

**Administration
Bear Traps**

**FCA
requirements**

**Special
Administration
Regimes**

**QFC
Appointments
When Is The
Security
Enforceable?**

**Accidental
Phoenixes**

**Appointment
timetable
(NoltAA)**

**Who
Appoints?
Members?
Directors?**

**Hostile
Appointments**

**Malcolm
Niekirk**



Administration Bear Traps

Today's topics

Appointments by QFC holders - when is the security enforceable?

Appointments by the company, or the directors - does it matter which?

Notice of intention to appoint - how does the timetable work?

The incomplete checklist - when do you need to tell the FCA?

The incomplete checklist - what about the 'special administration' regimes?

Hostile appointments - mitigating the risk

Evaluations - avoiding an accidental phoenix pre-pack



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QFC appointments - when are they enforceable

Administrations pre-Schedule B1

- Administrations by court order only
- Banks (etc) could appoint administrative receivers

Enterprise Act 2003 changes:

- Court-filing procedure (all but) replaced court order for debtor appointments
- Administrative receiverships (all but) abolished
- Banks (etc) could appoint administrators
- Also by a court-filing procedure



QFC appointments - when are they enforceable

QFC?

- QFC = 'qualifying floating charge'
- Broadly, the same type of security (for a debt) as would have allowed the lender to appoint an administrative receiver
- Charges over substantially the whole of the company's property
- Including at least one floating charge
(para 14, schedule B1)

QFC appointments - when are they enforceable

The QFC must become 'enforceable' before they can appoint an administrator.
(para 16, schedule B1)

How does a charge become 'enforceable'?



QFC appointments - when are they enforceable

How does a charge become 'enforceable'?

- Normally - ask a solicitor to check - it's enforceable when the debtor has failed to pay
- It's not enough for the loan to be in arrears
- The lender has to make formal demand
- And then give the borrower time to pay
 - Even when you know they can't, and won't
 - One banking hour is the absolute minimum
 - The 'notice' clauses in the loan agreement and debenture are important
 - (Usually they reconcile.)



QFC appointments - when are they enforceable

Here's an example:

- 11.00 Friday, formal demand emailed to the company's directors
- The 'notice' clause (in this case) says that's treated as received at 09.00 on the next business day.
- Monday is a bank holiday (in this case).
- 09.00 Tuesday the formal demand is treated as served on the company
- 09.30 Tuesday, banks open for business
- 10.30 Tuesday, ***the charge is now enforceable***
- 12.00 Tuesday, the secured creditor files the appointment in the High Court
- 14.30 Tuesday, the High Court issues the sealed appointment



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**Appointments by the company, or the directors -
does it matter which?**



Appointments by the company, or the directors - does it matter which?

Para 22 of schedule B1:

- (1) A company may appoint an administrator.
- (2) The directors of a company may appoint an administrator.

For the directors to appoint, you need a board resolution.

For the company to appoint, you need a members' resolution:

- Proposed by the directors; and
- Then passed by the members either:
 - as a written resolution; or
 - at an EGM (probably on short notice)



Appointments by the company, or the directors - does it matter which?

Appointment by the directors (para 22(2)) is easier

But, appointment by the company avoids potential conflicts of interest.

Because your pre-appointment engagement terms are wholly consistent with you working for the company (and not the directors) in getting you appointed as administrators.



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Appointment timetable (where there is a NoltAA)

Appointment timetable

(Where there is a NoltAA)

NoltAA = notice of intention to appoint administrators

When:

- it's a debtor's appointment (by the company or the directors); and
- there's a secured creditor (holding a QFC) who may be able to appoint...

Then:

- the appointer must give notice:
 - to the QFC holder
 - in the right form



Appointment timetable

(Where there is a NoltAA)

Procedure:

- Swear the statutory declaration (part of the form)
- File it (the NoltAA) in court
- Serve it on the QFC holder
- Also give it to these (if any):
 - Bailiffs (executing judgements or distraining for rent)
 - The CVA supervisor
 - The company (if the directors are appointing)



Appointment timetable

(Where there is a NoltAA)

Filing the notice in court:

- Opens the ten-day appointment window
 - Ten business days
 - Day one is the date it's filed.
- Opens the pre-appointment moratorium (para 44)

Appointment is not valid after the window has closed

(A second NoltAA can be filed later)



Appointment timetable

(Where there is a NoltAA)

Notice to the QFC holder:

- Minimum of five business days
- That means clear days
- Not including the day of service



Appointment timetable

(Where there is a NoltAA)

Worked example:

- Day 1 - Monday - NoltAA filed in court and posted to QFC holder
- Day 2 - Tuesday
- Day 3 - Wednesday - NoltAA now served on QFC holder
- Day 4 - Thursday - Day 1 (of 5) of notice on QFC holder
- Day 5 - Friday - Day 2 (of 5) of notice on QFC holder
[Saturday, Sunday and 30 November - St Andrew's Day - not business days]
- Day 6 - Tuesday - Day 3 (of 5) of notice on QFC holder
- Day 7 - Wednesday - Day 4 (of 5) of notice on QFC holder
- Day 8 - Thursday - Day 5 (of 5) of notice on QFC holder
- Day 9 - Friday - Appointment possible
[Weekends and bank holidays, including Scottish bank holidays - not counted]
- Day 10 - Monday - Appointment possible (last day)
- Day 11 - Tuesday - Appointment window now closed



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FCA requirements

Financial Conduct Authority

FCA requirements

Special pre-appointment rules apply when the company:

- is, or has been, an 'authorised person' (or recognised investment exchange)
- is, or has been, an 'appointed representative'
- is carrying on, or has carried on, a 'regulated activity' in breach of the 'general prohibition'

FCA requirements

This is very wide and includes:

- Firms that are no longer carrying on a regulated business
- Firms that should be FCA authorised (and are not)
- Firms that should once have been FCA authorised (and never were)



FCA requirements

These are the special pre-appointment rules that apply to those firms:

- You need to get written consent from the FCA to the appointment
- You must file a copy of the consent with:
 - The NoltAA; or
 - The appointment (if no NoltAA)
- You must send the FCA copies of any notice that goes to any creditor
- The FCA has published guidance (which includes a template consent letter)

(ss362-362A Financial Services and Markets Act 2000)



FCA requirements

Tricky bits!

- Get this wrong - and the appointment is likely to be invalid
- How do you know if the FCA has an interest?
 - Ask the directors
 - Check the FCA register, but
 - The name may not match exactly (full stops and spaces between letters)
 - The FCA may not know about unauthorised firms



Unknown petitions - another risk

The company or directors cannot use the notice-filing procedure to appoint when there is a winding up petition running.

(see para 25(a) of schedule B1)

How to find out if there is a petition running?

- Ask the directors
- Call the Companies Court to check the list of petitions

But:

- The Companies Court's list may be out of date...



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FCA requirements

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Special administration regimes

What are they?

Why do we need to know?



Special administration regimes

Why do we need to know?

- Some types of business have modified ('special') administration rules
- The different rules for them make changes to both:
 - Insolvency Act 1986
 - Insolvency (England and Wales) Rules 2016

If a special administration regime applies, make sure you know, pre-appointment!

Special administration regimes

What are they?

This list may not be complete, but they include:

- E-Money and payment institutions
- Investment banks
- Social landlords
- Further education and sixth form colleges
- Railways
- Public-private partnerships
- Water companies
- Air traffic administration
- Energy companies
- Postal services
- Health trusts
- Charitable incorporated institutions
- [Airlines and tour operators in the future?]

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Hostile Appointments

Mitigating the risk



Hostile appointments

When might an appointment be hostile?

How to mitigate the risk?



Hostile appointments

When might an appointment be hostile?

External hostility - typically from creditors - can often be managed with the administration moratorium

Internal hostility - from a faction on the board, or shareholders (or both) - is less easy to control with the administration moratorium

Remember: corporate governance may make it difficult to exclude a minority from involvement with the administration appointment process



Hostile appointments

How to mitigate the risk?

It may be better to flush out trouble in advance?

Apply to court for an administration order?

Give notice to the potentially hostile faction - and let them fight it in court

You will need the support of a majority (of shareholders, if not directors)

This may be an alternative solution for a deadlocked company



Hostile appointments

When might an appointment be hostile?

How to mitigate the risk?



Hostile Appointments

Mitigating the risk



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Accidental Phoenixes

Accidental phoenixes

Phoenix pre-packs are regulated

The regulations bite when you're selling:

- A substantial part of the business
- Within the first eight weeks
- To a connected party

In those case, you must either:

- Have creditor approval; or
- The buyer must have the sale reviewed by an Evaluator



Accidental phoenixes

The risk of an accidental phoenix...

A substantial part of the business

- This could be - depending on the business - the information on a laptop
- It could be acquired in a series of transactions over eight weeks

A connected party

- You might not know that the buyer is the director's brother in law



Accidental phoenixes

How to protect against the risk of an accidental phoenix...

Get warranties from the buyers, to confirm they are not a connected party

- Even when you're selling something trivial
- Even when it's your agent who's selling it

Make sure your engagement terms - for your agents:

- Instruct them to comply with the regulations
- And not sell:
 - A substantial part of the business
 - To a connected party
 - Within the first eight weeks



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Any questions?

(Next month)

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Next month

Monday 14 November 2022

10.30 am

Remuneration in bankruptcies

Any questions?

(Next month)

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