

To CE-File or not to CE-File: notices of intention to appoint an administrator and notices of appointment of an administrator

By Kelly Bond

A discussion of the use of CE-File to file notices of intention to appoint an administrator (NOI) and notices of appointment of an administrator (NOA) following the recent decision in Re Symm & Company Limited [2020] EWHC 317 (Ch) and the introduction of the Temporary Practice Direction Supporting the Insolvency Practice Direction (TIPD) on 6 April 2020

1. TIPD will remain in force until 1 October 2020 unless amended or revoked in the meantime (TIPD, para. 2). A briefing note dealing with the other provisions of the TIPD is available separately.
2. **TIPD, para. 3** deals with out-of-court appointment of administrators using CE-File.

Electronic Working rules

3. Practice Direction 51O - The Electronic Working Pilot Scheme (PD51O), para. 1.2(2) permits the use of CE-Filing for electronic delivery of documents to the court for the purposes of Insolvency (England and Wales) Rules 2016 (IR). This includes NOIs and NOAs.
4. Under PD51O, para. 5.3(1) submission of a document using CE-File generates an automated notification acknowledging that the document has been submitted and is being reviewed by the court prior to being accepted.
5. Certainty over the time of filing is crucial. In the case of NOAs this determines when the appointment of an administrator takes effect under Schedule B1 to the Insolvency Act 1986, paras. 19 and 31. In the case of directors and companies NOIs, it determines when the 10 business-day window for making an appointment commences under para. 28(2) of the said Schedule.
6. The general rule about time of filing is contained in IR rule 1.46(2), which provides,
“A document delivered by electronic means is to be treated as delivered to the court at the time it is recorded by the court as having been received or otherwise as the CPR, a Practice Direction or these Rules provide.”

Notices filed during court hours

7. TIPD makes alternative provision for the purposes of IR rule 1.46(2) as follows.

8. An NOI or NOA filed using CE-File *during* court opening hours is “*treated as delivered to the court at the date and time recorded in the Filing Submission Email*”¹ for the purposes of IR rule 1.46(2) (TIPD, para. 3.1).
9. It appears that court opening hours are to be classed as “*10:00 hours to 16:00 hours on any day that the courts are open for business*”² (TIPD, paras. 3.1, 3.3 and 3.4).

Notices filed out of court hours

10. Before turning to the provisions of TIPD which deal with out of hours filing using CE-File, it is necessary to consider the all-important context and an unresolved controversy which has arisen in multiple cases before the High Court.

Background

11. In the days when documents had to be filed physically, the court office had to be open for an NOI or NOA to be filed. Hard copy notices were and continue to be endorsed by hand with the date and time of filing.
12. With the advent of technology provisions were introduced by Insolvency Rules 1986, rules 2.16 and 2.19 to permit a qualifying floating charge holder to file an NOA when the court was closed (and only when it was closed) by fax. The date and time shown on the appointer’s fax transmission report was the time of filing and these details would be endorsed on the NOA by the court. In time the rules were amended to enable filing out of hours by e-mail. The date and time that the e-mail was sent were the date and time of filing. The procedure set out in the rules includes important procedural safeguards which must be followed.
13. Importantly, no similar provision was made for filing NOIs and NOAs by directors or companies out of hours. Any such notice had to be filed in the usual way when the court was open.
14. IR rules 3.20-3.22 replicate the provisions of the 1986 Rules on out of hours filing for NOAs by qualifying floating charge holders. It remains the case under the IR that the rules do not permit out of hours filing of notices by directors or companies.
15. These rules derive from the pre-Electronic Working era.
16. On 16 November 2015 PD51O came into effect to enable the use of CE-File in certain courts. CE-File enables parties to issue proceedings and file documents 24 hours a day, every day of the year.
17. The predecessor to IR rule 1.46 in the 1986 Rules was introduced in anticipation of the use of electronic filing in insolvency proceedings.

¹ Defined as “the email referred to at paragraph 5.3(1) of PD51O, generated by automatic notification following submission of a document using Electronic Working, which email acknowledges that the document has been submitted” (para. 1)

² Note that para. 3.5 (dealt with below) refers to “Normal Court Opening Hours” but this is not a defined term in TIPD and may be a drafting anomaly.

18. PD51O, para. 2.1(c) excludes the use of CE-File for out of hours qualifying floating charge holder appointments as follows,

“(c) where the filing is of a notice of appointment by a qualifying floating charge holder under Chapter 3 of Part 3 of the IR 2016 and the court is closed, in which case the filing must be in accordance with rule 3.20 of the IR 2016.”
19. This was no doubt to ensure that the procedural safeguards for out of hours filings, first built into the 1986 Rules and continued by IR, are not circumvented by use of CE-File.
20. A striking omission from PD51O was a similar exclusion for use of CE-File out of hours for company and directors NOIs and NOAs.
21. This gave rise to the possibility that, for the first time, directors and companies could file notices out of hours (by using CE-File).
22. The Practice Direction – Insolvency Proceedings (PDIP), para. 8.1 apparently sought to cure this:

“Attention is drawn to paragraph 2.1 of the Electronic Practice Direction 51O -The Electronic Working Pilot Scheme, or to any subsequent Electronic Practice Direction made after the date of this IPD, where a notice of appointment is made using the electronic filing system. For the avoidance of doubt, and notwithstanding the restriction in sub-paragraph (c) to notices of appointment made by qualifying floating charge holders, paragraph 2.1 of the Electronic Practice Direction 51O shall not apply to any filing of a notice of appointment of an administrator outside Court opening hours, and the provisions of Insolvency Rules 3.20 to 3.22 shall in those circumstances continue to apply.”
23. The stipulation that, *“paragraph 2.1 of the Electronic Practice Direction 51O shall not apply to any filing of a notice of appointment of an administrator outside Court opening hours”* [emphasis added] appears to have been intended to extend the exclusion from use of CE-File to out of hours to notices filed by directors and companies.
24. However, the addition of the words *“and the provisions of Insolvency Rules 3.20 to 3.22 shall in those circumstances continue to apply”* render the position hopelessly confusing, because IR rules 3.20-3.22 do not apply to company and directors notices, only to qualifying floating charge holder NOAs.
25. The resulting ambiguity has resulted in seven conflicting High Court decisions on the question of whether CE-File is a permissible method of filing notices out of hours and, if it is not, whether this is an irregularity that invalidates appointments. The most recent published decision is of Zacaroli J. on 5 February 2020 in **Re Symm & Company Limited** [2020] EWHC 317 (Ch), which fully rehearses the legislative and procedural background and surveys the preceding authorities. Appointers can take some comfort from this most recent decision which upheld the validity of an NOA filed using CE-File.
26. Due to the current unsatisfactory state of the law is it clear that a rule change is required to resolve the issue and such a change is anticipated.
27. In the meantime the Chancellor issued guidance on 29 January 2020 providing for all NOAs filed using CE-File out of hours to be referred to a Judge for a determination on

the validity of the appointment and the time at which it takes effect. This is available at <https://www.judiciary.uk/announcements/chancellor-of-the-high-court-guidance-note-on-appointing-an-administrator/>

28. To avoid the issues raised in these cases, the advice remains that wherever possible notices should be filed when the court is open.

TIPD provisions

29. A **company or directors** NOI or NOA filed using CE-File *out of court* opening hours³ is treated for the purposes of IR rule 1.46(2) as delivered to the court “*at 10:00 hours on the day that the courts are next open for business*” (TIPD, paras. 3.3 and 3.4). In the case of an NOA, the 10 business-day window for appointments to be made in Schedule B1, para. 28(2) begins on that date.
30. Whilst a rule change is required to deal with the *validity* issue identified in the authorities, TIPD has provided welcome clarification of the *time* at which a notice filed using CE-File is delivered to the court. It is now clear that if an NOA filed using CE-File is determined to be valid, the appointment will not take effect at the time recorded in the e-mail submission acknowledgment but at 10:00 a.m. on the next court business day. In effect, even if directors and companies use CE-File to submit an NOA out of hours, the appointment (if valid) will **not** take effect out of hours but at 10:00 a.m. on the next court business day.
31. A **qualifying floating charge holder** NOA may not be filed using CE-file outside “Normal Court Opening Hours” (undefined by TIPD). The procedure set out in IR, rules 3.20 to 3.22 must be followed (TIPD, para. 3.6), which applies to NOAs filed by qualifying floating charge holders when, but only when, the court is closed. In effect, qualifying floating charge holders can make appointments which take effect out of hours but can **only** do so using the procedure in the IR and cannot take a shortcut using CE-File.
32. It remains to be seen how the court will deal with a qualifying floating charge holder’s NOA filed out of hours using CE File. The logical course might be to treat the time of delivery as 10:00 a.m. on the next court business day by analogy with the provision for directors and companies notices. If an appointer, realising their mistake, files a further notice out of hours by fax or e-mail in accordance with the procedure in IR rr. 3.20-3.22, the earlier notice filed by CE-File would presumably not result in a valid appointment, an appointment having already been made in the meantime using the proper out of hours procedure.

Effect of delays in acceptance of notices by the court

33. NOIs and NOAs shall continue to be reviewed by the court, as and when practicable, in accordance with PD510, para. 5.3. The validity and time at which the appointment of an administrator is effective shall not be affected by reason only of any delay in acceptance of an NOA by the court (TIPD, para. 3.5).

KELLY BOND

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³ 10:00 hours to 16:00 hours on any day that the courts are open for business