

Insolvency appointment not invalid as a result of the form of wording used (Orton and others v Towcester Racecourse Company Ltd (in administration))

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Restructuring & Insolvency analysis: In Orton and Others v Towcester Racecourse Company Limited (in administration), the Companies Court clarifies and endorses the use of a preferential form of words in a notice of appointment of an administrator. Katie Gibb, barrister at Guildhall Chambers, comments on what lessons can be learned from this case and considers the implications for insolvency lawyers.

Orton and others v Towcester Racecourse Company Ltd (in administration) [\[2018\] EWHC 2902 \(Ch\)](#)

What are the practical implications of this case?

The Insolvency (England and Wales) Rules 2016, [SI 2016/1024](#) (IR 2016) changes did away with the prescribed forms for appointments of administrators and instead rule 3.24 of IR 2016, [SI 2016/1024](#) sets out what information must be provided after a notice of intention to appoint, including a requirement that the 'date and time of the appointment' be recorded in the Notice of Appointment filed at court. A case from March 2018 (*NJM Clothing Ltd, Ross & Higgins v Fashion Design Solutions Ltd & Aces Couture Ltd* [\[2018\] EWHC 2388 \(Ch\)](#), All ER (D) 228 (Mar)) had identified the failure to stipulate the precise date and time of the appointment as a potential defect but suggested that IR 2016, [SI 2016/1024, r 12.64](#) could be used to remedy such a fault.

In *Towcester*, HHJ Matthews went further and expressly endorsed the practice of completing the Notice of Appointment in referential terms which allow the form to refer to the appointment being made on 'the date and time endorsed by the court'. This will come as a welcome relief to practitioners and allay concerns which may arise out of the potential temporal lapse between appointment and the court endorsing the notice of appointment.

While the application in *Towcester* was made as a precautionary measure, and there was no dispute among the interested parties in relation to the appointment, it clearly has wider implications for such appointments generally. It brings clarity as to the use of referential wording in a notice of appointment.

What was the background?

The joint administrators of Towcester racecourse made an application to court for a declaration, among other things, that their appointment was valid. Insofar as was necessary, they sought an order under IR 2016, [SI 2016/1024, r 12.64](#) that any defect in the appointment would not operate so as to invalidate it. This form of application followed the decision in the unreported case of *NJM Clothing Ltd* decided by HHJ Klein in March 2018.

In *NJM Clothing*, a dissenting creditor of the company had sought to argue that the notice of appointment was invalid because the statute required the appointment to have taken place before the notice of appointment was filed at court. The notice of appointment in that case recorded the appointment as being referential to the date and time of filing with the court and did not accurately record the appointment. The creditor argued that the wording of the notice of appointment left it open to conclude that the appointment took place after the filing of the notice of appointment. This seemed to indicate that a notice of appointment which referenced the timing of the appointment to filing, a commonly used form of words, might be argued to be invalid.

HHJ Matthews carefully reviewed the reasoning in *NJM* and noted that while Judge Klein identified potential defects in the notice of appointment arising out of the use of referential wording, he did not actually find that the notice of appointment before him was defective. That being so, the judge held that Judge Klein had been hypothesising defects.

What did the court decide?

Judge Matthews confirms that wording within a notice of appointment which seeks to make a referential appointment at a future date is an effective method of appointment. Not only was there no authority to the contrary, but it was a practical and desirable means of making the appointment to ensure that it is as close as possible to the point when the court is notified of the same.

The judge went on to note that whether the appointment is deemed to take place shortly before or at the same time as the notice of appointment was filed was not a matter of great importance. The judge expressly noted that he did not regard it as a defect in a notice of appointment to specify the time of endorsement by the court as the time of the appointment. The judge also rejected any argument that in those circumstances the notice of appointment failed to record the exact second the appointment is made. Arguments focused on exact times down to the second would themselves create further disputes about accuracy of time recording in different locations. The judge expressly stated that the use of a referential form of words in a notice of appointment to identify the timing of an administrator's appointment did not in any way invalidate the appointment.

Katie Gibb is a barrister at Guildhall Chambers in Bristol. Gibb practices in all areas of insolvency and enjoys a broad commercial litigation practice with particular specialism in partnership disputes. In 2007, Gibb was appointed to the Attorney General's panel of junior counsel to the Crown.

Interviewed by David Bowden.

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