Neutral Citation Number: [2019] EWHC 1182 (Ch)

Case Nos: CR-2009-0034, 0038 and 0043

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: 10 May 2019

Before :

MR JUSTICE SNOWDEN

- -

IN THE MATTERS OF

(1) NORTEL NETWORKS N.V. ("Nortel Belgium")
(2) NORTEL NETWORKS HISPANIA S.A. ("Nortel Spain")
(3) NORTEL NETWORKS PORTUGAL S.A. ("Nortel Portugal")

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

- -

Mr. Alex Riddiford (instructed by **Herbert Smith Freehills LLP**) for the Applicant Administrators

Hearing date: 3 May 2019. Additional evidence received on 8 May 2019.

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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.

2. The form of the application closely follows a similar application in relation to a number of other Nortel companies which I considered in a judgment given in August last year: Re Nortel Networks International Finance & Holding BV and others [2018] EWHC 2266 (Ch).

Background

3. 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 and, as their names suggest, are incorporated in Belgium, Spain and Portugal respectively. They are each subsidiaries of Nortel Networks International Finance & Holding BV ("NNIF") which is in liquidation in the Netherlands. NNIF is in turn wholly owned by Nortel Networks UK Limited ("NNUK").

4. 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 17 December 2018 extending the administrations until 13 January 2020.

5. 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 certain 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.

6. 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 each of the 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 Company as follows:

   i) Nortel Belgium: All creditors (save for NNUK in respect of certain subordinated claims) have been paid 100% of their claims and have been paid interest for the period from the date of the Administrators' appointment to the date of payment in full at a commercial rate of 4.13% per annum. CVA distributions totalled £5,331,367 in respect of principal. Distributions have also been made to NNUK on account of its subordinated claims, equivalent to 49.23p/£. This leaves NNUK as the sole remaining creditor in respect of a total balance of £6,693,560.24 of subordinated debt.

   ii) Nortel Spain: All creditors, including NNUK as subordinated creditor, have been paid 100% of their claims and have been paid interest in full at a commercial rate of 4.15% per annum. CVA distributions totalled £8,699,675 on account of principal. Nortel Spain continues to hold various assets, including cash of approximately £4.1 million, intercompany receivables of approximately £0.5m and potential tax receivables. These assets will be available for distribution to NNIF in Nortel Spain's local solvent liquidation.

   iii) Nortel Portugal: All unsecured, non-subordinated creditors have been paid 100% of their claims and have been paid interest in full at a commercial rate of 4.32% per annum. NNUK as subordinated creditor received payment of 100% of the principal of its debt claim, and an element of interest. CVA distributions totalled £1,111,255 on account of principal. Nortel Portugal has no assets available for distribution save for potential tax receivables, which will be available for distribution to NNIF in Nortel Portugal's local solvent liquidation.

7. 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. The CVA Supervisors of each of the Companies served notices of termination of the CVAs on the creditors. The CVA for Nortel Spain terminated on 12 November 2018: those for Nortel Belgium and Nortel Portugal terminated on 4 April 2019.

8. There remain assets of significant value in Nortel Spain and Nortel Portugal, including in particular the £4.1 million in cash in Nortel Spain.

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.
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> ….
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> (3) The administrator of a company shall make an application under this paragraph if -
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> (a) the administration is pursuant to an administration order, and
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> (b) the administrator thinks that the purpose of administration has been sufficiently achieved in relation to the company.
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> (4) On an application under this paragraph the court may -
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> (a) adjourn the hearing conditionally or unconditionally;
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> (b) dismiss the application;
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> (c) make an interim order;
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> (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, 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 by paragraph 79(3) of Schedule B1 to make applications pursuant to paragraph 79(1) for the termination of the administrations.

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 of a process to wind up the Company in accordance with the law of the jurisdiction of that Company's incorporation. This is essentially because the commencement of a solvent liquidation is necessary in the cases of Nortel Spain and Nortel Portugal to enable distribution of surplus assets to NNIF as shareholder. Absent a solvent liquidation, on termination of the administrations responsibility for the Companies and their assets would pass to the directors, and neither the directors nor the Administrators consider it appropriate for the directors to bear this responsibility, even for a short time. In relation to Nortel Belgium, although there are no surplus assets, having managed the business and affairs of the Company for almost ten years, the Administrators submit that they should bear the responsibility of placing it into insolvent liquidation or dissolution.

12. That process reflects the process adopted in the earlier Nortel application last year, and the evidence of the Administrators is that it has generally worked well. I therefore consider that I should apply a similar approach to this application. The detail of the

local procedures to be followed in Belgium, Spain and Portugal is set out in the evidence, and appears to be relatively straightforward and essentially administrative in nature. However, given the experience under the earlier order of the time which it can take for the relevant processes to be commenced, I will specify that the appropriate procedures should be commenced within 60 days rather than the 30 days specified in the earlier order. Should the liquidation or dissolution of any Company not have commenced within that time, the Administrators should return to the Court for further directions.

Discharge from Liability

13. 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 -
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> (a) in the case of an administrator who dies, on the filing with the court of notice of his death,
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> (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 -
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> (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.

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

15. 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 the relevant 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.

16. All creditors (including those who have been paid in full) of each Company were given notice on 4 April 2019 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 via the Nortel EMEA website on 15 April 2019 of the making of the Applications. No responses or objections have been received.

17. I therefore consider that it is appropriate to grant the Administrators, who, after termination of their appointments, 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 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] which I adopted in the previous application.

Remuneration

18. The application to approve the remuneration of the Administrators is made both in their capacity as administrators and in respect of their remuneration as CVA Supervisors pursuant to the terms of the respective CVAs.

19. 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."

20. 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 Nortel Portugal up to 29 September 2017; in respect of Nortel Belgium up to 30 March 2018; and in respect of Nortel Spain up to 29 June 2018.

21. 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 Belgium, 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 own remuneration as administrators of Nortel Belgium.

22. 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."

23. The Administrators are seeking orders approving their remuneration:

    i) for the period from the last approval by the respective Company's creditors or creditors' committee to 15 March 2019 (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"); and

    ii) for the period from 16 March 2019 to the termination of the Administrators' appointment, subject to a financial cap ("Period 2").

24. The Administrators' remuneration for which approval is sought amounts in total to £1,048,326.47 made up as follows:-

    i) Nortel Portugal: £342,197.33 for Period 1 and £18,907.73 for Period 2.

    ii) Nortel Belgium: £325,074.79 for Period 1 and £18,544.13 for Period 2.

    iii) Nortel Spain: £323,730.76 for Period 1 and £19,871.73 for Period 2.

25. 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] Bus LR 2358 (the "Insolvency Practice Direction"). 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.

26. Although the ex-creditors of the Companies have been notified of the remuneration Applications in accordance with Rule 18.28, none have appeared at the hearing or taken any points on the Application in correspondence.

27. As I indicated in my previous judgment, the reality is that on an application of this magnitude I am 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. In my earlier judgment I therefore adopted a broader approach. I propose to repeat that approach in relation to these Applications, but will supplement it by direct reference to the guidelines set out in the Insolvency Practice Direction.

28. First, it is significant – and an important factor to be taken into account when assessing the proportionality of remuneration under paragraph 21.2(7) of the Insolvency Practice Direction – that the 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.

29. Secondly, when considering the value of the service rendered by the Administrators to creditors in accordance with paragraph 21.2(4) of the Insolvency Practice Direction, it is highly relevant that all of the external creditors of the Companies concerned in these Applications have been paid in full, together with commercial interest.

30. Thirdly, when considering whether the amount and basis of the remuneration is fair and reasonable remuneration for the work properly undertaken or to be undertaken in accordance with paragraph 21.2(5) of the Insolvency Practice Direction, it is relevant both to inquire into the charging rates used, and to compare them and the overall amount claimed with the previously approved charge-out rates, and the amounts of remuneration on a time cost basis which have previously been approved by the creditors of the respective Companies. It seems to me that these comparisons are expressly contemplated in paragraphs 21.4.7 to 21.4.9 of the Insolvency Practice Direction.

31. As regards charging rates, the evidence is that the rates charged by the Administrators and their UK staff at E&Y London have changed only once during the administrations, and that those altered rates were approved by the creditors with effect from September 2016. The rates claimed for staff in E&Y's local offices have not been specifically approved by creditors, but in the Administrators' Statement of Proposals it was noted

that charges for core staff in the relevant location of each Company would be at local market rates. In addition, at least a broad indication of the range of charging rates for the local team in each jurisdiction has been included in the remuneration packs provided to the creditor committees during the administrations.

32. As to the comparison of amounts of remuneration previously approved and now claimed, I have, following the hearing, been provided with further detailed evidence from the Administrators. This shows that the total remuneration approved prior to the start of Period 1 for each of the Companies is as follows:

    i) Nortel Portugal: £1,506,001.77.

    ii) Nortel Belgium: £2,804,074.96.

    iii) Nortel Spain: £3,935,633.46.

33. The remuneration which was approved for the immediately preceding period of the administrations is as follows:

    i) Nortel Portugal: £126,792.63 (for the period 3 September 2016 – 29 September 2017).

    ii) Nortel Belgium: £310,919.88 (for the period 3 September 2016 – 30 March 2018).

    iii) Nortel Spain: £229,624.21 (for the period 30 September 2017 to 29 June 2018).

34. When the average monthly time costs are computed, it appears that there is a material increase in the average monthly charges claimed for Period 1 over the average monthly charges for the immediately preceding period, as follows.

    i) Nortel Portugal: £19,601.70 average per month for Period 1, as against £9,863.45 average per month for the preceding period (i.e. the average now claimed is 199% of the average previously approved).

    ii) Nortel Belgium: £28,331.49 average per month for Period 1, as against £16,504.62 average per month for the preceding period (i.e. the average now claimed is 172% of the average previously approved).

    iii) Nortel Spain: £38,165.93 average per month for Period 1, as against £25,677.95 average per month for the preceding period (i.e. the average now claimed is 149% of the average previously approved).

35. The Administrators have filed further evidence explaining these increases in the amounts claimed. Broadly speaking, the evidence is that there have been additional tasks undertaken in each of the administrations in Period 1 over and above the recurring tasks undertaken in previous periods. Those additional tasks essentially relate to planning for the exit of the Companies from administration. They include, in particular, increased time spent on ascertaining and considering the necessary local procedures to put the Companies into liquidation following termination of the administrations and (where appropriate) to distribute surplus assets, resolving all outstanding tax matters, and preparing for these Applications themselves.

36. I have been provided with some narrative describing the specific work done rather than a line-by-line review of the relevant line entries. The latter would plainly not be practicable. Suffice to say that the items in the narrative all seem to be legitimate and appropriate tasks for the Administrators and their staff to have been undertaking in preparation for and exit from administration and for these Applications.

37. The point is also made by the Administrators that there has been an element of "front-loading" (where possible) the costs of the work that would otherwise have to be carried out in Period 2 (which the court is being asked to approve prospectively). That can be illustrated by the fact that the remuneration sought in Period 2 is very significantly less than in relation to Period 1, and that the monthly average remuneration sought for Period 2 is between 20% and 51% of the average monthly remuneration approved for the period preceding Period 1.

38. The Administrators' claimed remuneration in relation to these Companies can also be compared to the total remuneration of the Administrators across all of the EMEA entities. This has amounted to in excess of £188 million, of which by far the largest remuneration has been a sum of about £88.3 million which has been approved by the creditors' committee in relation to NNUK. As a proportion of this amount, the amounts claimed in relation to the Companies are far less and are comparable with other EMEA companies of similar size and complexity.

39. This evidence provides some high-level support for a conclusion that the Administrators' charges which are common to all EMEA entities have been fairly apportioned between the Companies and the other EMEA entities. In that regard the Administrators' evidence also explains that the proportion of such central costs which have been borne in recent months by the Companies has increased as a result of the other Nortel companies entering liquidation following my order last year.

40. Taking these points together, I am satisfied that although the total fees now claimed for Periods 1 and 2 represent a material increase over those claimed in the preceding period, it is an increase that has been properly explained and justified.

41. Against these points, it can be observed that the total amount of remuneration paid to and claimed by the Administrators is very significant, even for complex administrations, and 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.

42. In this respect, 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 Nortel Belgium and as the ultimate parent company of each of the Companies.

43. In that regard, and as with the previous application, 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 Applications by the Administrators. I am entitled to take such views into account: see paragraph 21.4.11 of the Insolvency Practice Direction.

44. The Pension Trustee's support has been expressed in a letter to me of 30 April 2019 from its solicitors, Hogan Lovells International LLP. That letter explains that the Pension Trustee engaged an experienced insolvency practitioner and partner of PwC to scrutinise the Administrators' and CVA Supervisors' fees. Having done so, PwC had formed the view that there was nothing to suggest that the amount of fees claimed was unreasonable in the circumstances.

45. That review was supplemented by Hogan Lovells, who discussed matters with PwC and considered the fees claimed in the context of the guiding principles set out in the Insolvency Practice Direction. Having considered those matters, Hogan Lovells expressed the view that they did not believe that there were any factors weighing against granting the Applications. That view was confirmed by a representative of Hogan Lovells, Mr. Bullen, who attended the hearing.

46. I have also received resolutions signed by two of the other three members of the NNUK creditors' committee approving a resolution to the effect that the fees sought by the Administrators appear to be fair and reasonable. The final member of the creditors' committee has not responded for reasons that have been explained and which do not give me any cause to think that it might disagree with the Applications being made.

47. 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.

48. 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 significantly less in relative terms, being a total of £109,136.19 made up as follows:

    i) Nortel Portugal: £48,187.17 for Period 1 and £2,200.00 for Period 2.

    ii) Nortel Belgium: £34,930.52 for Period 1 and £2,200.00 for Period 2.

    iii) Nortel Spain: £21,618.50 for Period 1.

49. These amounts have been separately justified in the evidence and schedules produced by the Administrators. They represent a significant reduction in the monthly average when compared with the monthly average CVA costs for the preceding period. That reduction is explained in the evidence to be the result of the CVAs having terminated.

50. Taken overall, I am satisfied that the CVA fees claimed are fair and reasonable in the context of the operation of the CVAs. The payment of such amounts is also supported by the Pension Trustee and other members of the NNUK creditors' committee for the reasons that I have explained.

Conclusion

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