisions. Despite the comfort *Re Active Wear* has provided regarding the authority of sole directors in companies with unmodified Model Articles (where there has never been more than one director), there is still reason to exercise caution and have particular regard to the decision making abilities of companies with sole directors (including considering amendments to the articles or appointing further directors), unless and until greater clarity is achieved from a decision of a higher court.

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**February 2023**

## 6 March 2023

## Opinion of the court delivered by Sheriff Principal N A Ross in the appeal in the cause Andrew Speight against Bankruptcy, Sheriff Appeal Court

### Introduction

The decision handed down by the Appeal Court provides Insolvency Practitioners with guidance on matters taken into consideration by the Court when deciding whether to exercise its discretion with regard to section 216 of the Bankruptcy (Scotland) Act 2016 **'Power of court to cure defects in procedure'.** An inordinate delay and the interests of the trustee discharging their functions will be keys issues for the Court to consider when deciding whether to exercise discretion.

### Background

17 October 2018 - Mr Speight ('debtor') was sequestrated.

18 June 2020 – Adjudication of claims issued. After a review the claims remain unchanged.

August 2020 – The decision was intimated by the AiB to the debtor.

24 August 2020 – Deadline to challenge decision expired.

19 August 2022 – Debtor submitted an appeal to the Sheriff.

The debtor recognised that two years had passed since the date to challenge, however, relied on the distraction of a family bereavement in July 2020, together with allegations of credible grounds on which to challenge the original adjudication. The Sheriff dismissed the appeal as being out of time.

The debtor then appeal to the Sheriff Appeal Court. The debtor relied on section 211 of the Bankruptcy (Scotland) Act 2016, in particular –

*"(1) On the application of a person having an interest, the sheriff may—*

*(a) if there has been a failure to comply with a requirement of this Act (or of regulations made under this Act), make an order—*

*(i) waiving the failure …"*

The debtor submitted that the Sheriff was in error in failing to have regard to that section, and that the Sheriff should have waived the debtor's failure to lodge this appeal timeously.

The AiB's position was that section 211 of the Bankruptcy (Scotland) Act 2016 did not apply in the circumstances and only to failures to comply with a requirement of the Act. *"Because there is no requirement to lodge an appeal against the AiB's decision, an appeal is a voluntary act. It is therefore not a "requirement" of the Act, and section 211 is not triggered."*

**Decision**

The Sheriff Appeal Court dismissed the appeal of the debtor, however, the Court did accept that section 211 gave the court discretion to waive the time limit for the appeal. The question before the Court was whether that discretion should be exercised. The Court said –

*"In assessing that question, it is significant that there is no explanation for such inordinate delay. A delay of almost 2 years is grossly disproportionate to a statutory time limit of 14 days. The only explanation, namely recent bereavement, is not supported by any evidence. It is not explained by any medical factor. It does not by itself explain why a timeous application could not have been presented in 2020 and then sisted. The passage of time has meant that any extenuating circumstances have diminishing weight."*

*"There is also the matter of balancing the equities between the parties. The statutory time limit is not arbitrary. It is a short period. Once passed, the trustee in sequestration is free to pay dividends. It allows the trustee to act with certainty in distributing the estate. The late opening up of claims would undermine the trustee's statutory function. If the statutory deadline were vulnerable to being overruled it would mean endless uncertainty as to whether the trustee could safely make payments to the creditors."*

The judgment is available **here**.

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