Re Seabrook Road Ltd

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Synopsis

In *Re Seabrook Road Ltd*[1] the High Court provided guidance on the considerations the court takes into account when determining whether an out of court appointment of an administrator is valid. The court held that not only is it necessary for a notice of intention to appoint an administrator (a 'NOITA') to be validly served, but there also has to be a genuine and settled intention to appoint an administrator. In *Re Seabrook* it was held that neither of these factors were present, with the effect that the company's purported NOITA was invalid and the company was unable to benefit from the interim moratorium imposed by paragraph 44 of Schedule B1 to the Insolvency Act 1986 (the 'Insolvency Act').

Facts

Seabrook Road Limited ('Seabrook') entered into a facilitation agreement with Retail Money Market Ltd (the 'Lender') for the refinancing of a development called Seabrook Heights. The applicant, Security Trustee Services Limited ('STS'), acted as agent and security trustee under the agreement. Pursuant to this refinancing, Seabrook granted a charge over the property by way of legal mortgage and a floating charge over what were called 'the chattels'.

The agreement was due to expire in August 2020 but was extended by agreement until 15 November 2020. In the intervening months, Seabrook failed to pay its monthly interest instalments on time. There were extensive discussions between the parties about refinancing the facility during which Seabrook showed a clear intention to repay the facility in full if given more time. Seabrook also expressed on 12 November 2020 that it wished to avoid administration and proposed a recovery plan. The negotiations did not lead to an agreement and on 16 November 2020 STS sent a default and demand letter to Seabrook. Further discussions again failed to bring about an agreement and on 7 December 2020 STS appointed receivers of the secured property, which Seabrook acknowledged on 11 December 2020. It was only at this time that STS were informed that Seabrook had already filed a NOITA with the court on 27 November 2020. It later emerged that Seabrook had also filed and purportedly served three further NOITAs on 3 November 2020, 16 November 2020 and 10 December 2020 respectively. All of the NOITAs made clear that Seabrook understood that STS was a qualifying floating charge holder, and therefore that Seabrook was required to give notice to STS, but no notice had been given to STS (in relation to any of the NOITAs) in accordance with paragraph 26 of Schedule B1 to the Insolvency Act.

The law

Paragraph 22 of Schedule B1 to the Insolvency Act gives the directors of an insolvent company the right to appoint an administrator outside of the court process. The directors must give at least five business days' written notice to any person who is entitled to appoint an administrator or administrative receiver of the company (paragraph 26(1)(a) of Schedule B1 to the Insolvency Act). This includes a qualifying floating charge holder ('QFCH') such as STS. An appointment under paragraph 22 can only be made where the directors have complied with paragraph 26 and have filed their NOITA with the court, accompanied by a statutory declaration in accordance with paragraph 27. All QFCHs must have received notice of the proposed appointment and have either consented in writing to the appointment or not responded to the notice within five business days of receiving the notice (paragraph 28(1)).

A NOITA is valid for 10 business days, beginning with the day it is sworn (para 28(2) of Schedule B1 to the Insolvency Act), and once a valid notice has been filed with the court, provides the company with the protection of an interim moratorium until the earlier of the appointment of administrators to the company or the expiry of the NOITA. This interim moratorium prohibits (amongst others) creditors from taking action to enforce their security against the company and its assets (paragraph 44(4)).

Notes

1 [2021] EWHC 436 (Ch).

Following the case of *JCAM Commercial Real Estate Property XV Ltd v Davis Haulage Ltd*[2] the law is clear that the company or its directors must have a 'settled intention' to appoint an administrator to be able to benefit from the interim moratorium.

Judgment

The court stated that the failure to give STS notice of the intention to appoint an administrator, a failure for which Seabrook had not given any explanation, was a 'serious and inexcusable breach' of the insolvency legislation (see [22]). The NOITAs themselves referred to the need to provide notice to STS and stated that notice was being given – which was not true. On this point alone, it was sufficient to hold that the NOITAs issued by Seabrook constituted an abuse of process and were invalid.

Miles J considered the Court of Appeal's decision in *JCAM* in which it was held that, in order to give a valid NOITA under paragraph 26 of Schedule B1, a person had to propose or intend unconditionally to appoint an administrator. The timeline in *Re Seabrook* shows that on 12 November 2020 (after Seabrook's first NOITA on 6 November but before Seabrook's second NOITA on 16 November) the company had represented to the Lender that administration was a last resort option and that it wished to pursue a recovery plan instead. Indeed, the company continued negotiations with the Lender until 4 December with a view to extending the facility.

No attempt was ever made to appoint an administrator, notwithstanding the various notices.

In addition, the last notice was only filed in court after STS had already appointed its receivers and given Seabrook notice of such appointment. In these circumstances, Miles J considered it improbable that there was any genuine intention to appoint an administrator, and instead found that the notices were served in an attempt to obtain a moratorium, to arm the company with an argument against any steps being taken by the Lender to enforce the facilitation agreement, and to give the company valuable leverage in the refinancing negotiations.

It was held that: (i) the NOITAs filed by Seabrook were not valid and should be removed from the court file; (ii) STS's appointment of joint receivers was effective; and (iii) the receivers' subsequent actions were permitted.

Comment

Ultimately, *Re Seabrook* may be a rare case (where mistakes in relation to the out of court administration appointment route are not an oversight or error in the process) but a case where the company appears to seek to abuse the statutory procedure. The case comes as a timely reminder that, while an out of court appointment mechanism is no doubt a flexible tool, there are certain safeguards for a QFCH built into the process which the court will strain to uphold and be quick to stop any abuse of the process.

The purpose of the NOITA is to give a QFCH the opportunity to appoint an administrator of their own choosing, which is an important protection and an essential part of the process under Schedule B1. The moratorium imposed by paragraph 44 presupposes that such notice has been given to the QFCH. In circumstances where this is not done, the company cannot avail itself of the protection afforded by paragraph 44.

The recent cases of *Re Tokenhouse VB Ltd*[3] and *Re NMUL Realisations Limited (in Administration)*[4] suggest that the court is open to remedying cases where the failure to serve a QFCH with a NOITA was only an 'irregularity' and therefore did not invalidate the appointment of an administrator. In *Tokenhouse* I.C.C. Judge Jones states at [45] that non-compliance with paragraph 26(1) is not a fundamental breach and that the importance of giving notice to creditors will not necessarily outweigh the importance of the company being put into administration at the right time. Although there will be prejudice against the QFCH who is not given the five day notice period in which it can appoint its own administrator, this is limited when contrasted with the potential danger that the main purposes of the administration may no longer be capable of being achieved due to the delay caused by finding the appointment of the administrator null and void. Miles J did not consider *Tokenhouse* or *NMUL* in his judgment, but *Re Seabrook Road Ltd* can be distinguished on its facts as a case which involved a clear abuse of process.

Notes

2 [2016] EWHC 772 (Ch).
3 [2020] EWHC 3171.
4 [2021] EWHC 94 (Ch).