Re Zoom UK Distribution Ltd (in administration) Wessely and another (in their capacity as joint administrators of Zoom UK Distribution Ltd (in administration)) v Rubra and others

[2021] EWHC 800 (Ch), [2021] All ER (D) 31 (Apr)

Administration – Appointment of administrator. The applicant administrators were entitled to a declaration that their appointment had been valid, despite a defect in procedure relating to their appointment. The Chancery Division held that the answer to the question of whether non-compliance resulted in invalidity depended on whether Parliament had 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. In the circumstances, the administrators' appointment had been admitted defective, but the defect was curable.

Catchwords

Administration — Appointment of administrator — Appointment of administrators

Background

In March 2009, the third respondent company (Zoom) executed a debenture in favour of Lloyds TSB Bank plc (Lloyds) as security for a loan (the Lloyds debenture). In consequence, Lloyds became a qualifying floating charge holder within the meaning of the Insolvency Act 1986 (IA 1986). Under para 14(1) of Schedule B1 to IA 1986, the holder of a qualifying floating charge in respect of a company's property could appoint an administrator of the company.

In January 2010, Zoom executed another debenture in favour of Lloyds TSB Commercial Finance Ltd as security for a loan (the TSB debenture). In 2017, Zoom refinanced its borrowings, involving the provision of alternative invoice financing by Aldermore Bank plc (Aldermore), secured by way of another debenture (the Aldermore debenture) and designed to satisfy and replace the TSB debenture. As a result, in November, the TSB debenture was marked at Companies House as satisfied. Due to an error in the Aldermore documentation, the Lloyds debenture was also marked at Companies House as satisfied. Zoom subsequently repaid its indebtedness to Aldermore and the Aldermore debenture too was marked as satisfied.

In May 2020, administrators were appointed out of court by the directors in May 2020 pursuant to the directors' power to do so under paragraph 22(2) of sch B1. Under para 26(1)(b) of sch B1, the directors were required to give at least five business days' written notice to Lloyds of their proposal to appoint an administrator. By para 28(1) of sch B1, an appointment under para 22 could not be made unless, inter alia, the notice period had expired or each person to whom the notice had been given had consented in writing to the making of the appointment. Unbeknown at the time to the administrators, the directors had inadvertently failed to give the requisite written notice to Lloyds. The administrators had only become aware of the situation after having been informed by Lloyds in August 2020 that the Lloyds debenture remained outstanding. Zoom repaid the outstanding loan to Lloyds in about December 2020.

Among other things, the administrators made an application pursuant to para 63 of sch B1 to IA 1986, for: (i) a declaration that their appointment on 5 May 2020 had been valid, despite a defect in procedure relating to their appointment; and (ii) relief that any of their acts since that date were valid.

Issues and decisions

Whether the declaration would be made.

The answer to the question whether non-compliance resulted in invalidity depended on whether Parliament had 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 (see [15] of the judgment).

Applying that approach, a conclusion that the breach of para 26(1)(b) did not render the appointment of the administrators a nullity was consistent with the case law. In *Re Skeggs Beef Ltd Eason and another (as joint administrators of Skeggs Beef Ltd (in administration)) v Skeggs Beef Ltd (in administration)* (Re Skeggs Beef), the court had identified three categories of case to be applied when deciding the consequences of a breach of the requirements for an out of court appointment, namely where the breach was: (i) fundamental; (ii) not fundamental but had caused no injustice; and (iii) not fundamental but had caused substantial injustice. A conclusion that the breach of para 26(1)(b) was a fundamental one such as to render the appointment a nullity would wrongly rank the importance of receiving a notice above the importance of there being an administration. A breach of para 26(1)(b) fell into the second category of case. In the result, the administrators' appointment had been admitted defective, but the defect was curable. The present case fell within the second and not the third category of case identified in *Re Skeggs Beef*. No substantial injustice has been caused by the defect. The administrators were entitled to a declaration that their appointment had been valid and that any of their acts since that date were valid (see [16]-[18] of the judgment).

R v Soneji [2005] UKHL 49 [2005] 4 All ER 321 [2005] All ER (D) 294 (Jul) applied; *Re Skeggs Beef Ltd Eason and another (as joint administrators of Skeggs Beef Ltd (in administration)) v Skeggs Beef Ltd (in administration)* [2019] All ER (D) 129 (Oct) [2019] EWHC 2607 (Ch) applied; *Adjei v Law For All* [2011] All ER (D) 154 (Oct) [2011] EWHC 2672 (Ch) considered; *Ceart Risk Services Ltd, Re; Bootes v Ceart Risk Services Ltd* [2012] EWHC 1178 (Ch) [2012] All ER (D) 43 (May) considered; *Euromaster Ltd, Re* [2012] EWHC 2356 (Ch) [2012] All ER (D) 84 (Aug) considered; *Re Tokenhouse VB Ltd (formerly VAT Bridge 7 Ltd) Strategic Advantage SPC (for and on behalf of VAT 1 SP) v Rutter and others* [2020] All ER (D) 86 (Oct) [2020] EWHC 3171 (Ch) considered.

Carla Dougan-Bacchus, Barrister.

Judgment date

31 March 2021

Judge

Stuart Isaacs QC (sitting as a deputy judge of the High Court)

Representation

Rachael Earle (instructed by Kingsley Napley LLP) for the applicants.

Philip Currie (instructed on a direct access basis) for the first and second respondents.

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