

Administration appointment minefield

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Why is this important? – an invalid appointment is not only embarrassing but can lead to claims for damages resulting from a lost sale or diminution of value resulting from the appointment or the delay in having to reappoint.

Recent cases have underlined how strictly the Court interprets the rules relating to the appointment of an administrator out of court by directors or shareholders, and the extension of an administration.

In *Re M.T.B. Motors Ltd (in administration)*, the company, being FSA authorised, required the FSA's written consent to an out of court appointment.(s362A, Financial Services and Markets Act 2000). The name of the company was incorrectly set out on the FSA register (omitting the full stops), so a search against the proper name did not show the company as FSA registered. Relying on the clear search result, administrators were appointed without the FSA's written consent. The court held that the appointment of administrators was invalid because the prescribed FSA consent had not been filed together with the notice of intention to appoint administrators. In this case, the error that led to the appointment being invalid was due an error in the FSA register, which had been properly searched.

In *Minmar v Khalastchi*, a majority of the directors resolved to appoint administrators out of court, Two issues arose. No notice of intention to appoint was served on the Company (which is required if the appointment is not being made by shareholders-Insolvency Rules 1986 Rule 20(2)(d)), and the board meeting held to discuss the matter, though quorate, was attended by only one representative of 3 corporate directors, rather than the full board and was called without the notice required by the company's articles. Although para 105, Sched B1 Insolvency Act 1986 states that "A reference ...to something done by the directors of a company includes a reference to the same thing done by a majority of the directors", the directors could not rely on this to dispense with provisions of the company's constitutional documents regarding the holding of board meetings and passing of directors' resolutions. Accordingly the appointment was invalid.

In *Re Frontsouth (Whitham) Limited* The consent of a secured creditor to extend an administration, required by para 78(2), Sched B1 Insolvency Act 1986, was not obtained. The court held that this defect was fundamental and could not be corrected under Rule 7.55 Insolvency Rules 1986.

Practical steps to minimise the risk of failing to observe the necessary formalities:

- search registers for similar names,
- check the company's constitutional documents to ensure observance,
- check the company's register of mortgages and charges,
- check the requirements of Schedule B1 and the Insolvency Rules.

Sometimes even taking every care, failure by third parties can mean that searches do not reveal crucial information.

Should a problem with formalities become apparent after appointment, the practical solution will often be for a urgent application to court either to apply Rule 7.55 to waive the defect or to make a retrospective administration appointment.

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