Neutral Citation Number: [2016] EWHC 2769 (Ch)

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
COMPANIES COURT

Royal Courts of Justice
Rolls Building, Fetter Lane
London, EC4A 1NL
Date: 3 November 2016

Before:

MR. JUSTICE SNOWDEN

IN THE MATTERS OF:-	
NORTEL NETWORKS UK LIMITED	**No. 536 of 2009**
NORTEL NETWORKS HISPANIA SA	**No. 535 of 2009**
NORTEL NETWORKS (AUSTRIA) GmbH	**No. 537 of 2009**
NORTEL NETWORKS SRO	**No. 538 of 2009**
NORTEL NETWORKS S.A.	**No. 539 of 2009**
NORTEL NETWORKS ENGINEERING SERVICE KFT	**No. 540 of 2009**
NORTEL NETWORKS (IRELAND) LIMITED	**No. 541 of 2009**
NORTEL GmbH	**No. 542 of 2009**
NORTEL NETWORKS FRANCE SAS	**No. 544 of 2009**
NORTEL NETWORKS OY	**No. 545 of 2009**
NORTEL NETWORKS ROMANIA SRL	**No. 546 of 2009**
NORTEL NETWORKS PORTUGAL SA	**No. 547 of 2009**
NORTEL NETWORKS AB	**No. 548 of 2009**
NORTEL NETWORKS INTERNATIONAL FINANCE & HOLDING BV	**No. 549 of 2009**
NORTEL NETWORKS NV	**No. 550 of 2009**
NORTEL NETWORKS SLOVENSKO	**No. 551 of 2009**
NORTEL NETWORKS S.P.A.	**No. 552 of 2009**
NORTEL NETWORKS BV	**No. 553 of 2009**
NORTEL NETWORKS POLSKA SP.Z.O.O	**No. 554 of 2009**

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

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William Trower QC and Alex Riddiford (instructed by **Herbert Smith Freehills LLP**) for the **Administrators of each of the above-named companies**
Michael Todd QC and Ben Shaw (instructed by **Skadden Arps Slate Meagher & Flom (UK) LLP**) for the **Conflict Administrator of Nortel Networks S.A.**

Hearing date: 31 October 2016

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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.

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MR JUSTICE SNOWDEN

MR. JUSTICE SNOWDEN:

1. This is an application by the administrators of 19 Europe, Middle East and Africa ("EMEA") companies in the Nortel group (the "Administrators"). The Administrators seek directions from the court that they be at liberty to perform and procure that the companies perform a global settlement of the vast majority of disputes that have arisen in relation to the affairs of the Nortel group and the distribution of the proceeds of sale of its assets which amount to about US$7.3 billion ("the Global Settlement").

2. The agreements comprising the Global Settlement were executed on 12 October 2016 but will only become effective upon the satisfaction of certain conditions. These conditions include a condition that the Administrators obtain this court's approval of the implementation of the Global Settlement by no later than Friday this week, 4 November 2016. It is then anticipated that the process of seeking the approval of creditors and the courts in Canada and the US will follow, with a longstop date of 31 August 2017, leading to a distribution of assets to the various insolvent estates worldwide shortly afterwards.

3. The background to the collapse of the Nortel group and the litigation that has led to the Global Settlement is complex. I shall simply sketch some of the more salient points for the purposes of this judgment.

The insolvency of the Nortel group

4. The Nortel group operated a global networking solutions and telecommunications business through more than 130 subsidiaries located in more than 100 countries. Nortel Networks Corporation, a publicly-traded Canadian company, was the ultimate parent company of the group, and Nortel Networks Limited was the primary Canadian operating company (together with a number of their subsidiaries, the "Canadian Debtors"). The Nortel group also included a group of US entities headed by Nortel Networks Inc, ("the US Debtors") and a group of entities based in the EMEA regions. The EMEA entities included in particular Nortel Networks UK Limited ("NNUK") (an English company), Nortel Networks SA ("NNSA") (a French company) and Nortel Networks (Ireland) Limited ("Nortel Ireland") (an Irish company).

5. The Nortel group collapsed in 2009. The Canadian Debtors and the US Debtors went into insolvency proceedings or filed for bankruptcy protection, and on 14 January 2009 the Administrators were appointed by this court to 19 of the EMEA entities ("the EMEA Companies") on the basis that their COMIs were in the UK. The Administrators are all partners or executive directors of Ernst & Young.

6. The administrations are all main proceedings under the European Insolvency Regulation. No secondary proceedings have been opened in respect of any of the EMEA Companies, save for NNSA, which in addition to going into administration in England ("the NNSA Main Proceeding"), also went into liquidation in France on 28 May 2009 (the "NNSA Secondary Proceeding").

7. As regards NNSA, a conflict administrator (the "Conflict Administrator") was also subsequently appointed by this court on 2 June 2015. This appointment was made in light of a perceived conflict between the interests of NNSA and the other EMEA Companies arising out of the first instance judgments in the Allocation Dispute to

which I shall refer below. The Conflict Administrator has also issued an application on behalf of NNSA in similar terms to the Administrators' application seeking the approval of the court to the Global Settlement.

The sale of the global Nortel businesses

8. After filing for insolvency protection in January 2009, the companies in the Nortel group continued to work together in an effort to co-ordinate a global reorganisation. When that proved impossible, it was decided to attempt a global sale of the businesses and assets of the group. To facilitate that sale, an Interim Funding and Settlement Agreement ("the IFSA") was entered into on 9 June 2009 with the approval of the courts in Canada, the US and the UK. The IFSA provided that the net proceeds from the global sale would be held in escrow pending agreement or court determination as to how the proceeds should be allocated amongst the parties to the agreement who included the Canadian Debtors, the US Debtors and the EMEA Companies.

9. Pursuant to the IFSA, various business lines and associated assets were sold for approximately US$3.285 billion during the course of 2009 and 2010 and the residual intellectual property rights (being patents, patent applications and related rights) were subsequently sold for US$4.5 billion. The net sale proceeds of about US$7.3 billion were paid into escrow bank accounts in New York ("the Lockbox") in accordance with the terms of the IFSA.

The current asset position and the debts of the EMEA Companies

10. About US$7.304 billion now remains in the Lockbox for distribution. Of this, about US$55 million has been agreed to be payable to reimburse the Canadian and US Debtors in relation to certain costs of the post-insolvency asset realisations, and US$5 million will be divided between the US Debtors and NNUK as a result of a tax restructuring.

11. On the liabilities side, the aggregated debts of the EMEA Companies are estimated at US$3.951 billion, of which the largest liabilities are the claims of certain pension funds and pension liabilities in the aggregate sum of US$3.135 billion (about 79.3% of total liabilities). Inter-company debts amount to about US$257 million (about 5.1% of total liabilities). Of the remaining liabilities, the larger claimants (or classes of claimants) include potential liabilities to former employees in the sum of US$163 million and claims by fiscal or social authorities in the sum of US$103 million.

The Allocation Dispute

12. Following extensive negotiations and three formal mediation processes, all of which failed, the task of determining how the monies in the Lockbox should be allocated between the various Nortel entities was, by agreement, given to the courts in the US and Canada. An allocation protocol was approved by both courts requiring a joint trial in the Ontario Superior Court of Justice (Commercial List) and the U.S. Bankruptcy Court for the District of Delaware ("the Allocation Trial").

13. At the Allocation Trial, one of the key issues was who owned the intellectual property ("IP"). The Canadian Debtors argued that as the holder of legal title to the various pieces of IP which were assigned to them by employees and subsidiary entities, they

should receive all or substantially all of the sale proceeds insofar as they related to IP. The Canadian Debtors argued that the value of fixed assets should be allocated to the entities which had surrendered those assets as part of the sales. The Canadian Debtors did not allocate value on the basis of customer assets separately from the value of IP.

14. The US Debtors argued that the value of the Nortel group's IP came from the ability to exploit it for profit in accordance with the licences granted by the group. As the US was the biggest market and generated the greatest share of global revenues, the US Debtors argued that they should receive the greatest portion of the sale proceeds.

15. The EMEA Companies argued that the IP belonged beneficially to those entities which had contributed to its creation, and that the value of the respective ownership interests should be measured by reference to the amounts spent on research and development over the relevant years by each Debtor. The EMEA Companies also argued for an allocation to be given in respect of separate categories of assets (particularly, customer assets and fixed assets) that had been sold, and not just in respect of IP. This was significant for many of the EMEA Companies which were not involved in the development of IP but which simply distributed or sold products (so-called Limited Risk Entities or "LREs"). In contrast, the US Debtors and Canadian Debtors tended to argue solely by reference to the various Debtor groupings collectively and were unclear as to what allocation, if any, would be due to the EMEA Companies other than NNUK, NNSA and Nortel Ireland (the so-called Residual Profit Entities or "RPEs").

16. The Judgments of Judge Gross in Delaware and Mr. Justice Newbould in Ontario were handed down on 12 May 2015 ("the Allocation Judgments"). Both Judges rejected the approaches promulgated by the US Debtors, Canadian Debtors and EMEA Companies and instead ordered that the Lockbox should be split in accordance with a "Modified Pro Rata" allocation mechanism calculated by reference to the percentage that "Allowed Claims" against each debtor's estate bear to the total Allowed Claims against all of the individual Nortel group entities. In particular, the Judges held that for the purposes of allocation,

    i) a claim that can be made against more than one individual Nortel Debtor can only be calculated and recognized once: therefore,

        a) claims on bonds issued by the Canadian Debtors and guaranteed by the US Debtors will only be recognized in the Canadian Debtors' estate as the issuer of the bonds for allocation purposes; and

        b) the debt claimed to be due from NNUK to the trustees of the occupational pension scheme of which NNUK was the principal employer ("the NNUK Pension Scheme") pursuant to section 75 of the Pensions Act 1995 shall be included in the allocation calculation; but any liability which may become due from any other EMEA Debtor company as a result of an exercise of the UK Pensions Regulator's powers under sections 43 to 51 of the Pensions Act 2004 to issue a financial support direction ("FSD") or a contribution notice ("CN") in relation to the NNUK Pension Scheme deficit will not be included in the pro rata allocation calculation;

ii) inter-company claims are to be included in the calculation; and

iii) cash in hand is to be excluded from the calculation.

17. In very broad terms, the primary arguments put forward by each of the EMEA Companies, US Debtors and Canadian Debtors at the Allocation Trial and the Modified Pro Rata allocation decided upon by the Judges have been estimated by the Administrators as likely to result in the following financial outcomes for each of the main Debtor groupings (taken as a whole).

Basis for allocation	**Approximate Allocation of Lockbox Proceeds (%)**		
	EMEA	**Canada**	**US**
EMEA theory	18.2	31.8	49.9
Canada theory	4.1	82.2	13.7
US theory	16.8	10.6	72.6
Modified Pro Rata	22.4	62.9	14.7

18. Following the handing down of the Allocation Judgments, the Joint Administrators sought to model the likely financial consequences of the Modified Pro Rata approach for the individual EMEA Companies. That task was complicated by the fact that none of the EMEA Companies had a final and binding figure for the total quantum of claims, and because even after further application to the US and Canadian Judges for clarification, there was still uncertainty as to how some of the adjustments to the Modified Pro Rata calculation should be applied to each company.

19. That modelling did, however, illustrate two points very clearly. The first related to the very large funding deficit in the NNUK Pension Scheme and the correspondingly very large debt due from NNUK under section 75 of the Pensions Act 1995. This very large liability resulted in NNUK being entitled to a much larger allocation from the Lockbox under the Modified Pro Rata allocation than would have been the case under any of the other rival arguments advanced at the Allocation Trial. The second point is that NNSA would fare very much worse under the Modified Pro Rata allocation than it would fare under any of the other allocation arguments. These points can be illustrated by the following table which gives the returns from the Lockbox as estimated by the Conflict Administrator.

	Approximate allocation of lockbox (US$ million)				
Basis for allocation	**Canadian Debtors**	**US Debtors**	**NNUK**	**Other EMEA Companies**	**NNSA**
EMEA Cos' Position	2,333	3,669	630	271	434
US Debtors' Position	777	5,329	531	365	335
Canadian Debtors' Position	6,031	1,005	98	30	173
Modified Pro Rata Position	4,632	783	1,653	150	118

20. Having considered the results of their modelling with their legal advisers, the Administrators considered whether it was in the interests of the EMEA Companies to appeal. Some of the EMEA Companies were projected to receive an amount under the Modified Pro Rata approach which was as good as, or better than, the outcome for which they had contended (e.g. NNUK and Nortel Poland) whereas other EMEA Companies were projected to receive a lower outcome than they had argued for (e.g. NNSA, Nortel Ireland and Nortel Germany).

21. With respect to the EMEA Companies other than NNSA, although for some entities the Modified Pro Rata outcome was not as high as they had argued for, the Administrators did not consider that any of those entities should file an appeal against the Allocation Judgments. The Administrators particularly had in mind that there was a risk that if the Judgments were reversed on the basis of the arguments of the Canadian Debtors, all of the EMEA Companies apart from NNSA risked receiving an allocation far less than under the Modified Pro Rata allocation, and some risked receiving zero or near zero. Even on the basis of the arguments of the US Debtors, the result for many of the EMEA Companies would not have been significantly better than under the Modified Pro Rata allocation.

22. There were, however, two exceptions to this general position. The first and most obvious was NNSA, for which the outcome of the Allocation Trial was effectively a worst case scenario. The Administrators considered the matter at length with the French liquidator in the NNSA Secondary Proceeding who informed them that in his view NNSA should appeal. This potential divergence of the interests of NNSA and the other EMEA Companies resulted in an appeal being instituted by NNSA in the US

and Canadian Courts and the appointment of the Conflict Administrator to handle the appeal on behalf of NNSA in the NNSA Main Proceeding.

23. The second exception was Nortel Ireland, which although doing rather better than would have been the case under the Canadian Debtors' arguments, would likely have fared better under either the EMEA Companies' own arguments or under the US Debtors' arguments. I shall return to consider the position of Nortel Ireland separately below.

24. In the US, appeals against the judgment of Judge Gross were filed by the US Debtors, NNSA and other parties in the US District Court for the District of Delaware. Contingent cross-appeals were filed by the Canadian Debtors and the EMEA Companies other than NNSA. These cross-appeals asserted that, in the event that the Modified Pro Rata approach was reversed on appeal, the US court should adopt the alternative approach originally argued for by each respective cross-appellant. Following an oral hearing in the US District Court, the US appeal was directly certified to the Court of Appeals for the Third Circuit on 23 May 2016 and the Third Circuit accepted the certification on 9 August 2016.

25. In the meantime, on 25 August 2015, the US District Court had recommended that further rounds of mediation should be undertaken. The first round of mediation took place in New York from 27 to 29 October 2015 with further rounds taking place in New York from 8 November to 11 November 2015, from 16 November to 19 November 2015, from 12 January to 14 January 2016, and from 22 March 2016 to 25 March 2016.

26. In Canada, a motion for leave to appeal had also been made by the US Debtors and NNSA to the Ontario Court of Appeal against the judgment of Mr Justice Newbould. On 3 May 2016, the Ontario Court of Appeal rejected the motion for leave to appeal. In its judgment, [2016] ONCA 332, the Court of Appeal noted that the Nortel insolvency proceedings had lasted more than seven years during which more than 6,800 former Nortel employees or pensioners had died and over $1 billion had been incurred in costs. After analysing and dismissing the intended challenges to Mr. Justice Newbould's judgment, the Court of Appeal concluded, at paragraphs 98-103,

> "[98] This brings us to the final consideration: progress. Repeatedly, the parties have been encouraged to resolve their differences, but without success. For instance, in a 2011 decision, *In re Nortel Networks, Inc.*, 669 F.3d 128, the Third Circuit Court of Appeals admonished the parties at p. 143:
>
> > 'We are concerned that the attorneys representing the respective sparring parties may be focusing on some of the technical differences governing bankruptcy in the various jurisdictions without considering that there are real live individuals who will ultimately be affected by the decisions being made in the courtrooms. It appears that the largest claimants are pension funds in the U.K. and the United States, representing pensioners who are undoubtedly dependent, or who will become dependent, on their pensions. They are the

> Pawns in the moves being made by the Knights and the Rooks…'
>
> [99] Former Chief Justice Winkler also encouraged the parties to find a way to resolve this matter. In April 2012, he warned about the "prospect of additional delays and the potential for conflicting decisions" if the parties failed to reach a negotiated settlement.
>
> [100] Numerous mediations have been ordered but have failed.
>
> [101] In the Annual Review of Insolvency, Kevin P. McElcheran described *Nortel* as a case that has become "an emblem of waste and dysfunction in a system intended to foster consensus based solutions to commercial insolvency", noting that it has "eclipsed all previous Canadian cases in both duration and expense": 2014 Ann. Rev. Insolv. L. 24 at p. 24. And that was in 2014.
>
> [102] Consistent allocation decisions have been issued by the Canadian and U.S. courts. A further appeal proceeding in Canada would achieve nothing but more delay, greater expense, and an erosion of creditor recoveries. There are asymmetric appeal routes in Canada and the U.S. However, we do not accept that the separate appeal proceedings in the U.S. somehow diminish the need to bring these proceedings in Canada to a conclusion. In our view, any additional step is a barrier to progress.
>
> [103] Furthermore, the fact that this case is a liquidation and not a restructuring does not render delay immaterial, where so many individuals and businesses continue to await a resolution of this proceeding. The potential of an interim distribution, remote or otherwise, does not alter this reality…."

27. A subsequent application for leave to appeal was made by the US Debtors and NNSA to the Canadian Supreme Court. That application is pending.

The Global Settlement

28. Although the earlier rounds of mediation had not been successful, after the decision of the Ontario Court of Appeal, a further mediation was held between the parties on 2 and 3 June 2016. This time, an over-arching settlement was agreed in principle which was intended to settle all of the outstanding claims (both present and future) between the EMEA Companies and other entities within the Nortel Group; between the EMEA Companies and the NNUK Pension Scheme and the UK Pensions Regulator; and between the EMEA Companies *inter se*.

29. The parties then set about the task of trying to draft the documentation giving effect to the settlement. This was finalised in early October 2016 and as indicated above, the agreements giving effect to the Global Settlement were executed on 12 October 2016. The documentation giving effect to the Global Settlement is, as might be expected, lengthy and complex. In broad terms, however, it breaks down the Global Settlement into four main parts.

The Allocation Settlement

30. The Allocation Settlement settles the dispute regarding the division of the funds in the Lockbox. The principal effect of the Allocation Settlement is that the Lockbox monies shall be released to the relevant Nortel Group entities (including to each of the EMEA Companies) in set % proportions: the Canadian Debtors will receive about 57.1%, the US Debtors about 24.4% and the EMEA Companies the remaining 18.5%. Among the EMEA Companies, NNUK will receive about 14%, NNSA will receive a fixed amount of US$220 million (being about 3%) and the other EMEA Companies will receive a total of about 1.5% of the Lockbox monies.

31. Under the Allocation Settlement, it is also agreed that no party will have any claim (whether by way of contribution, indemnity or otherwise) against any other Debtor in respect of any liability due or which may become due to SNMP Research International, Inc. and SNMP Research Inc. (together "SNMP"). SNMP filed a complaint on 2 November 2011 against various US Nortel entities claiming infringement of intellectual property rights, to which all of the Companies have been joined by way of a contribution claim. The effect of the Allocation Settlement is that the EMEA Companies shall not face any liability for the SNMP Claim save in the event that SNMP chooses to bring claims directly against them. If such claims are brought, the Joint Administrators intend to argue that such claims should be brought before this court and will be contested.

32. The Administrators' best estimates as to the outcome for each of the EMEA Companies under the Modified Pro Rata allocation and the Allocation Settlement are set out in the following table.

Company	***Anticipated Allocation (US$k)***	
	Modified Pro Rata	***Settlement***
NNUK	1,352,901	1,017,408
Nortel Ireland	49,128	39,701
Nortel Poland	7,972	6,442
Nortel Hungary	1,164	941
Nortel Czech	2,315	1,871
Nortel Slovakia	883	713
Nortel Romania	437	353
Nortel Finland	39	31
Nortel Germany	26,800	21,657
Nortel France	4,812	3,888

Company	***Anticipated Allocation (US$k)***	
	Modified Pro Rata	***Settlement***
Nortel Italy	6,585	5,322
Nortel Spain	10,512	8,495
Nortel Belgium	4,827	3,901
Nortel Netherlands	11,763	9,506
Nortel Austria	1,047	846
Nortel Portugal	1,064	860
Nortel Sweden	567	518
Nortel Int. Finance	3,395	2,743
NNSA	156,498	220,00

33. For NNUK the Allocation Settlement therefore represents a reduction of about 25% when measured against the Administrators' estimated outcome of the Modified Pro Rata allocation; for the other EMEA Companies apart from NNSA, this represents a reduction of about 20% when measured against the Administrators' estimated outcome of the Modified Pro Rata allocation; and for NNSA it represents an increase of about 40%.

The Pensions Settlement

34. The Pensions Settlement settles various claims including the dispute regarding the issue of FSDs and/or CNs between the UK Pensions Regulator, the EMEA Companies and the NNUK Pension Scheme.

35. As a part of the compromise, the EMEA Companies which are the targets of an FSD (other than NNSA) have agreed to promulgate company voluntary arrangements ("CVAs") which shall include a requirement that, if post-petition interest is payable to any creditor of that company, the rate payable shall be a specified commercial rate of interest rather than the much higher statutory rate of interest which would ordinarily accrue. The result of such CVAs will be that where unsecured creditors will be paid in full, any surplus monies from the Lockbox will flow to NNUK as the parent company of the EMEA Company in question in order to enhance the dividend payable by NNUK to the NNUK Pension Scheme. Accordingly, the commercial effect of this aspect of the Pensions Settlement is that the UK Pensions Regulator and the NNUK Pension Scheme will give up their rights to impose, or benefit from the imposition of, an FSD or CN on any of the EMEA Companies who agree to a CVA under which the other unsecured creditors of those companies agree to reduce their entitlement to claim interest on their debts.

The Intra-EMEA Settlement

36. The Intra-EMEA Settlement serves to settle various matters between the EMEA Companies themselves. These include (a) the apportionment of the Administrators' common costs pro rata to the Allocation Settlement among the EMEA Companies; (b) the issue of "top-up" payments to be made by NNUK to some of the other EMEA Companies to compensate them for having continued to trade unprofitably after going into administration in order to facilitate the advantageous global sale of the Nortel group's assets; and (c) the release of restitutionary claims that have been asserted against NNUK by the other EMEA Companies (apart from Nortel Finland and Nortel Romania) who faced a potential liability to the NNUK Pension Scheme.

The NNSA Settlement

37. The NNSA Settlement settles the claims: (a) between NNSA and the other EMEA Companies; and (b) between the NNSA Main Proceeding and the NNSA Secondary Proceeding. In particular it settles a dispute currently being litigated in the Versailles Commercial Court as to which of NNSA's assets constitute NNSA Main Proceeding assets and which constitute NNSA Secondary Proceeding assets. That dispute has already resulted in one decision of the CJEU: see Comite d'enterprise de Nortel Networks SA v Rogeau, C-649/13, [2016] QB 109. This dispute has potential significance for the payment of preferential claims in the NNSA Secondary Proceeding that would not rank as preferential in the NNSA Main Proceeding. The compromise reached is that after payment of a number of specified items, the US$220 million to be received by NNSA from the Lockbox will be split 50/50 between the NNSA Main and Secondary Proceedings.

38. One set of claims not being settled by the NNSA Settlement are a number of claims by French employees of NNSA which are pending before various French courts against a number of Nortel entities including NNUK. These claims seek damages for alleged unfair dismissal and as a result of alleged tortious acts. Some of the employees have also sought to prove in the relevant administrations. These employee claims are being resisted by the Administrators and by the liquidator in the NNSA Secondary Proceeding and will continue to be litigated in France. It has, however, been agreed that the liquidator in the NNSA Secondary Proceeding shall not enter into any settlement agreement in respect of such claims without the consent of the Administrators in the NNSA Main Proceeding and NNUK, and various terms have been agreed to ensure the co-ordination of the handling of the claims.

Notice of this application

39. Steps have been taken to ensure that the EMEA Companies' creditors have been notified of the Global Settlement and given the opportunity to object to the Administrators' application.

40. In particular, the day after the Global Settlement was signed on 12 October 2016, notice was posted on the Nortel website and emails were sent to the creditors' committees of the various EMEA Companies (save Nortel Czech Republic, Nortel Finland, Nortel Hungary, Nortel Netherlands and Nortel International Finance where

there had been inadequate creditor engagement to enable a committee to be formed). That notice and emails indicated that a hearing before this court would be required, and at least some of the creditors' committees requested sight of the application and evidence in support.

41. In addition, in the middle of last week, a notice was posted giving the specific details of this hearing. Although I think that more notice could have been given of the specific time and date of the hearing (which had been fixed with the court shortly after the Global Settlement was signed), I am content that an adequate opportunity has been given to any creditors who might have wished to participate, essentially for three reasons.

42. First, because the Administrators tell me that no response has been received from any of the creditors' committees or any individual creditor objecting to the inadequacy of notice, or indicating any intention to take an active role in the application, still less to oppose it. Secondly, because the UK Pension Scheme, the largest creditor of the EMEA Companies by far, has been involved in the negotiations throughout and its trustees received their own separate direction from Mr. Justice Henderson approving their execution of the Global Settlement on 13 October 2016. And thirdly because in relation to the NNSA, where there has been activity on the part of individual creditors, there was a hearing before the Versailles Commercial Court on 27 October 2016 which was attended by separate counsel for the Administrators, the Conflict Administrator, the liquidator in the NNSA Secondary Proceeding and (importantly) the Works Council of NNSA (being a committee of former employees of NNSA). At that hearing the French court was obviously satisfied that all interested parties were represented, and it gave its approval to the liquidator in the NNSA Secondary Proceeding entering into the Global Settlement on behalf of NNSA.

43. I therefore think that there is no real prospect that any, or any significant, creditors who might have wished to make representations at this hearing have been deprived of the opportunity to do so.

The law

44. Entry into settlement agreements and compromises is within the powers of administrators pursuant to paragraph 60 of Schedule B1 and paragraph 18 of Schedule 1 to the 1986 Act. Accordingly, it is within the Administrators' powers to cause each of the EMEA Companies to enter into the agreements comprised in the Global Settlement. The same is true for the Conflict Administrator and NNSA.

45. In MF Global UK Ltd [2014] EWHC 2222 (Ch) at [41], Mr. Justice David Richards was asked to authorise a settlement agreement to compromise claims by the company to assets said to be held on its own account, which were also said to be held by the company on trust for its own clients. He addressed the approach to be taken by administrators when seeking to compromise the company's own claims as follows:

> "[41] … In commercial matters, administrators are generally expected to exercise their own judgment rather than to rely on the approval or endorsement of the court to their proposed course of action: see In re T & D Industries plc [2000] 1 WLR 646. While the compromise of claims raising difficult legal issues may not be on all fours with a

> purely business decision, administrators commonly exercise the power of compromise without recourse to the court and in general apply to the court for directions only if there are particular reasons for doing so: see In re Lehman Bros International Europe [2014] BCC 132."

46. One such "particular reason" which might justify administrators applying to the court for directions in relation to the exercise of the power of compromise can be derived by analogy from the second category of cases in which trustees can seek directions from the court. This was identified by Mr. Justice Hart in Public Trustee v Cooper [2001] WTLR 901 at 922–924,

> "The second category is where the issue is whether the proposed course of action is a proper exercise of the trustees' powers where there is no real doubt as to the nature of the trustees' powers and the trustees have decided how they want to exercise them but, because the decision is particularly momentous, the trustees wish to obtain the blessing of the court for the action on which they have resolved and which is within their powers. Obvious examples of that, which are very familiar in the Chancery Division, are a decision by trustees to sell a family estate or to sell a controlling holding in a family company. In such circumstances there is no doubt at all as to the extent of the trustees' powers nor is there any doubt as to what the trustees want to do but they think it prudent, and the court will give them their costs of doing so, to obtain the court's blessing on a momentous decision. In a case like that, there is no question of surrender of discretion and indeed it is most unlikely that the court will be persuaded in the absence of special circumstances to accept the surrender of discretion on a question of that sort, where the trustees are prima facie in a much better position than the court to know what is in the best interests of the beneficiaries."

47. The instant case is, in my judgment, just such a case. In signing the documents comprising the Global Settlement, the Administrators and the Conflict Administrator have already decided that the Global Settlement is in the best interests of each of the EMEA Companies and their creditors. They do not propose to surrender the exercise of their discretion in that regard to the court, but they seek the approval of the court because of the great significance of the Global Settlement in the context of the administrations of each of the EMEA Companies. Given the size and complexity of the affairs of the Nortel group and the amounts in the Lockbox, there can, in my judgment, be no doubt that the execution of the Global Settlement is a truly momentous decision.

48. In a category two case involving trustees, the approach of the court was summarised by Mr. Justice David Richards in Re MF Global UK Limited at para 32, where he cited with approval the following paragraph 29-299 from *Lewin on Trusts* (18th ed, 2008),

> "The court's function where there is no surrender of discretion is a limited one. It is concerned to see that the proposed exercise of the trustees' powers is lawful and within the power and that it does not infringe the trustees' duty to act as ordinary, reasonable and prudent trustees might act, ignoring irrelevant, improper or irrational factors; but it requires only to be satisfied that the trustees can properly form the view that the proposed transaction is for the benefit of beneficiaries or the trust estate and that they have in fact formed that view. In other words, once it appears that the proposed exercise is within the terms of the power, the court is concerned with limits of rationality and honesty; it does not withhold approval merely because it would not itself have exercised the power in the way proposed. The court, however, acts with caution, because the result of giving approval is that the beneficiaries will be unable thereafter to complain that the exercise is a breach of trust or even to set it aside as flawed; they are unlikely to have the same advantages of cross-examination or disclosure of the trustees' deliberations as they would have in such proceedings. If the court is left in doubt on the evidence as to the propriety of the trustees' proposal it will withhold its approval (though doing so will not be the same thing as prohibiting the exercise proposed). Hence it seems that, as is true when they surrender their discretion, they must put before the court all relevant considerations supported by evidence. In our view that will include a disclosure of their reasons, though otherwise they are not obliged to make such disclosure, since the reasons will necessarily be material to the court's assessment of the proposed exercise."

Similar (albeit expanded) observations appear in the current (19th) edition of *Lewin on Trusts* at paras 27-079 to 27-081. Reference can also be made to the decision of Mr. Justice Henderson in Hughes v Bourne [2012] WTLR 1333 at paragraph 16.

49. For my part, whilst noting that the position of an administrator seeking directions under the Insolvency Act, and a trustee seeking directions under the Trustee Act are not identical, I see no obvious reason why most of the same considerations should not apply when the court considers giving directions to an administrator who wishes to enter into a compromise which is particularly momentous. In short, the court should be concerned to ensure that the proposed exercise is within the administrator's power, that the administrator genuinely holds the view that what he proposes will be for the benefit of the company and its creditors, and that he is acting rationally and without being affected by a conflict of interest in reaching that view. The court should, however, not withhold its approval merely because it would not itself have exercised the power in the way proposed.

50. In these respects the approach of the court will mirror the attitude which the court would take to a subsequent challenge to the decision by a creditor: see e.g. Re Longmeade Limited [2016] EWHC 356 (Ch) at paragraphs 61-65. But having regard to the fact that its approval will prevent subsequent challenge, the court will require the administrator to put all relevant material before it, including a statement of his reasons, and the court will not give its approval if it is left in any doubt as to the propriety of the proposed course of action.

The decision to enter into the Global Settlement

51. In the instant case, consistent with the requirements for full disclosure to the court, I have had the benefit of very full evidence from one of the Administrators, Mr. Alan Bloom, who has taken particular responsibility for the interests of NNUK in the settlement negotiations. I have also had similarly full evidence from the Conflict Administrator of NNSA, Mr. Stephen Taylor. In addition, Mr. Bloom has exhibited a letter from the other Administrator of Nortel Ireland, Mr. David Hughes, dealing with its particular position. Further witness statements were also produced from Mr. Stephen Harris, the Administrator who has taken particular responsibility for the interests of the other EMEA Companies, dealing with their particular positions.

52. In addition, I have been supplied with a number of confidential documents including projected outcome statements for EMEA Companies and various pieces of legal advice provided to the Administrators by their lawyers in the relevant jurisdictions, namely England, Canada, the US and France. It is particularly to be noted that the Administrators, the Conflict Administrator and Mr. Hughes have had separate advice from different law firms dealing with the position of NNUK and the EMEA Companies, the position of NNSA in relation to the Allocation Dispute, and the position of Nortel Ireland respectively. Among other things, the legal advice given analyses the likely course of the appellate stages of the Allocation Dispute in Canada and the US, and of the litigation between the NNSA Main and Secondary Proceedings if the Global Settlement were not to become effective. I shall, for obvious reasons, be making an order in due course preserving the confidentiality of that material, at least until after the Global Settlement has become effective and the Lockbox proceeds have been distributed.

53. I also had the assistance of detailed written submissions from counsel for the Administrators and for the Conflict Administrator, together with oral submissions over the course of a day. Those submissions were, as might be expected, extremely helpful, and led, among other things, to the Administrators and their UK advisers revisiting one important aspect of their evidence and producing an amended version of the estimated outcome analysis for each of the EMEA Companies.

54. At the end of that process, and on the basis of the evidence that I have seen, I am satisfied that the Administrators (including Mr. Bloom, Mr. Hughes and Mr. Harris) and the Conflict Administrator are genuinely and firmly of the view that the Global Settlement is in the best interests of each of the EMEA Companies for which they are responsible, together with their respective creditors. I am also satisfied that those views have been formed properly and rationally.

55. I do not propose to set out in great detail the basis for that conclusion, not least because it would require me to disclose the detail of the confidential legal advice that has been received. Moreover, I would be unable, without giving a judgment of considerable length and complexity, to explain the detail of the many inter-related issues and uncertainties that are dealt with in the evidence and which would continue to bedevil the insolvencies, but which will be resolved by the Global Settlement.

56. I will, therefore, confine myself to the following core points.

57. First, there is a risk that on appeal the Modified Pro Rata basis of apportionment in the Allocation Judgments might be overturned in favour of the case theory proposed by the Canadian Debtors. In that regard, although it would seem that the prospects of the Supreme Court of Canada accepting and allowing an appeal are slim, and the prospects of the US Third Circuit adopting a Canadian approach which has been rejected by the Canadian courts are even more remote, the issues raised in the Allocation Dispute are without precedent and accordingly the risk of such an outcome cannot be entirely discounted.

58. The danger, of course, is that for NNUK in particular, and for most of the EMEA Companies as well, that would give rise to an outcome that would be far worse than under the Modified Pro Rata approach or than the outcome that would apply under the Allocation Settlement. For example, on the Canadian Debtors' approach, just 4.1% of the funds in the Lockbox would be apportioned among all of the EMEA Companies, whereas pursuant to the Allocation Settlement, the EMEA Companies together will receive about 18.5%, and NNUK alone will receive about 14% of the Lockbox monies. For many of the EMEA Companies, this could result in their creditors receiving nothing or next to nothing.

59. Whilst the outcome of the appeal to the Third Circuit may well be that the decision of Judge Gross is upheld, there is nevertheless a risk that the Third Circuit might overrule his decision and adopt the argument advanced by the US Debtors. Whilst that outcome would potentially favour Nortel Ireland, it would provide little marginal advantage to many of the other EMEA Companies, and any variation to the Modified Pro Rata approach would be to the substantial disadvantage of NNUK.

60. There is, moreover, an inherent risk in the appeals process that a divergence of view and hence a potential deadlock may arise between the US and Canadian courts. There is no agreed solution in the allocation protocol or other precedent for resolving such a deadlock, and it is very likely that if such a situation were to arise, it would lead to substantial further uncertainties, costs and delay in the EMEA Companies recovering any money from the Lockbox.

61. In general terms, therefore, whilst the Allocation Settlement may require the EMEA Companies (apart from NNSA) to take a reduction when compared with the best estimate of the allocation that they might receive pursuant to the Modified Pro Rata approach, the Administrators consider that the advantage of eliminating the risks generated by an appeal of the Allocation Judgment and/or of a deadlock developing between the US and Canadian courts outweighs the disadvantage of this discount. That is, in my judgment, a rational view to take.

62. The second general point arises even if all goes favourably for the EMEA Companies in the Canadian and US appeals process. In that event there is still likely to be considerable further delay, uncertainty and expense. It is inherent in the Modified Pro Rata allocation set out in the Allocation Judgments that the allocation cannot be implemented until after the various estates have completed their claims resolution processes, and any disputes over the level of claims and how to account for them in the allocation have been resolved. Absent the Global Settlement there may, for example, be a dispute over the level of the section 75 claim by the NNUK Pension Scheme.

63. This leads to the third point that echoes the views of the Ontario Court of Appeal to which I have referred above. The Nortel insolvencies have been going on at great expense for over seven years, with no return to creditors. Any continued litigation over the allocation of the Lockbox proceeds is likely to take several more years and waste substantial further legal and professional costs. There is considerable force in the point that the novel issues raised in the Allocation Dispute have been considered by courts in different jurisdictions, and that after having heard detailed legal arguments, the two judges have managed to agree on what they regard as an appropriate and fair result. The various parties have then used that as a starting point to arrive at a consensual solution to virtually all of the issues in what is undoubtedly a highly complex cross-border case.

64. Against this background, the Administrators (including Mr. Bloom, Mr. Hughes and Mr. Harris) and the Conflict Administrator are quite entitled to take the view that creditors of the EMEA Companies may well prefer, and indeed deserve, certainty and finality. To that end, the Global Settlement has the obvious commercial merit of ensuring that the creditors of the EMEA Companies will see some money in the near future, rather than see their returns put at risk and diminished by continuing to pay lawyers to do battle with considerable uncertainty as to the outcome, and for what might, in the end, be marginal gains.

65. Fourthly, and in relation to the EMEA Companies other than NNUK, NNSA and Nortel Ireland, this latter point is reinforced by a consideration of the return that the Administrators anticipate is likely to be paid to the unsecured creditors of those companies as a result of the Global Settlement.

66. In that regard, in addition to the amounts that are expected to be received from the Lockbox, as I noted above, the Intra-EMEA Settlement also provides for a number of the EMEA Companies to receive what has been referred to as a "top-up payment" from NNUK. This payment will be made to those EMEA Companies that would have been better off if they had ceased to trade and gone into liquidation immediately, but which continued to trade on the basis that they would benefit from the enhanced recoveries from the global sale of the Nortel group's assets. The "top-up" payment will be the lesser of the amount needed to ensure that the unsecured creditors of those companies will be paid 100p in the £ (i.e. excluding interest) or the amount that will (after receipt of any monies from the Lockbox) restore the "deemed cash" position of those companies (including inter-company receivables) to what it was at 31 December 2009.

67. Whilst it might be said (and the Administrators acknowledge) that a "top-up" payment ought to be made to the EMEA Companies concerned in any event so as to ensure that they do not end up worse off as a result of having continued to trade for the overall benefit of the sales of the Nortel group's IP, it is nevertheless of benefit to the EMEA Companies in question for that to be agreed, and of course the Global Settlement means that NNUK will shortly have the money from the Lockbox to make such payments.

68. According to the amended figures produced by the Administrators, the consequence of the "top-up" under the Intra-EMEA Settlement and the Allocation Settlement is that all of the relevant EMEA Companies are anticipated to be able to pay their creditors 100p in the £ on their debts (i.e. excluding interest). That includes Nortel

Finland, in relation to which there was initially the suggestion that it would only return about 37p in the £ to creditors, but where, following a close examination of the evidence at the hearing, the Administrators revisited their projections and discovered that an intra-group receivable had wrongly been excluded from their computations.

69. For the other EMEA Companies that will not receive a top-up, the anticipated result is also that they will be able to pay 100p in the £ to their creditors. They will, in addition, also pay a commercial rate of interest if their creditors agree to a CVA under which the entitlement to a higher statutory rate of interest is foregone in return for the release of any FSD or CN claim in respect of the deficit on the UK Pension Scheme.

70. Accordingly, the combined result of the Allocation Settlement and the top-up payments under the Intra-EMEA Settlement (where applicable) is that it is anticipated by the Administrators that all of the EMEA Companies, except for NNUK, Nortel Ireland and NNSA, will return 100p in the £ to their unsecured creditors and some may also pay a commercial rate of interest. This is plainly a result that reasonable creditors are likely to find acceptable, albeit that it has taken seven years to get there.

71. Having made these general remarks, I therefore turn to consider briefly the particular positions of NNUK, Nortel Ireland and NNSA.

72. NNUK Given NNUK's very advantageous outcome under the Modified Pro Rata approach, the commercial benefits of eliminating the risk of any appeal are very clear. There are also a number of other advantages to NNUK and its creditors in the Global Settlement. These include in particular the agreement that the size of the section 75 claim by the UK Pension Scheme will not be disputed by other Debtors; and the release of the SNMP contribution claim and the restitutionary claims from other EMEA Companies. In short, the Global Settlement seems to be a good deal for NNUK and one that is entirely rational for the Administrators to take.

73. Nortel Ireland For Nortel Ireland, its estimated outcome under the Modified Pro Rata approach was near to the worst of its potential outcomes. It would only have fared worse under the argument put forward by the Canadian Debtors, and it would fare much better if the argument of the US Debtors was adopted. Whilst that might suggest that the interests of Nortel Ireland would be best served if it was to support the US Debtors on their appeal to the US Courts and to reject the Global Settlement, there are two significant counterbalancing factors in addition to the general points to which I have referred above.

74. The first is that in the absence of the Global Settlement, Nortel Ireland is at risk of being hit with a substantial FSD in relation to the deficit in the NNUK Pension Scheme. Unlike many of the other EMEA Companies, Nortel Ireland was a significant trading entity which had a complex relationship with NNUK. As a result there is a significant risk that it might be asked to make a substantial contribution to the deficit in the NNUK Pension Scheme. Any such FSD claim would dilute the returns to its other creditors. The Administrators evidence is that it is this risk that has prevented Nortel Ireland being able to pay any substantial dividends to its creditors. The Global Settlement effectively removes that risk.

75. The second is that on the current estimates produced by the Administrators, and on the assumption that there is no FSD or CN issued against Nortel Ireland, the

unsecured creditors of Nortel Ireland can expect to be paid in excess of 75% of their debts. Whilst not full payment, that is nevertheless a significant return, and one that makes the potential incremental benefits of rejecting the Global Settlement and hoping that the US Debtors are successful on appeal, seem far more of a gamble.

76. Taking these factors into account, I think that the Administrators, and in particular Mr. Hughes who has taken particular responsibility for the interests of Nortel Ireland and has been separately advised in this respect, are acting entirely rationally in reaching the conclusion that the Global Settlement is in the best interests of Nortel Ireland and its creditors.

77. NNSA Given NNSA's very poor result on the Modified Pro Rata approach and the enhanced return that it stands to obtain under the Allocation Settlement, the only justification for NNSA rejecting the Global Settlement and progressing an appeal would be to attempt to obtain a distribution from the Lockbox on the basis of the arguments advanced by the EMEA Companies or by the US Debtors. But the obvious risk is that NNSA would simply end up back where it started if the appeal was rejected and the Modified Pro Rata allocation confirmed, and in doing so would have given up the possibility of enjoying the extra 40% allocation that has been negotiated, whilst incurring significant further legal and professional costs that would eat into any return to creditors.

78. In addition, if the Global Settlement was to be rejected, NNSA would still have to contend with a number of disputes between it and NNUK, and between the NNSA Main Proceeding and the NNSA Secondary Proceeding. The outcome of these would be uncertain and their prosecution would incur further costs and delay. They will all, however, be resolved by the NNSA Settlement and the Intra-EMEA Settlement in a manner that appears appropriate having regard to the legal issues involved. That includes, in particular, the 50/50 resolution of the dispute between the NNSA Main Proceeding and the NNSA Secondary Proceeding in the Versailles Commercial Court. The outcome of that dispute was left very much at large by the decision of the CJEU and is, on the evidence that I have seen, capable of producing an all-or-nothing outcome one way or the other. In addition NNSA will benefit from the removal of any threat of an FSD and CN in relation to the NNUK Pension Scheme.

79. Taking these factors into account, in my judgment it is a rational decision for the Conflict Administrator to seek to lock in the enhanced benefits of the Allocation Settlement and the other aspects of the Global Settlement for NNSA, rather than pursue an uncertain appeal and expend further time and money in litigation between NNSA and NNUK and between NNSA's Main and Secondary Proceedings. I am also supported in that conclusion by the endorsement given by the French court to the Global Settlement in the NNSA Secondary Proceeding.

Conclusion

80. For the reasons that I have summarised above, I consider that I should, in the exceptional circumstances of the Nortel cases, and having regard to the momentous nature of the decision, give the Administrators and the Conflict Administrator the directions that they seek, approving and authorising them to implement the Global Settlement.

81. In doing so, I respectfully endorse the sentiments of the Ontario Court of Appeal to which I have referred and commend the parties for arriving at a commercial solution which, subject to obtaining approval in Canada and the US, now gives the creditors of the various Nortel estates a real prospect of a recovery on their long outstanding debts.