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In Practice

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Why statutory declarations by video conference are lawful

KEY POINTS

- Because of doubts about whether para 9 of the Temporary Insolvency Practice Direction is effective, it is worthwhile considering whether primary legislation already permits statutory declarations by video conference.
- Under s 2 of the Statutory Declarations Act 1835 (SDA 1835) a person who would otherwise have to make an oath was instead to *'make and subscribe'* a declaration *'in the presence of'* a person empowered to administer the oath.
- Although no reported case has yet considered what *'in the presence of'* means in SDA 1835, the history of the use of those words and the purpose of the Act indicate that presence here encompasses presence by video conference.

Just two weeks after 'lockdown', the Lord Chancellor approved the Temporary Practice Direction Supporting the Insolvency Practice Direction (TIPD). Paragraph 9 of the TIPD provides that insolvency proceedings will not be invalid just because a statutory declaration was made by video conference.

Paragraph 9 was intended to reassure insolvency officeholders that their appointments would be valid even if they depended on a statutory declaration made by video conference. Officeholders had needed reassurance because some questioned whether it was lawful to make a statutory declaration by video conference and because appointors need to make a statutory declaration to put a company into administration without court order or put a company into members' voluntary liquidation (Insolvency Act 1986, s 89 and Sch B1, paras 18, 27, 29). Without the reassurance, officeholders may have refused to accept appointments made by video conference and unintentionally encouraged prospective appointors to breach social-distancing guidelines.

THE TIPD

Because primary legislation – the Interpretation Act 1978 and the Statutory Declarations Act 1835 (SDA 1835) – defines *'statutory declaration'*, the TIPD cannot change what appointors have to do to make a valid statutory declaration.

Instead, the TIPD uses r 12.64 of the Insolvency (England and Wales) Rules 2016 (SI 2016/1024) (IR 2016) to minimise the consequences of making an invalid statutory declaration. Rule 12.64 says: *'No insolvency proceedings will be invalidated by any formal defect or any irregularity unless the court before which objection is made considers that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of the court.'* In turn, TIPD para 9 provides that, so long as the statutory declaration is made by video conference, states that it has been made by video conference and is attested as having been made by video conference, any *'defect or irregularity… arising solely from the failure to make the statutory declaration in person before a person authorised to administer the oath shall not by itself be regarded as causing substantial injustice'*.

If effective, TIPD para 9 means no insolvency proceedings will be invalid just because the appointor made a statutory declaration by video conference, so long as the appointor complied with the formal requirements in para 9.

But some might doubt whether TIPD para 9 *is* effective. For a start, first-instance authority suggests the court has no power under IR 2016 r 12.64 to uphold an appointment which is a 'nullity' because of a fundamental defect (*Re Frontsouth (Witham) Ltd* [2011] EWHC 1668 (Ch), [2011] BCC 635; *Re Euromaster Ltd* [2012] EWHC 2356 (Ch), [2012] BCC 754; *Re HMV Ecommerce Ltd* [2019] EWHC 903 (Ch), [2019] BCC 887 at [15]). A failure to make a valid statutory declaration might be a fundamental defect.

In addition, some might argue that a practice direction cannot abrogate the individual judge's duty under r 12.64 to decide whether the irregularity has caused substantial injustice in the individual case. Rules, which have statutory force, cannot generally be altered by practice directions (*Bovale Ltd v Secretary of State for Communities and Local Government* [2009] EWCA Civ 171, [2009] 1 WLR 2274 at [11] and [27]).

Because of these doubts, it is worthwhile considering whether the primary legislation already permits statutory declarations by video conference. Doing so is also worthwhile because some appointors will wish to make statutory declarations by video conference even after the TIPD loses force on 1 October 2020.

PRIMARY LEGISLATION

Under the Interpretation Act 1978, a statutory declaration is *'a declaration made by virtue of the Statutory Declarations Act 1835'*.

Parliament passed SDA 1835 to reduce the number of oaths made. It worried that the reverence attached to oaths had shrunk because tradesmen had to make them too often (see HL Deb (15 July 1831) vol 4 col 1308-11). As the Bishop of London put it in the House of Lords: *'A pound of tea cannot travel regularly from the ship to the consumer, without costing half a dozen oaths at least'* (HL Deb (20 June 1833) vol 18 col 1016).

In Practice

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SDA 1835 met this concern by empowering the Treasury to replace requirements for oaths with requirements for unsworn declarations. Under s 2, the person who would otherwise have to make an oath was instead to '*make and subscribe*' a declaration '*in the presence of*' a person empowered to administer the oath.

The words '*in the presence of*' are the source of doubt about whether an appointor can make a statutory declaration by video conference. Sometimes the word '*presence*' imports a requirement for physical proximity. Sometimes the word has a broader meaning: take, for example, company model articles which recognise presence at meetings by telephone or video link.

Although no reported case has yet considered what '*in the presence of*' means in SDA 1835, the history of the use of those words and the purpose of SDA 1835 indicate that presence here encompasses presence by video conference.

HISTORY

Let us start with history. By the time SDA 1835 passed, several judges had considered what '*in the presence of*' meant. That was because s 5 of the Statutory of Frauds 1677 stipulated that witnesses must attest a will devising land '*in the presence of*' its maker.

In wills cases, whether someone was '*in the presence*' of another did not depend on the distance between the testator and the witness but rather on whether the testator could have seen the witness sign the will. Thus in *Shires v Glascock* (1687) 2 Salk 688, 91 ER 584 the witness was in the testator's presence when the testator could have seen the witness sign the will by looking through a broken window. Similarly, in *Casson v Dade* (1781) 1 Bro CC 99, 28 ER 1010; (1781) Dick 586, 21 ER 399 the witness was in the testator's presence when the testator could have seen the witness sign by looking through her carriage window and an attorney's office window. But in *Doe, on the demise of Wright v Manifold* (1813) 1 Maule and Selwyn 294, 105 ER 110 the witness was not in the testator's presence because the bedridden testator could not have seen the witness sign in a neighbouring room even if he had leant his head into the corridor. In that case, the Lord Chancellor explained that a witness was '*in the presence of the testator*' when within reach of the testator's '*organs of sight*'.

Not long after Parliament passed SDA 1835, it replaced s 5 of the Statute of Frauds 1677 with s 9 of the Wills Act 1837. The new section required both that a testator make or acknowledge his signature '*in the presence of two or more witnesses present at the same time*' and that each witness either attest and sign the will or acknowledge his signature '*in the presence of the testator*'.

The Wills Act 1837 has been interpreted in the same way as the Statute of Frauds 1677. In *Hudson v Parker* (1844) 1 Rob Ecc 14; 163 ER 948, the Court of King's Bench held that a testator cannot sign a will in the presence of someone unaware of the signing, with one of the judges, Dr Lushington, explaining that presence meant '*mental, not bodily, presence*'. Citing this explanation, Pearce J held in *Re Gibson* [1949] P 434 at 437, 440 that testators cannot sign wills '*in the presence of*' blind witnesses.

If the interpretation of '*presence*' in the wills cases were applied to statutory declarations, a statutory declaration could be made by video conference. The person making the declaration would be in the presence of the commissioner for oaths because the commissioner could hear them make, and see them sign, the declaration. (Whether it is lawful to make a will or deed by video conference is a more complicated question, beyond the scope of this article. Apart from anything else, the validity of a will or deed usually depends on valid attestation, which may need to be contemporaneous with signature, something which may be difficult to achieve by video conference.)

PURPOSE

Let us now consider the purpose of the requirement for the presence of the commissioner for oaths in SDA 1835. Like the requirement for the presence of the testator in s 5 of the Statute of Frauds 1677 and s 9 of the Wills Act 1837, the purpose of this requirement must be to prevent fraud. The commissioner's jurat reliably identifies the declaration, who made it, and when.

This purpose is not thwarted by allowing commissioners to take statutory declarations over video conference. The commissioner need not be physically present at the signing for his or her attestation to identify the declaration reliably. All that matters is that the commissioner can ensure that the document they attest is the declaration made. A commissioner can do this over video conference.

CONCLUSION

In sum, both the history of the words '*in the presence of*' and the purpose of the SDA 1835 s 2 point towards interpreting SDA 1835 s 2 as allowing a statutory declaration by video conference.

Since little points the other way, the courts should adopt this interpretation. It does not matter that video-conference technology did not exist when Parliament passed SDA 1835. Courts must interpret and apply a statute to the world as it exists today (see *R v Ireland* [1998] AC 147 at 158A-159, holding that '*bodily harm*' in s 47 of the Offences against the Person Act 1861 encompassed psychiatric injury although the Victorian Parliament would not have had psychiatric injury in mind, and *McCartan Turkington Breen v Times Newspapers Ltd* [2001] 2 AC 277 at 295H-296G). In interpreting SDA 1835, the courts need only recognise that modern technology has extended the reach of the '*organs of sight*'.

Two practical benefits will follow. First, officeholder appointments will survive a successful challenge to the TIPD. Second, appointors will be able to make statutory declarations by video conference even when the TIPD loses force. ■