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Case Nos: CR-2009-0039, 0041, 0042, 0046, 0049 and 0050

IN THE HIGH COURT OF JUSTICE
THE BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES
COMPANY AND INSOLVENCY LIST (ChD)

Rolls Building,
Fetter Lane
London EC4A 1NL

Date: 24 August 2018

Before :

MR JUSTICE SNOWDEN

IN THE MATTERS OF

- (1) NORTEL NETWORKS INTERNATIONAL FINANCE & HOLDING BV
("NNIF")
(2) NORTEL NETWORKS SRO ("Nortel Czech Republic")
(3) NORTEL NETWORKS ENGINEERING SERVICE KFT ("Nortel Hungary")
(4) NORTEL NETWORKS AB ("Nortel Sweden")
(5) NORTEL NETWORKS OY ("Nortel Finland")
(6) NORTEL NETWORKS ROMANIA SRL ("Nortel Romania")

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Ms. Charlotte Cooke (instructed by **Herbert Smith Freehills LLP**) for the Applicant
Administrators
Mr. Matthew Bullen of **Hogan Lovells International LLP** for the Trustee of the Nortel
Networks UK Limited Pension Plan

Hearing date: 23 August 2018

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

MR JUSTICE SNOWDEN

MR JUSTICE SNOWDEN :

Introduction

1. These are applications (the “Applications”) by the joint administrators of the above named companies (the “Administrators” and the “Companies”) for orders: (i) pursuant to paragraph 79(1) of Schedule B1 to the Insolvency Act 1986 (the “Act”) terminating their appointments; (ii) pursuant to paragraph 98 of Schedule B1 to the Act discharging them from liability with effect from 28 days after their appointments have been terminated; and (iii) approving their recent remuneration as administrators and/or supervisors of company voluntary arrangements in respect of the Companies.

Background

2. As is well-known, the Nortel group was a global supplier of networking solutions, operating through entities based in the US, Canada, and Europe, the Middle East and Africa (EMEA). The Companies are members of the EMEA sub-group of Nortel entities. Nortel Finland is a subsidiary of Nortel Sweden. NNIF is the immediate parent company of Nortel Sweden and each of the other applicant Companies. NNIF is itself wholly owned by Nortel Networks UK Limited (“NNUK”).
3. The Companies were each placed into administration by orders of Mr Justice Blackburne on 14 January 2009. The Administrators’ terms of office have been extended a number of times, most recently by an order which I made on 14 December 2017 extending the administrations until 13 January 2019.
4. After appointment, the Administrators managed the business, affairs and property of the EMEA debtors during the negotiation and consummation of a sale of the global Nortel business, and then participated in litigation in the US and Canada between the groups referred to as the “US Debtors”, the “Canadian Debtors” and the “EMEA Debtors” over the appropriate allocation of the sale proceeds between the relevant Nortel entities. That allocation dispute was eventually settled pursuant to a “Global Settlement” entered into in October 2016 which became effective in May 2017, following which substantial sums were released to the various parties, including the Administrators, for distribution to the creditors of the various Companies. One feature of the Global Settlement was the provision by NNUK of a “top-up” to enable payment by other EMEA debtors of their external unsecured creditors to the level of 100p in the £, but excluding interest for the period from the date the Companies were placed into administration.
5. In April 2017, and in anticipation of the receipt of the allocation of the sale proceeds, the Administrators proposed company voluntary arrangements (the “CVAs”) in respect of NNIF, Nortel Sweden, Nortel Czech Republic and Nortel Hungary (the “CVA Companies”). The CVAs were duly approved by creditors, and the Administrators were appointed as supervisors of the CVAs (the “CVA Supervisors”). Distributions were then made by the CVA Supervisors of each CVA Company as follows:

- i) NNIF: all creditors have been paid 100% of their claims and have been paid a commercial rate of interest of 3.76% per annum for the period from the date of the Administrators' appointment to the date of payment in full. The CVA distributions totalled £755,561.28 on account of principal and £253,579.96 on account of interest;
 - ii) Nortel Sweden: all creditors have been paid 100% of their claims and have been paid commercial interest at a rate of 2.8% per annum, with CVA distributions totalling £124,149.37 on account of principal and £32,383.17 on account of interest;
 - iii) Nortel Czech Republic: all creditors (save NNUK in respect of an intercompany subordinated debt) have been paid 100% of the principal amount of their claims. Such distributions totalled £1,764,769.53. By reason of the limited available assets and the limit on the terms of the "top-up" from NNUK, no payments have been made on account of interest; and
 - iv) Nortel Hungary: all creditors (save NNUK in respect of an intercompany subordinated debt) have been paid 100% of the principal amount of their claims. Such distributions totalled £1,011,250.01. For the same reasons as in relation to Nortel Czech Republic, no payments have been made on account of interest.
6. The terms of each CVA provided that the CVA Supervisors should serve a Notice of Termination on the creditors in certain circumstances including (i) if any assets remaining after the payment of all claims in full (including interest) had been returned to the Administrators and/or the Company, and (ii) the CVA Supervisors had distributed all assets in accordance with the terms of the CVAs and there were no further assets available for distribution under the CVAs. As the CVA Supervisors have paid all creditors of NNIF and Nortel Sweden in full (together with commercial interest in full) and the Administrators are not aware of any further assets of Nortel Hungary or Nortel Czech Republic, the CVA Supervisors of each of the CVA Companies served notices of termination of the CVAs on the creditors. Each of the CVAs terminated in July 2018.
 7. There remain assets of significant value in NNIF and Nortel Sweden. NNIF and Nortel Sweden hold approximately £55 million and £2.4 million of cash respectively. In addition, as the intermediate holding company, NNIF holds shares in 16 other companies in the Nortel EMEA group; and Nortel Sweden holds the shares in Nortel Finland.
 8. For reasons of cost efficiency, CVAs were not promulgated in respect of Nortel Finland and Nortel Romania. However, the Administrators declared first interim distributions of 95p in the £ to non-preferential creditors of Nortel Finland and Nortel Romania on 5 December 2017. They subsequently declared final dividends of 5p in the £ on 4 May 2018, bringing total dividends paid to 100p in the £ (save to NNUK in respect of a subordinated debt owed by Nortel Romania). In total, the Administrators have made distributions of £13,084.53 to creditors of Nortel Finland and of £466,085.61 to creditors of Nortel Romania. The Administrators are not aware of any further assets of Nortel Finland or Nortel Romania.

Termination of the Administrators' Appointments

9. Paragraph 79 of Schedule B1 to the Act provides as follows:

“(1) On the application of the administrator of a company the court may provide for the appointment of an administrator of the company to cease to have effect from a specified time.

....

(3) The administrator of a company shall make an application under this paragraph if -

(a) the administration is pursuant to an administration order, and

(b) the administrator thinks that the purpose of administration has been sufficiently achieved in relation to the company.

(4) On an application under this paragraph the court may -

(a) adjourn the hearing conditionally or unconditionally;

(b) dismiss the application;

(c) make an interim order;

(d) make any order it thinks appropriate (whether in addition to, in consequence of or instead of the order applied for).”

10. Having terminated each of the CVAs and made final distributions to creditors of Nortel Finland and Nortel Romania, the Administrators are of the view that the purposes of the administrations have been sufficiently achieved for each of the Companies. They are therefore obliged to make applications pursuant to paragraph 79(3) of Schedule B1 to the Act.

11. The Administrators submit that the termination of their appointment should in each case be conditional on the commencement by each Company's relevant shareholder, or by application to the competent court, of a process to wind up the Company in accordance with the law of the jurisdiction of that Company's incorporation. This is because solvent liquidations which enable distributions of surplus assets to shareholders are necessary in the cases of NNIF and Nortel Sweden and further assets may be realised by the liquidator in the course of the winding-up. Absent a solvent liquidation, on termination of the administrations responsibility for those assets would pass to the directors of NNIF and Nortel Sweden. Neither the directors nor the Administrators consider it appropriate for the directors to bear this responsibility, even for a short time.

12. Similarly, in the case of Nortel Czech Republic, Nortel Hungary, Nortel Finland and Nortel Romania, the Administrators submit that it would not be appropriate for the

Companies to be handed back to the control of the directors in circumstances where the only remaining task would be to arrange for the winding up of those companies. Having managed the business and affairs of the Companies for almost ten years, the Administrators submit that they should bear the responsibility of placing those Companies into solvent or insolvent liquidation (as the case may be).

13. I accept those submissions. Given the time which it will take for the various liquidation processes to be commenced, I will specify that the appropriate procedures should be commenced within 45 days, save in respect of Nortel Czech Republic where a slightly longer period of 60 days is required. Should the winding up of any Company not have commenced within the specified time, the Administrators should return to Court for further directions.

Discharge from Liability

14. Paragraph 98 of Schedule B1 to the Act provides as follows:

“(1) Where a person ceases to be the administrator of a company (whether because he vacates office by reason of resignation, death or otherwise, because he is removed from office or because his appointment ceases to have effect) he is discharged from liability in respect of any action of his as administrator.

(2) The discharge provided by sub-paragraph (1) takes effect -

- (a) in the case of an administrator who dies, on the filing with the court of notice of his death,
- (b) in the case of an administrator appointed under paragraph 14 or 22, at a time appointed by resolution of the creditors’ committee or, if there is no committee, by resolution of the creditors, or
- (c) in any case, at a time specified by the court.

...

(4) Discharge -

- (a) applies to liability accrued before the discharge takes effect, and
- (b) does not prevent the exercise of the court’s powers under paragraph 75.

15. The Administrators were appointed by the Court and they therefore seek an order pursuant to paragraph 98(2)(c) of Schedule B1 that they shall have their discharge from liability in respect of any of their actions as administrators.

16. When asked to grant a discharge, the Court is naturally concerned to ascertain what, if any, liabilities the administrators in question might possibly have in respect of any of their actions. In this case, certain claims were intimated or asserted against the Administrators by (among others) the US Debtors, the Canadian Debtors and the Trustee of NNUK's Pension Plan ("the Pension Trustee") in connection with the dispute over the allocation of the global sale proceeds at an earlier stage in the administrations. However, such claims were released pursuant to the terms of the Global Settlement. Moreover, by an earlier order that I made in the administrations, a Bar Date was set for submission of any administration expense claims, and the terms of each CVA provided that each unsecured creditor of a CVA Company irrevocably and unconditionally discharged the Administrators from any liability in connection with their acts, omissions or default as administrators. Apart from such matters, the Administrators are in any event not aware of any claims made against them which have not been dealt with during the course of the administrations, and they are not aware of any facts and matters which might give rise to any further claims.
17. All creditors (including those who have been paid in full) of each Company were given notice on 2 August 2018 of the Administrators' intention to make the Applications to cease to be administrators and to be discharged from any liabilities, and creditors were given specific notice of the making of the Applications on 8 August 2018. No responses or objections have been received.
18. I therefore consider that it is appropriate to grant the Administrators, who will no longer have any substantial assets of the Companies in their hands out of which to meet any liabilities properly incurred by them, their discharge from liability pursuant to paragraph 98 of Schedule B1. Pursuant to paragraph 98(2)(c) I shall specify that the discharge shall take effect from 28 days after the cessation of the appointment of the Administrators. This follows the approach of Hildyard J in *Re Lehman Brothers Holdings UK Limited (in administration)* [2016] EWHC 3552 (Ch) at [10].

Remuneration

19. The application to approve the remuneration of the Administrators in their capacity as administrators is made in respect of NNIF, Nortel Sweden, Nortel Hungary and Nortel Romania. No such application is made in respect of Nortel Czech Republic or Nortel Finland, as the creditors in those two companies passed resolutions in 2009 and 2010 respectively authorising the Administrators to draw remuneration on a time costs basis without further recourse to the creditors (and no application has subsequently been made to challenge any such drawings). The Administrators also make application in respect of their remuneration as CVA Supervisors in respect of the CVA Companies pursuant to the terms of the respective CVAs.
20. So far as the application for remuneration as administrators is concerned, it was decided at the outset that the basis of the Administrators' entitlement to remuneration was to be fixed by reference to the time properly given by them and their staff to the matters in the administration. In that regard, the Statements of Proposals in respect of each of the relevant Companies provided, inter alia, that:

"The Administrators shall be paid their professional fees on account on a monthly basis of 80% of time charged as agreed

by a creditors' committee (should one be formed) in accordance rule 2.106 of the Insolvency Rules 1986. The remaining 20% per month shall be agreed by subsequent resolution of the committee/creditors/court."

21. On that basis, the Administrators have been drawing 80% of their time costs on account monthly in advance, and have regularly sought approval of all time costs from the creditors' committee of the respective Company or from the creditors. The creditors' committees or creditors (as appropriate) have always approved the remuneration of the Administrators. The Administrators' remuneration was last approved in this way in respect of NNIF up to 30 March 2018; in respect of Nortel Sweden up to 29 December 2017; in respect of Nortel Hungary up to 29 September 2017; and in respect of Nortel Romania up to 29 September 2017.
22. It is, however, no longer possible or appropriate for the Administrators to seek approval for their most recent activities in this way, because by reason of full payment of their debts, the members of the respective creditors' committees have automatically ceased to be creditors of the Companies and hence have ceased to be members of their creditors' committees by reason of the operation of Rule 17.11(e) of the Insolvency (England and Wales) Rules 2016 ("the Insolvency Rules 2016"). In the case of Nortel Romania and Nortel Hungary, NNUK is still left as an unpaid (subordinated) creditor, but for obvious reasons the Administrators do not, in their capacity as administrators of NNUK, consider that it is appropriate for them to approve their remuneration as administrators of those two Companies.
23. The Administrators therefore apply for the approval of their recent remuneration by the Court. Their applications are made pursuant to Rule 18.24(b) of the Insolvency Rules 2016, which provides that:

"An office-holder who considers the rate or amount of remuneration fixed to be insufficient or the basis fixed to be inappropriate may –

...

(b) apply to the court for an order increasing the rate or amount or changing the basis in accordance with rule 18.28."
24. The Administrators are seeking orders approving their remuneration for the periods:
 - i) from the last approval by the respective Company's creditors or creditors' committee to 20 July 2018 (being the last practicable date prior to the filing of the Applications up to which the Administrators are able to provide a full breakdown in respect of their remuneration) ("Period 1");
 - ii) and for the period from 21 July 2018 to the termination of the Administrators' appointment subject to a cap ("Period 2").
25. The Administrators' remuneration for which approval is sought amounts in total to £637,667.54 made up as follows:-
 - i) NNIF: £166,335.89 (£115,786.82 for Period 1 and £50,549.07 for Period 2).

- ii) Nortel Sweden: £92,757.55 (£76,555.01 for Period 1 and £16,202.54 for Period 2).
 - iii) Nortel Hungary: £254,046.20 (£237,200.47 for Period 1 and £16,845.73 for Period 2).
 - iv) Nortel Romania: £124,527.90 (£113,381.18 for Period 1 and £11,146.72 for Period 2).
26. Extensive schedules detailing the work done, time spent and charging rates of all of the individuals involved in the cases have been prepared in respect of each Company in accordance with Part Six of the Practice Direction: Insolvency Proceedings (2018). The evidence in support of those schedules explains in some detail how in each case the Administrators have endeavoured to avoid unnecessary duplication of work; have attempted to ensure that tasks were allocated to the appropriate grade of staff member and were carried out properly and in a cost-effective manner; have determined staff charge out rates; and have apportioned fees charged centrally as between the various EMEA companies in administration.
27. Although the ex-creditors of the Companies have been notified of the remuneration Application in accordance with Rule 18.28, none have appeared at the hearing or taken any points on the Application in correspondence.
28. For my part, although I have examined the schedules and the detailed evidence from the Administrators, the reality is that on an application of this magnitude I am simply not in a position to conduct a line-by-line analysis of the work done by the Administrators, or to investigate and verify the evidence of the Administrators as to how the work done has been organised and carried out. That would require a considerable amount of time, additional information and quite possibly the input of an experienced independent insolvency practitioner.
29. Accordingly, in the absence of any challenge to the remuneration now sought from any of the creditors (or ex-creditors) of the Companies, I must, I think, approach matters more broadly.
30. The amounts of remuneration which have been paid to date and which are now sought are large. But to put matters into context, I should first recognise that participation by the Administrators and their advisers in the cross-border insolvency proceedings for the worldwide entities in the Nortel EMEA group has been an exceptionally complex and demanding task. The size of the task can readily be seen from the fact that the global sale in which the Administrators played a significant role resulted in the receipt of US\$7.3 billion (net of costs), of which the entities in the EMEA group eventually received a total of just over £1 billion. The very demanding and complex nature of the insolvency proceedings can also be seen from a review of the periodic reports that the Administrators have made to creditors and from the numerous judgments in this jurisdiction and abroad dealing with the many issues that have arisen.
31. Secondly, the amounts of remuneration on a time cost basis which have previously approved by the creditors of the respective Companies are approximately as follows:
- i) NNIF: £6,908,255.

- ii) Nortel Sweden: £2,056,448.
- iii) Nortel Hungary: £2,135,431.
- iv) Nortel Romania: £770,227.

From those figures it can be seen that the creditors' committees or creditors of the Companies have previously thought fit to approve materially larger amounts of remuneration than those now claimed. Having regard to the work done and to be done in bringing the administrations to a close, it also appears to me that the amounts now claimed for Period 1 and projected for Period 2 do not seem significantly out of step with the remuneration which has been approved over the preceding periods.

- 32. Thirdly, Administrators' claimed remuneration in relation to these Companies can be compared to the total remuneration of the Administrators across all of the EMEA entities. This has amounted to in excess of £181 million, of which by far the largest remuneration has been a sum of more than £87 million paid in relation to the administration of NNUK. As a proportion of this amount, the amounts claimed in relation to the Companies are much more modest, providing some indication that the Administrators' charges have been fairly apportioned between the Companies and the other EMEA entities.
- 33. Fourthly, when considering the value provided by the Administrators to creditors, it is relevant that all of the external creditors of the Companies making this application have been paid in full (in two cases with commercial interest in full).
- 34. Against these points, it can be observed that the total amount of remuneration paid to and claimed by the Administrators is in each case significantly more than the amount which has been distributed to the external unsecured creditors of the relevant Company. Moreover, the fact that the external unsecured creditors have been paid in full means that those parties now have no incentive to take issue with the amounts claimed by the Administrators. The reality is that the economic effect of any overpayment of remuneration to the Administrators would be felt by the subordinated creditors and shareholders of the Companies. Given the corporate and intercompany debt structure to which I have referred, this means that the effect of any overpayment of remuneration to the Administrators of the Companies would be felt by NNUK as a subordinated intercompany creditor of some of the Companies and as the ultimate parent company of each of the Companies.
- 35. In that regard, I consider that it is highly significant that the largest single creditor of NNUK, the Pension Trustee, which accounts for about 95% of the unsecured claims against NNUK, has indicated that it strongly supports the Application by the Administrators. That support was initially expressed in a letter to me of 22 August 2018 from Hogan Lovells International LLP, the solicitors acting for the Pension Trustee, and was then helpfully expanded and explained by Mr. Bullen who appeared at the hearing at short notice from Hogan Lovells.
- 36. Mr. Bullen explained to me that the Pension Trustee is represented on the creditors' committee for NNUK, and in that capacity has considerable experience in reviewing the Administrators' claims for remuneration in relation to NNUK, which, as I have indicated, have been for amounts which far exceed the sums now claimed in respect

of the Companies. Mr. Bullen also indicated that in addition to having the services of Hogan Lovells, who have acted for some considerable time for the Pension Trustee in relation to Nortel, the Pension Trustee has also engaged PwC to review and sense-check the fees claimed in relation to NNUK.

37. Mr. Bullen indicated that with the benefit of this experience and information, Hogan Lovells had reviewed the Application and the evidence in support. Although they had not conducted a detailed review of the schedules which accompanied that evidence, Mr. Bullen told me that Hogan Lovells had satisfied themselves that the aggregate level of the remuneration claimed was fair and reasonable in the context of the administrations of the Companies.
38. Taking all of these factors together, I am persuaded that the remuneration claimed by the Administrators in respect of both Periods 1 and 2 for each of the Companies is fair and reasonable, and that it is appropriate for me to grant the approvals sought by the Administrators.
39. The position in relation to the remuneration sought by the Administrators in respect of their role as CVA Supervisors is more straightforward. The amounts claimed are far more modest, being as follows:
 - i) NNIF: £32,171.86 (£26,617.36 for Period 1 and £5,554.50 for Period 2).
 - ii) Nortel Sweden: £21,826.16 (£19,415.76 for Period 1 and £2,410.40 for Period 2).
 - iii) Nortel Hungary: £47,104.22 for Period 1.
 - iv) Nortel Czech Republic: £57,952.90 for Period 1.
40. These amounts have been separately justified in the evidence and schedules produced by the Administrators and I am satisfied that they are fair and reasonable in the context of operation of the CVAs. The payment of such amounts is also supported by the Pension Trustee for the reasons that I have explained.

Conclusion

41. I therefore propose to grant the relief sought by the Administrators.