Neutral Citation Number: [2017] EWHC 1429 (Ch)

Case No: 535 - 554 of 2009

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
COMPANIES COURT

Royal Courts of Justice
Rolls Building, Fetter Lane
London, EC4A 1NL

Date: Friday 16 June 2017

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 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

- -

William Trower QC and Alex Riddiford (instructed by **Herbert Smith Freehills LLP**) for the **Administrators of each of the above-named companies**

Hearing date: 6 June 2017

- -

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. Following a hearing on Tuesday 6 June 2017, on Friday 9 June 2017 I made Orders on applications ("the Applications") by the administrators (the "Administrators") of each of 18 Nortel Group companies ("the Companies"). At the time that I made these Orders I indicated that I would give my reasons for doing so in writing, which I now do.

2. The primary purpose of each of the Orders is to deal with an issue which has arisen in relation to administration expenses and distributions in the long-running administrations of the Companies. The Administrators are aware of the possibility for certain claims to be made which might, if established, qualify as administration expenses ("Expense Claims"), and thereby rank for payment in priority to the claims of unsecured creditors. However, a number of these Expense Claims have not actually been made, and unless matters are brought to a head, the resultant uncertainty or need to reserve for them would prevent or delay the making of long-awaited distributions to unsecured creditors.

3. The Orders give directions from the Court to the Administrators to inform potential claimants that any Expense Claims which have not yet been made must be notified to the Administrators on a prescribed "Demand Form" on or before a specified "Bar Date". For most of the Companies, the proposed Bar Date will be 27 October 2017, which will be about four months after the Administrators send a letter to the persons of whom they are aware who they think might be intending to make an Expense Claim. The Administrators will also place suitable advertisements in a national newspaper in each of the various jurisdictions in which the Companies were incorporated. The letter and the advertisements will make it clear that notice of any Expense Claim which has not previously been notified or agreed must be served on the Administrators by the Bar Date, after which the Administrators will be at liberty to proceed to pay or reserve for the known Expense Claims and make distributions to unsecured creditors on the basis that persons who have not complied with the Bar Date have no Expense Claims. Any late Expense Claims will not be extinguished, but will only be paid if and to the extent that the Administrators still have any unreserved funds available after making the distributions to unsecured creditors.

4. In addition, in the case of two of the Companies, Nortel Networks Romania SRL ("Nortel Romania") and Nortel Networks OY ("Nortel Finland"), I made Orders authorising the Administrators to distribute their assets to their unsecured creditors directly rather than by promoting a company voluntary arrangement ("CVA") for that purpose.

The applicable law

5. As a preliminary point of detail, I should observe that the administrations of the Companies, which commenced in 2009, have always been governed by the Insolvency Act 1986 (the "Act"). Until 6 April 2017, the relevant insolvency rules that were applicable to the administrations were the Insolvency Rules 1986 ("the 1986 Rules"). However, from 6 April 2017, and subject to specific transitional provisions, the 1986 Rules have been repealed and replaced by the Insolvency (England and Wales) Rules 2016 ("the 2016 Rules"). Accordingly, for the future, the rules generally applicable to the administrations of the Companies will be the 2016 Rules.

6. However, the Applications for directions in relation to the Expense Claims were issued under the 1986 Rules on 4 April 2017. As such, they fall within paragraph 14(1) of Schedule 2 to the 2016 Rules, which provides,

> "Where an application to court is filed or a petition is presented under the Act or under the 1986 Rules before the commencement date [i.e. 6 April 2017] and the court remains seised of that application or petition on the commencement date, the 1986 rules continue to apply to that application or petition."

Accordingly, the issues arising in the Applications in relation to the Expense Claims are to be determined in accordance with the 1986 Rules.

7. In relation to Nortel Romania and Nortel Finland, the applications for authority to make distributions in the administrations were also made on 4 April 2017 and referred to the proof of debt and distribution rules in the 1986 Rules. The transitional provisions in paragraph 14 of Schedule 2 to the 2016 Rules accordingly also require me to determine those applications in accordance with the 1986 Rules.

8. However, once the Applications have been determined, because the 2016 Rules have come into force and the 1986 Rules have been revoked, the rules which will be applicable to the future steps which I have authorised to be taken are those in the 2016 Rules.

9. Having made these points, I should state that because the relevant parts of the 1986 Rules and the 2016 Rules are materially the same, I do not think that the outcome of the Applications would have been any different under the 2016 Rules than under the 1986 Rules. For ease of reference I shall endeavour to indicate the relevant provisions of both the old and new rules in this judgment.

Background to the Administrations

10. I set out the background to the insolvency of the Nortel Group in two earlier judgments given on 27 August 2015 ([2015] EWHC 2506 (Ch)) and 3 November 2016 ([2016] EWHC 2769 (Ch)). I shall use the same terminology as in those judgments, to which reference should be made for the detailed history of the matter. For present purposes, a much shorter summary will suffice.

11. The 19 European, Middle East and Asia ("EMEA") companies of the Nortel Group were placed into administration in England on 14 January 2009 by Order of Mr Justice Blackburne. The Administrators of each of the EMEA companies are insolvency practitioners with Ernst & Young LLP or, in the case of Nortel Networks (Ireland) Limited, Ernst & Young LLP and Ernst & Young Chartered Accountants.

12. The centre of main interests of each of the EMEA companies was held to be England & Wales for the purposes of the EC Regulation on Insolvency Proceedings 2000 (No. 1346/2000) (the "Insolvency Regulation"), and each of the administrations are main insolvency proceedings as defined in Article 3(1) of the Insolvency Regulation.

13. After their appointment, the Administrators considered that it would be in the interests of creditors to avoid secondary proceedings being opened in the jurisdictions in which the EMEA companies other than Nortel Networks UK Limited ("NNUK") were incorporated. The opening of secondary proceedings was considered at the time by the Administrators to be likely to erode confidence in the post-filing trading and stability of the companies and to disrupt the various companies' participations in a coordinated global reorganization or sale of the global business lines of the Nortel Group, thereby reducing the value realised for the benefit of its creditors. In order to discourage the opening of secondary proceedings in the various local jurisdictions in question, the Administrators of each of the EMEA companies therefore gave various assurances that if local creditors did not seek to open secondary proceedings, they would be in no worse position than they would have been in if the relevant company and the assets in the relevant jurisdiction were subject to secondary proceedings.

14. As a result, no secondary proceedings have been opened in respect of any of the EMEA companies except for Nortel Networks S.A. ("NNSA"). Secondary proceedings were opened in respect of NNSA in France since it would otherwise have been unable to carry out a major and urgent part of its required restructuring programme. The complications to which this has led mean that NNSA was not a party to the Applications and no Order has been made in relation to it.

15. Although there was a successful sale of the global business of the Nortel Group in 2010 and a sale of the remaining intellectual property rights thereafter, the EMEA companies faced a variety of disputes with other Nortel Group entities, in particular those in the US and Canada, in relation to the allocation and division of the proceeds of that sale (in the total sum of approximately US$7.3 billion) which had been held in accounts in the US ("the Lockbox Proceeds").

16. By the orders that I made in 2015, I gave the Administrators permission pursuant to paragraph 65(3) of Schedule B1 to the Act to call for proofs of debt in relation to NNUK and make distributions to its unsecured creditors, and permission to promulgate CVAs for the other Companies. These orders were made in anticipation of resolution by the courts in the US and Canada of the disputes between the EMEA companies and the US and Canadian entities over the Lockbox Proceeds. In fact, the various disputes were finally compromised by the parties in 2016 by way of four interlocking conditional settlement agreements (together the "Global Settlement") and in my judgment given on 3 November 2016, I gave the Administrators liberty to perform and procure that the EMEA companies performed the Global Settlement.

17. On 8 May 2017 the Global Settlement became unconditional, and as a result, the EMEA companies' entitlements to the Lockbox Proceeds under the terms of the Global Settlement were paid to them on 26 May 2017. The amounts paid vary between NNUK, which has received in excess of US$1 billion, down to Nortel Romania and Nortel Finland which have received US$354,552.09 and US$31,383.31 respectively.

18. In the case of NNUK, the Administrators are required by the terms of the Order that I made on 3 November 2016 to pay a first distribution to unsecured creditors within ten weeks of receipt of its share of the Lockbox Proceeds. They therefore intend to make a first distribution to NNUK's unsecured creditors before the end of July 2017.

19. As regards most of the Companies other than NNUK, the Administrators considered that the most appropriate process by which to determine the liabilities of those Companies and effect a distribution to creditors under and in accordance with local laws (and thereby to honour the assurances to which I have referred to above), would be by promulgating CVAs in accordance with the permission I gave in 2015. Proposals were duly sent out to the creditors of 15 of the other Companies, and CVAs have now been considered and approved by creditors in respect of all of them.

20. Although liberty to promote a CVA was granted in relation to Nortel Finland and Nortel Romania in 2015, for reasons that I will explain below, the Administrators took the view, with which I concur, that it would be more appropriate simply to commence a distribution process in the administrations of those companies. Accordingly, no CVA proposals were made in relation to those two companies.

21. On the basis of the Orders that I have made, the Administrators anticipate making a first payment to the supervisors of the CVAs, so that distributions may be made to creditors, in Autumn 2017. The only exception is Nortel Networks (Ireland) Limited, where the distribution is anticipated to be made in Spring 2018. As regards Nortel Finland and Nortel Romania, the Administrators anticipate that first distributions in the administrations will be made to unsecured creditors in December 2017.

Expense Claims

22. Paragraph 99 of Schedule B1 to the Act provides for an administrator's remuneration and expenses to be charged on and payable out of the company's property of which the administrator had custody or control immediately before he ceased to be administrator, and for such amounts to be payable in priority to any floating charge, and hence, by necessary implication, in priority to any unsecured debts.

23. Rule 12.2(1) of the 1986 Rules provides,

> "All fees, costs, charges and other expenses incurred in the course of … administration … proceedings are to be regarded as expenses of the … administration…"

Rule 3.50 of the 2016 Rules is in materially the same form.

24. A list of the expenses of an administration in the order in which they are payable is set out in Rule 2.67 of the 1986 Rules. Rule 3.51 of the 2016 Rules is in materially the same form.

25. In the Supreme Court in *re Nortel GmbH (Bloom v Pensions Regulator)* [2014] AC 209 ("*Bloom v Pensions Regulator*") at paragraph 39, Lord Neuberger explained that in an administration under the Act and the 1986 Rules, the order of priority for payment out of the company's assets (often referred to as the insolvency "waterfall") was, in summary:

    i) fixed charge creditors;

    ii) expenses of the insolvency proceedings;

    iii) preferential creditors;

iv) floating charge creditors;

v) unsecured provable debts;

vi) statutory interest;

vii) non-provable liabilities; and

viii) shareholders.

26. Lord Neuberger plainly considered that the expenses of an administration are a distinct category of claims and liabilities from unsecured provable debts: see e.g. paragraph 43 of his judgment. That was also common ground between the parties in the Supreme Court: see paragraph 97 of the judgment.

Expense Claims in the Administrations of the Companies

27. The Administrators are aware of several significant categories of actual or potential Expense Claims in the administrations of the Companies.

28. Certain Expense Claims, such as legal and adviser's fees, are uncontroversial, and have been made and accepted both as to their nature and quantum. The Administrators intend to continue to pay these accepted Expense Claims (the "Accepted Expense Claims") in the normal course, subject to any necessary approvals (for example as to their own remuneration).

29. However, the Administrators are also aware of a number of potential Expense Claims which have not been clearly or formally asserted. These potential Expense Claims are described in the evidence as (i) the Kapsch claim, (ii) the SNMP claim, (iii) the Chubb claim, (iv) the French employee claims, and (v) the tax authority claims. In addition, although the Administrators are confident that they have identified all potential Expense Claims, there is the theoretical possibility that there may be other unknown expense claims.

The Kapsch claim

30. Kapsch CarrierCom ("Kapsch"), a former supplier of the Nortel Group, has proved an unsecured claim against NNUK for an alleged breach of a carrier network equipment contract said to have been entered into in 2007. In extensive correspondence in February this year with the Administrators' solicitors, Herbert Smith Freehills LLP ("HSF") concerning that claim, Kapsch's solicitors, Nabarro LLP, also included a short sub-paragraph purporting to reserve its right to assert an Expense Claim in relation to acts undertaken by the Administrators in the months following the entry of NNUK into administration. These acts were said to amount to the adoption by the Administrators of the 2007 contract. There was also a further reservation of rights in relation to a claim against NNUK and/or the Administrators for allegedly inducing or procuring a breach of contract and/or causing loss by unlawful means. No further particulars were given, and HSF replied, rejecting the claims and any suggestion that they qualified as Expense Claims.

31. Kapsch has not made any Expense Claim, and on 6 April 2017, HSF wrote to Nabarro in order to explain the basis for (and enclose a copy of) the Applications. On 25 April 2017, Nabarro responded, indicating that it was considering whether or not to appear at the hearing of the Applications to make submissions. HSF followed up with Nabarro by a further letter dated 31 May 2017, to which no response was received. Nabarro did not appear at the hearing of the Applications and Kapsch has not otherwise expressed any objection to the relief sought by the Administrators.

The SNMP claim

32. SNMP International, Inc. and SNMP Research, Inc. (together, "SNMP"), former software licensors to the Nortel Group, have asserted a claim against the Nortel Group's US and Canadian entities. They allege that SNMP are owed fees for pre- and post-insolvency use of SNMP's software in Nortel products and that some of SNMP's intellectual property was wrongly transferred during the sales of the Nortel global business and/or that the sales violated SNMP's intellectual property rights. SNMP has estimated in proceedings in the US Bankruptcy Court that the claim should be for no less than US$86 million, although in resolving its objection to the US Plan, SNMP agreed to accounting reserves being made by the US Debtors in relation to the administration expense claims in the amount of US$57.8 million. Conversely, in argument before the US Bankruptcy Court, SNMP asserted that the claim could be for as much as US$200 million.

33. On 22 September 2015, the US Bankruptcy Court granted the US Debtors leave to serve a contribution claim in relation to the SNMP action against the EMEA companies as third party defendants for any damages that SNMP may recover against the US Debtors. However, on 2 May 2016 the US Bankruptcy Court dismissed the EMEA companies as third party defendants. That Order was then appealed by the US Debtors, but that appeal was agreed to be withdrawn as part of the Global Settlement.

34. Notwithstanding the effect of the Global Settlement vis-à-vis any contribution claim by the US Debtors, on 8 September 2015, counsel for SNMP indicated in oral submissions before the US Bankruptcy Court that SNMP might seek to bring claims directly against the EMEA companies. No such claims have been asserted, but the Administrators consider that there is at least a possibility that SNMP might seek to do so and further, that they might bring such claims, at least in part, as Expense Claims.

35. On 6 April 2017, HSF wrote to SNMP in order to explain the basis for (and enclose a copy of) the Applications. On 31 May 2017, SNMP's lawyers confirmed that they did not intend to appear at the hearing of the Applications and SNMP has not otherwise expressed any objection to the relief sought.

The Chubb claim

36. On 20 March 2014, Chubb Insurance Company of Europe S.E. ("Chubb") asserted a claim against NNUK by way of a pre-action letter. The claim related to NNUK's alleged omission to deal with a power failure at the premises of an insured party, Arrow Electronics UK Limited, which occurred on 14 September 2012. HSF responded to the pre-action letter on 10 April 2014. However, save for *ad hoc* requests for information from Chubb's solicitors, there has been no further formal communication between the Administrators and Chubb.

37. While the 20 March 2014 pre-action letter did not specify whether Chubb's claim would be advanced as an Expense Claim, the Administrators consider, on reflection after the issuing of the Applications, that there is a chance that, if pursued, it would be advanced as such. Accordingly, on 16 May 2017, HSF wrote to Chubb in order to explain the basis for (and enclose a copy of) the Applications. Despite a follow-up letter from HSF to Chubb dated 31 May 2017, there has been no response from Chubb or its lawyers, and Chubb did not appear at the hearing and has not otherwise expressed any objection to the relief sought in the Applications.

The French Employee Claims

38. 167 former employees of NNSA have asserted claims in France against (among others) NNSA, Nortel Networks Limited (the primary Canadian entity in the Nortel Group) and NNUK (the "French Employee Claims"). The French Employee Claims are currently being disputed before the *Conseil des Prud'hommes de Versailles* and the *Cour d'Appel de Versailles*. Of all the Companies in respect of which the Applications have been issued, it is only NNUK which is affected by the French Employee Claims.

39. The French Employee Claims are for damages (i) for alleged unfair dismissal by NNSA, and (ii) for alleged tortious acts by NNUK. The Administrators understand that the claims may be up to €43 million in value, or higher. The French employees have also asked the *Cour d'Appel de Versailles* to order that, should it be determined that they have good claims against NNUK, such claims will rank as "*superprivilège*", which connotes a degree of priority in a French insolvency.

40. The secondary liquidator in the NNSA secondary proceedings and the NNUK Administrators have challenged the French Employee Claims, in particular on the basis that the French Court has no jurisdiction to hear them. The *Cour de Cassation* has recently held, in the case of Michael McMullan (whose case was brought against NNUK on a similar basis to the French Employee Claims), that the French Court lacked jurisdiction to hear such claims, which fell within the jurisdiction of the English Court because they arose out of the administrations. This jurisdictional question is due to be argued again before the *Cour d'Appel de Versailles*, which is not bound by (but is expected to be strongly persuaded by) the decision of the *Cour de Cassation* on this point. The next procedural hearing in this matter, before the *Cour d'Appel de Versailles*, is scheduled for 28 September 2017.

41. In addition to pursuing their claims in France, in October and November 2015, 133 of the French employees sent letters to myself and to the Administrators in response to the request by the Administrators for proofs of debt. Those letters were in fairly standard form and contained an assertion that the French Employee Claims, "*may give rise to claims having a rank and privilege that will be enforceable against administration expenses*". The basis for that assertion has not been explained or particularised and the point has not been addressed in the French proceedings.

42. On 10 April 2017, HSF wrote to the lawyer acting on behalf of the French employees in order to explain the basis for (and enclose a copy of) the Applications. The Administrators also sent a copy of that letter directly to each of the French employees and followed that up with a further letter to the French employees' lawyer on 31 May 2017. However, no response has been received from the French employees or their lawyer to any of the Administrators' letters, and the French employees did not appear

at the hearing of the Applications and have not otherwise expressed any objection to the relief sought.

Tax authority claims

43. The Administrators anticipate receiving claims from some or all of the local tax authorities against each of the Companies for corporation tax payable as a result of the receipt of its share of the Lockbox Proceeds. It is possible that such claims will be asserted as Expense Claims on the basis that they arise from the global sales of assets that took place during the administrations, and that even though they might arise under a foreign taxing statute, they fall within Rule 3.51(2)(j) of the 2016 Rules as,

> "The amount of any corporation tax on chargeable gains accruing on the realisation of any asset of the company (irrespective of the person by whom the realisation is effected)."

Rule 2.67(1)(j) of the 1986 Rules was in materially the same form.

44. The Administrators understand from local tax advisers that, in respect of each of the Companies except NNUK, there is a risk that they will not have certainty regarding the quantum of any such tax claims for a number of years following receipt of the Lockbox Proceeds, or even until expiry of a limitation period for bringing tax claims. This is because there is either, (i) a formal procedure by which tax clearance can be obtained, but with great uncertainty as to whether and if so, when such tax clearance will be granted; or (ii) no procedure available to secure tax clearance in the form of a binding determination.

45. Accordingly, since 4 April 2017, the Administrators have been actively contacting the tax authorities in order to address this issue. For example, the Administrators have sent each tax authority a letter setting out (i) details of the status of the administration of the relevant Company, (ii) an explanation of the relevant Application and (iii) in most cases, draft tax computations. The Administrators have also engaged with many of the tax authorities in this regard by way of further correspondence and, in some cases, meetings in person. Further, a number of the tax authorities received the CVA proposal for the relevant Company in their jurisdiction which referred to the Applications that were planned, and a number of tax authorities voted on those CVA proposals.

46. None of the tax authorities appeared at the hearing of the Applications and none of them have otherwise expressed any objection to the relief sought.

Unknown Expense Claims

47. As I have foreshadowed, there is, in theory at least, the possibility that potential Expense Claims that are currently unknown to the Administrators might materialise in the future. Given the duration, the advanced stage and the high profile of the administrations, the Administrators consider, however, that such possibility is very remote.

The Problem

48. By September or October 2017, the Administrators and (where applicable) the CVA supervisors, will be in a position finally to determine the unsecured liabilities of each of the Companies, and will also have collected in all, or the vast majority, of the Companies' assets, ready for distribution.

49. The problem posed by the potential Expense Claims referred to above is that with respect to all of the Companies other than NNUK, if the Administrators are not able to crystallise the position and obtain some degree of certainty in relation to the potential Expense Claims which would rank for payment before unsecured creditors, they consider that they would, as a matter of prudence, have to reserve for such potential Expense Claims in full. This would prevent them from making any (or any meaningful) distribution to unsecured creditors or to the supervisors of a CVA, even though the Lockbox Proceeds have finally been received after the Companies have been in administration for over eight years.

50. For example, taking the potential SNMP Claim alone, the quantum of this claim at its lower end (between about US$60 million and US$80 million) is equal to all of the assets which are likely to be available for distribution in each of the Companies other than NNUK, Nortel Ireland and Nortel Germany. If the SNMP Claim is asserted at its higher level of close to US$200 million, then the quantum of the claim is likely to be greater than the assets available to each of the Companies other than NNUK. With respect to NNUK, the uncertainty surrounding the potential Expense Claims will not prevent a significant first distribution from being made, but it will have an impact on subsequent dividends and the completion of the administration.

The Rules on distributions do not assist

51. The problem facing the Administrators cannot simply be cured by resort to the provisions in Chapter 10 of Part 2 of the 1986 Rules, or Part 14 of the 2016 Rules, which enable administrators to call for proofs of debt and make distributions to persons who have proved their debts. That is because those provisions relate only to unsecured debts and not to Expense Claims.

52. So, although Rule 12.3 of the 1986 Rules provides that,

> "Subject as follows, in administration … all claims by creditors are provable as debts against the company … whether they are present or future, certain or contingent, ascertained or sounding only in damages."

in *Bloom v Pensions Regulator*, Lord Neuberger plainly proceeded on the basis that this was only dealing with unsecured claims and not with the expenses of the administration: see paragraphs [43] - [44] of his judgment. Rule 14.2(1) of the 2016 Rules is in materially similar form.

53. The point can also be illustrated, for example, by the fact that whereas a claim for administration expenses will be for a liability "incurred in the course of … administration" (Rule 12.2 of the 1986 Rules), a proof of debt is required to state the amount of the creditor's claim as at the date upon which the company entered

administration (Rule 2.72(3)(b)(ii) of the 1986 Rules). The same distinction is made in Rules 3.50, 14.1(3) and 14.4(1) of the 2016 Rules.

54. The distinction drawn between (on the one hand) an expense, and (on the other hand) an unsecured claim which has been proved is further illustrated by the terms of Rule 4.180 of the 1986 Rules which states,

> "Whenever the liquidator has sufficient funds in hand for the purpose he shall, subject to the retention of such sums as may be necessary for the expenses of the winding up, declare and distribute dividends among the creditors in respect of the debts which they have respectively proved."

The same provision is now to be found in Rule 14.27 of the 2016 Rules. Although this Rule does not apply to administrations, given the similarities between the structure of the administration and liquidation expense regimes, it is inconceivable that the same distinction should not be observed in relation to administrations.

55. Importantly for present purposes, it also follows that the detailed provisions of Chapter 10 of Part 2 of the 1986 Rules or Part 14 of the 2016 Rules, which enable an administrator to deal with late claims when making distributions, do not apply to Expense Claims. These provisions include, for example, requirements for notices to be given to creditors of the intention to declare a dividend or make a distribution (Rules 2.68 and 2.95 of the 1986 Rules, and Rules 14.29-14.30 of the 2016 Rules); an express statement that the administrator is not obliged to deal with late proofs (Rule 2.96(2) of the 1986 Rules, and Rule 14.32(2) of the 2016 Rules); and exclusions under which creditors who do not prove before the last date for proving are unable to disturb dividends paid or distributions made thereafter (Rule 2.101 of the 1986 Rules, and Rule 14.40 of the 2016 Rules).

56. In short, neither the Act, nor the 1986 Rules nor the 2016 Rules provide any express mechanism under which an administrator can require Expense Claims to be asserted by a specific date, or enable him to refuse to deal with claims asserted after that date in the context of a distribution to unsecured creditors. Instead, the unstated assumption appears to be that persons who have Expense Claims will assert their claims, and that since they will have been incurred in the course of the administration, the administrator will know what such claims are, and will pay or reserve for such claims before making any distribution to unsecured creditors.

The Applications and Orders

57. In the absence of any applicable statutory scheme, the Administrators sought to utilise their general power to apply to the court for directions to implement their own bespoke regime to achieve a similar result. Paragraph 63 of Schedule B1 to the Act provides:

> "The administrator of a company may apply to the court for directions in connection with his functions."

58. The regime originally proposed in the draft orders annexed to the Applications was refined by the Administrators as a result of the argument at the hearing. The final

version of each Order follows the same basic structure, under which the Administrators are given directions by the Court to act as follows.

Paragraph (1)

59. Paragraph (1) of the Order provides that on or before 23 June 2017 explanatory letters requiring the filing of a completed Demand Form and giving notice of the Bar Date should be sent to all potential Expense Claim creditors of the Companies, except for those who have Accepted Expense Claims. It also provides that each Order shall also be advertised in one leading newspaper in each of the Companies' home jurisdictions.

60. The Demand Form requires the creditor to give details of his Expense Claim and to explain why it is an expense claim rather than some other category of claim (such as a provable debt) under English law. In all of the jurisdictions apart from Italy, the Bar Date is 27 October 2017, which is just over four months after notice is given by way of the explanatory letter. The proposed Bar Date in Italy is 22 December 2017, which is three months after the bar date for unsecured creditors which applies under the CVA applicable to Nortel Networks S.P.A. ("Nortel Italy").

61. In the case of NNUK, paragraph (1) also provides for an explanatory letter to be sent to each of the French employees who have made claims against NNUK in France. That letter contains the same explanation of the requirement to file a Demand Form by the Bar Date, but provides that the 133 employees who have already sent letters to the court and/or to the Administrators in 2015 do not need to send a further Demand Form, and will instead be deemed to have filed a Demand Form by the Bar Date.

62. There is no equivalent requirement for notification to the French employees in relation to any Expense Claims that they might wish to assert against any of the Companies other than NNUK. That is because the French employees have not sued any of the other Companies, and it is not at all easy to see how they could validly assert such a claim against those other Companies.

63. To address concerns that I raised during the hearing, the letter to the French employees will also make clear (and the Administrators have given me an undertaking) that the Administrators will not seek to rely upon anything done by the French employees in response to my Orders in support of any argument that the French employees have submitted to the jurisdiction of the English court. The making of the Orders should therefore not affect the jurisdictional dispute over the claims that the French employees are pursuing in France.

Paragraph (2)

64. Paragraph (2) provides a carve-out from the notification and claims process in respect of those creditors with Accepted Expense Claims.

Paragraph (3)

65. Paragraph (3) provides that the Administrators shall apply each Company's assets in discharge of any Expense Claim that is notified by the Bar Date and then agreed or otherwise determined.

Paragraph (4)

66. Paragraph (4) sets out a dispute resolution mechanism in respect of those asserted Expense Claims which the Administrators reject (whether in whole or in part). Pursuant to paragraph (4)(a), the Administrators are required to make a reserve in respect of disputed Expense Claims and, under paragraph (4)(b), they are also obliged to take appropriate steps to reach agreement with the claimant as to the existence (or otherwise) and amount of the Expense Claim. Absent agreement, it is envisaged by paragraph (4)(c) that an application will be made to the court by the Administrators under paragraph 63 of Schedule B1 to the Act for directions as to whether they should pay the Expense Claim, and if so, in what amount.

Paragraphs (5) and (6)

67. Paragraphs (5) and (6) provide for the treatment by the Administrators of a Demand Form received in respect of an asserted Expense Claim on or after the Bar Date (a "Late Expense Claim") but before any distribution to the unsecured creditors is made by the Administrators pursuant to paragraph (7) of the Order.

68. In those circumstances, the Administrators are to agree, or reserve for and apply a dispute resolution procedure to that Late Expense Claim in the same way as a timely Expense Claim. The Late Expense Claim will not, however, be entitled to disturb the amount of any reserves established or payments already made in respect of claimants with Accepted Expense Claims or claimants who made or were deemed to have made their Expense Claims prior to the Bar Date.

Paragraph (7)

69. Paragraph (7) enables the Administrators to treat the balance of the Company's assets that have not been applied or reserved for Expense Claims as available for distribution to unsecured creditors (or, where applicable, to make payment to the CVA Supervisors). This is so notwithstanding the existence of any unresolved Expense Claims, provided that the Administrators have reserved in full for all Expense Claims of which the Administrators are aware and any future Expense Claims which they can foresee.

Paragraphs (8) and (9)

70. Paragraphs (8) and (9) provide for the treatment by the Administrators of a Demand Form received in respect of an asserted Expense Claim on or after the Bar Date and after any distribution to the unsecured creditors has been made by the Administrators pursuant to paragraph (7). In those circumstances, the Administrators will be able to agree, or reserve for and apply a dispute resolution procedure to that Late Expense Claim in the same way as a timely Expense Claim, and, if it is established, pay it pari passu with any other outstanding Late Expense Claim from any assets that might still be in their hands. Again, however, such Late Expense Claim will not be entitled to disturb the amount of any earlier payments made, or reserves established, for claimants with actual or deemed Accepted Expense Claims, or any earlier distribution to unsecured creditors.

Jurisdiction

71. Although the Rules do not contain any express provisions for Expense Claims to be made and determined, there is no doubt that paragraph 63 of Schedule B1 enables an administrator to apply for directions from the court if he is in any doubt as to what qualifies as an expense. *Bloom v Pensions Regulator* was just such an application.

72. On behalf of the Administrators, Mr. Trower QC submitted that paragraph 63 of Schedule B1 was not limited to this function, but was a provision of wide general application which was capable of being deployed whenever an insolvent estate is under the control of an administrator, so as to enable the court to give directions to facilitate the distribution of the fund. He submitted that this would include directions to enable the office-holder to ascertain the nature and extent of the expenses which are to be paid out of or are charged on the fund, together with a direction that the assets may be distributed (including to lower ranking unsecured creditors) without regard to any potential higher ranking claims that are unknown and have not been asserted.

73. In support of this submission, Mr. Trower referred to a number of cases in which directions have been given by the court to liquidators and administrators in similar situations, authorising the giving of notice and the making of distributions without regard to the potential claims of persons who would either rank *pari passu* or higher in the statutory waterfall than the intended recipients of the distribution.

74. In *Re Armstrong Whitworth Securities Co Ltd* [1947] Ch. 673, the original liquidator in a members' voluntary liquidation had made a distribution to members without properly investigating the potential claims of employees who had been injured in accidents at work. Some employees who had been injured in industrial accidents and whose incapacity had arisen since the date of the liquidation subsequently made claims for compensation. By the time of the hearing the original liquidator had died, and the replacement liquidator sought directions as to what to do. Jenkins J. indicated that the liquidator should do what he thought that the original liquidator should have done at the start, namely to write to all employees who were known to have been involved in an accident at work, informing them of the liquidation and requiring them, if they thought they had any further claims, to send particulars of such claims to the liquidator by a specified date not less than 28 days after the posting of the letter. Jenkins J. then gave directions to the successor liquidator that he might then apply the funds still in his hands to the payment of the four known claimants and any other claimants who came forward.

75. In *Re R-R Realisations Ltd* [1980] 1 WLR 805, liquidators in a creditors' voluntary liquidation had paid all known debts and proposed to make a substantial distribution to members of the company formerly known as Rolls-Royce Limited. At the last minute, however, they received a letter indicating that claims might be made against the company on behalf of the victims of an air crash in India several years earlier involving an aeroplane powered by Rolls-Royce engines. The liquidators applied to the court for directions that they be at liberty to distribute the assets of the company to its members without providing for any claims or liability arising out of the accident. The applications were made under section 307 of the Companies Act 1948, which empowered the liquidator to apply to the court to determine any question arising in the winding-up, and provided that if the court was satisfied that the determination of

the question or the exercise of the power concerned would be just and convenient, it could make any order it thought just.

76. Megarry V-C refused to authorise the distribution to members on the facts, but did not doubt that the relevant jurisdiction existed. After considering cases involving the administration of estates and two earlier cases involving liquidators, Megarry V-C stated, at pages 813H-814C:

> "In the result, I would summarise my conclusions as follows.
>
> (1) In deciding whether to make an order under section 307 authorising liquidators of a company in a voluntary liquidation to distribute the assets of a company among the company's members, notwithstanding a last-minute claim by persons who contend that they are creditors, the test to be applied is whether in all the circumstances of the case it is just to make such an order. There is no rule that the claimants must establish that they have been guilty of no wilful default and no want of due diligence, although the presence or absence of any such default or lack of diligence will of course be a factor, and normally an important factor, in determining what is just.
>
> (2) On making such an order the court may impose such terms and conditions as in all the circumstances of the case it considers fitting, or may make such other order as it thinks just. Where the court is asked to refuse or suspend such an order, any contention that this should be done only on terms that the claimants should bear the expenses thrown away by their tardiness in asserting their claims should itself be subject to the test of what is fitting and just.
>
> (3) Where the order is sought in order to facilitate a distribution among members, the court will be more reluctant to grant it than if the distribution is to be made to creditors."

The last point is a reflection of an observation made earlier in the judgment at page 811C-D that,

> "Just as a man should seek to be just before he affects to be generous, so I think that an especial care is needed to ensure that all creditors are paid before distributions are made to the members."

77. In *Re WW Realisations 1 Ltd* [2011] B.C.C. 382, the administrators of a general retail company sought to be appointed as liquidators of the company. They also sought directions authorising them to make a payment to a second tier of secured creditors without making provision for any claims by landlords and local authorities unless such claims were made by a particular date following the sending of a letter inviting them to be made. If the claims by landlords and local authorities were well-founded, the assumption was that they might have qualified as administration expenses, and therefore ranked ahead of the secured claims.

78. David Richards J stated that the jurisdiction to give such directions was well-founded in relation to claims in liquidations, and he referred to *Re Armstrong Whitworth* and *Re R-R Realisations Limited* in that regard. He said, at paragraph 23:

> "The jurisdiction is derived so far as liquidations are concerned, from the statutory power of the court to give directions to liquidators, now contained in s.168(3) of the Insolvency Act 1986. The equivalent power to give directions to administrators is contained in para.63 of Schedule B1 to the Insolvency Act, and I can see no reason why it should not be exercised in a similar way. Equally, I see no reason why it should not be exercised in relation to expense claims, as well as provable debts."

79. David Richards J then continued, at paragraph 25:

> "Of course, the interests of expense claimants must be properly protected, but equally there must be a limit to the time in which the proper working out of administration and liquidation is delayed while those claimants decide whether to lodge claims. In my judgment, in this case they have already had good opportunity to lodge their claims, and provided that they are notified of the effect of my order and provided that the final cut-off date for claims is not less than 28 days after a further letter is sent, it seems to me that the proper balance will be struck between the interests of the proper working out of the administration and liquidation on the one hand and the protection of these creditors on the other."

80. I was also referred to several other cases at first instance where similar orders had been made: see e.g. *Tombs v Moulinex SA* [2004] 2 BCLC 397 (a members' voluntary liquidation) and *Re Powertrain Limited* [2016] BCC 216 (a creditors' voluntary liquidation).

81. I accept Mr. Trower QC's submission that these authorities, together with *Bloom v Pensions Regulator* itself, appear to establish that it is permissible for the Court to use its power to give directions under paragraph 63 of Schedule B1 (i) to assist administrators in ascertaining which liabilities of the company properly rank as administration expenses, and (ii) to authorise administrators to distribute the property of the company to unsecured creditors who rank lower in order of priority in the statutory waterfall without regard to any claims for administration expenses that have not been made by a specified date.

82. I should, however, deal with two issues that were not expressly considered in the earlier authorities, but which have come into closer focus in recent years as a result of cases such as *Bloom v Pensions Regulator* and *Re Lehman Brothers International (Europe) (No.4)* [2017] UKSC 38, [2017] 2 WLR 1497 ("*Lehmans Waterfall*"). Those issues are whether the giving of such directions would illegitimately (i) extinguish the rights of creditors or vary the statutory waterfall, or (ii) amount to judicial legislation.

83. The first issue arises because it is now clear that, absent an express statutory power, the court has no jurisdiction either to extinguish statutory rights to priority or promote lower ranking creditors to a higher order of priority in the statutory waterfall: see e.g. the observations of Lord Neuberger in *Bloom v Pensions Regulator* at paragraphs 115 – 127 to the effect the court does not have a residual discretion to change the priority rules set out in the insolvency legislation.

84. In my judgment, the directions which I have given in the Orders do not purport to extinguish any legal rights or vary the statutory waterfall. I recognise, of course, that by authorising a distribution of assets to other claimants, the directions potentially affect the available fund from which any expense claims can be satisfied if and when they are finally asserted. That is because any late expense claimants will not participate in any earlier distributions of assets and will not be able to disturb distributions that have already been made or provided for. But latecomers will still be entitled to assert their expense claims and "catch up" if and to the extent that this is possible through subsequent distributions of any remaining assets.

85. In short, what is authorised is the distribution of the assets from which such expenses could, if they had been asserted in a timely fashion, have been paid. But prior to the end of the administration, expense claimants have no express statutory right to payment of their claims out of any particular assets, or at any particular time. The legal entitlement of an expense creditor under paragraph 99(3) of Schedule B1 is simply that his debt will be,

> "charged on and payable out of property of which [the administrator] had custody or control immediately before [the time when he ceases to be the company's administrator].

86. This provision has attracted the attention of the courts on a number of occasions. So, for example, in *Paramount Airways Ltd, Powdrill v Watson* [1994] BCC 172 (CA) at 180G, Dillon LJ pointed out that strictly the expenses are only payable when the administrator vacates office, albeit that he added that it was well understood that administrators would, in the ordinary course, pay expenses as and when they arose during the administration. Likewise, in *Re Sports Betting Media Limited* [2008] BCC 177, Briggs J held that where there was a shortfall of assets left at the end of the administration even to pay all of the expense claims, expense creditors who had received some payments in respect of their expense claims during the administration were not required to bring those payments into account for the purposes of calculating a *pari passu* distribution of the assets that were left.

87. In these circumstances, it seems to me that it is possible as a matter of jurisdiction for the court to give directions under paragraph 63 of Schedule B1 for a regime that involves a distribution to unsecured creditors under paragraph 65(3) of Schedule B1, even though that carries a risk that, at the end of the administration, insufficient assets might have been retained to enable a late expense claimant to be paid under paragraph 99(3) of Schedule B1. The question of whether it would be appropriate as a matter of discretion to give those directions is a different matter, which I shall address below.

88. On the second issue, I do not think that the directions to be given to the Administrators amount to impermissible judicial legislation. In *Lehmans Waterfall* at paragraph 13, Lord Neuberger commented on the Act and 1986 Rules as follows,

> "13. … despite its lengthy and detailed provisions, the 1986 legislation does not constitute a complete insolvency code. Certain long-established judge-made rules, albeit developed at a time when the insolvency legislation was far less detailed, indeed by modern standards sometimes positively exiguous, none the less survive. Recently invoked examples include the anti-deprivation principle (see *Perpetual Trustee Co Ltd v BNY Corporate Trustee Services Ltd* [2012] 1 AC 383, the rule against double-proof (discussed in *In re Kaupthing Singer & Friedlander Ltd* [2012] 1 AC 804, paras 8–12), the rule in *Cherry v Boultbee* (1839) 4 My & Cr 442 (also discussed in *In re Kaupthing Singer & Friedlander Ltd* [2012] 1 AC 804, paras 13–20), and certain rules of fairness (alluded to in *In re Nortel GmbH* [2014] AC 209, para 122). Provided that a judge-made rule is well-established, consistent with the terms and underlying principles of current legislative provisions, and reasonably necessary to achieve justice, it continues to apply. And, as judge-made rules are ultimately part of the common law, there is no reason in principle why they cannot be developed, or indeed why new rules cannot be formulated. However, particularly in the light of the full and detailed nature of the current insolvency legislation and the need for certainty, any judge should think long and hard before extending or adapting an existing rule, and, even more, before formulating a new rule."

89. The earlier cases such as *Re Armstrong Whitworth* and *Re R-R Realisations Limited* might be regarded either as examples of the application of a well-established judge-made rule of the type to which Lord Neuberger referred, or as the well-established use of an express statutory provision (paragraph 63 of Schedule B1 or its liquidation equivalent) in a particular type of case. But whichever way they are viewed, I think that they are entirely in accordance with Lord Neuberger's requirements.

90. The type of directions which have been given in the earlier cases provide a pragmatic solution to a practical problem, so as to ensure that the administration of the estate of an insolvent company is progressed and concluded in a timely fashion in the interests of those creditors who have established their claims, even if that risks prejudice to those who have delayed. That is essentially what David Richards J was referring to in *Re WW Realisations 1 Ltd* when he said that,

> "Of course, the interests of expense claimants must be properly protected, *but equally there must be a limit to the time in which the proper working out of administration and liquidation is delayed while those claimants decide whether to lodge claims.*"
>
> (my emphasis)

91. This reflects other judicial observations to the effect that the insolvency legislation implicitly requires office-holders to proceed with all due expedition to collect in and distribute the assets of an insolvent company to those entitled to them under the Act. In *House Property and Investment Limited* [1954] Ch 576 at 612, Roxburgh J referred to the implied obligation imposed by the Companies Act 1948 on liquidators to

complete the liquidation and effect a final distribution of the assets within a reasonable time, and that dictum was referred to with evident approval by Patten LJ in *Danka Business Systems plc* [2013] Ch 506 at paragraphs 30 - 32.

92. Moreover, the scheme of giving notice to persons to make a claim by a certain date, or risk being left out of a distribution, and being forced to catch up if possible from later distributions, is very similar to the express scheme that applies as between unsecured creditors with provable debts in administrations (see e.g. Rules 2.95, 2.96 and 2.101 of the 1986 Rules, and Rules 14.29, 14.30, 14.32(2) and 14.40 of the 2016 Rules). The directions that I have given in the Order are thus "consistent with the terms and underlying principles of the current legislative provisions" (per Lord Neuberger).

Discretion

93. As Megarry V-C indicated in *Re R-R Realisations Ltd*, and David Richards J repeated in *Re WW Realisations 1 Ltd*, the discretionary question is whether it is just for the court to give directions of the type sought, having regard to the need to protect the interests of persons who might have expense claims, but also recognising the need to facilitate an efficient conclusion to the insolvency process.

94. In my judgment, the terms of the Orders which I have made properly balance the need to protect the interests of persons who might have Expense Claims which have yet to be asserted, against the need to minimise any further delay to the conclusion of the administrations and to facilitate the distribution of the Companies' assets to their unsecured creditors. I of course recognise that Expense Claims rank in priority ahead of unsecured claims. They are, however, all claims by creditors, and so the Applications do not raise the same level of concern that Megarry V-C voiced in *Re R-R Realisations* over the return of monies to members of a company before its creditors.

95. In relation to each of the categories of potential Expense Claim to which I have referred, it must also be recalled that the administrations of the Companies have been going on for over eight years. During that time they have attracted considerable publicity, most recently in relation to the imminent receipt of the Lockbox Proceeds. The Administrators have also been careful to keep creditors regularly informed of progress. Realistically, it is difficult to see how any person having a legitimate claim against the Companies could still be unaware of the need to make that claim, or of the potential benefits to him in doing so.

96. Moreover, the potential claimants in most of the categories set out above have each had a very long time in which to take advice and formulate any Expense Claims, because the events to which each of the potential Expense Claims relates took place many years ago. So, for example, the Kapsch claim is said to have originated in the adoption of a contract shortly after the commencement of the administration of NNUK in 2009; the SNMP claim relates to the use of software by the Companies prior to the sale of the global business in 2010 together with the possible violation of intellectual property rights by that sale; the Chubb claim relates to the Administrators' response to a power failure that occurred in 2012; and the French Employee Claims relate to the decision to place NNSA into administration in 2009. The only exception is the tax authority claims, where the precise amount to be received by each of the Companies from the Lockbox Proceeds was not known until very recently. Even there, however, the sales of assets giving rise to a potential claim to corporation tax

took place in about 2010 and the Companies have continued to file tax returns during the administrations.

97. Further, each of the identified categories of potential Expense Claimants have had specific notice of the Applications – in some cases both by a number of direct communications and personal contact - and the opportunity to appear to oppose the Applications or at very least to ask for more time to consider the issues. Most of them (including the French Employees) have instructed lawyers in relation to their potential claims, and the tax authorities can equally be expected to have access to appropriate in-house legal advice. None of them has seen fit to oppose the Orders that I have made or seek more time to consider their position. The same cannot, by definition, be said of unknown potential claimants, but as I have indicated, the prospects of such persons existing must be very slim, and apart from the regular up-dates on the Companies' websites, nothing more can be done other than the placing of advertisements in national newspapers.

98. Finally, and in any event, the Bar Date will be some four months after the potential claimants receive a letter or see a newspaper advertisement advising them of the need to make any Expense Claims or risk being unable to be paid after a distribution is made to unsecured creditors.

99. Taken together, it seems to me that these factors mean that persons with potential Expense Claims will have had more than enough time by the Bar Date within which to assert such a claim if they genuinely think they have one. I think that the general provisions of the Orders which I have outlined provide more than adequate safeguards for their interests, and hence that the time has now come to put such persons on notice that they should not be permitted to delay making such claims any longer given the prejudice that doing so will cause to the interests of the unsecured creditors.

100. There are, in addition, a number of specific protections which have been added to ensure that the interests of certain of the identified persons with potential claims are protected.

101. I have already referred to the details of the letter to be sent to the French employees, to the fact that those who have sent letters to the court or the Administrators in response to the invitation for proofs of debt will be deemed to have made an Expense Claim, and to the undertaking given by the Administrators not to rely upon any response to the Orders in support of any argument concerning submission to the jurisdiction of the English court.

102. In relation to the tax authorities, who have only recently had notice that the Companies were due to receive their share of the Lockbox Proceeds, and some of whom have not yet received a tax computation from the Administrators, it may be that some of the authorities will be unable to process the materials in time to complete a Demand Form and submit it to the Administrators by 27 October 2017. The Administrators are not aware that any such problem actually exists, apart from in relation to Nortel Italy, where the Bar Date has been set for December 2017. However, to address this potential issue, the Administrators have confirmed (i) their intention to provide any outstanding tax computations at least three months before the Bar Date, and (ii) that if any of the tax authorities contact them to indicate that they have difficulty complying with the Bar Date, the Administrators will apply to the court for further directions. Finally, the Administrators indicated that even if no claim

is made by the Bar Date, they intend, in any event, to reserve sufficient funds to cover the tax liability which they have been advised that the relevant Company might owe to the tax authority and which might rank as an administration expense.

The Orders in relation to Nortel Romania and Nortel Finland

103. In relation to Nortel Romania and Nortel Finland, the Administrators sought orders under paragraph 65(3) of Schedule B1 to the Act and rule 2.97(2) of the 1986 Rules, granting them permission to make distributions and declare dividends to unsecured creditors. As I have indicated, I made such an order in relation to NNUK in 2015.

104. Paragraph 65 of Schedule B1 to the Act provides as follows:

> "(1) The administrator of a company may make a distribution to a creditor of a company.
>
> (2) Section 175 shall apply in relation to a distribution under this paragraph as it applies in relation to a winding up.
>
> (3) A payment may not be made by way of distribution under this paragraph to a creditor of the company, who is neither secured nor preferential unless the court gives permission."

105. There have been relatively few cases which have considered the exercise by the court of its discretion to grant permission under paragraph 65(3) of Schedule B1 to the Act. I reviewed the law in my 2015 judgment at paragraphs 19 et seq.

106. In *Re GHE Realisations Ltd* [2006] 1 WLR 287, at paragraphs 5 to 11, Rimer J considered that the creditors' interests as a whole should govern the exercise of the discretion and that the court should consider whether payment of a dividend is consistent with the functions and duties of the administrator and any proposals made by him or which he intends to make. That statement was approved in *Re MG Rover Belux SA/NV* [2007] BCC 446 by HH Judge Norris QC and by David Richards J in *Re MF Global Overseas Ltd* (unreported, 5 June 2013).

107. When I heard the application in July 2015, the Administrators thought that the promulgation of CVAs would be appropriate for Nortel Finland and Nortel Romania, in particular because (a) it was not anticipated that creditors would be paid in full, and (b) a CVA would in each case be the best way of giving effect to the assurances that had been given in relation to local law priorities to which I have referred. Accordingly, orders were sought and obtained giving the Administrators permission, but not obliging them, to promulgate CVAs in respect of these two companies.

108. Since then, and particularly in light of the relatively modest amounts which Nortel Finland and Nortel Romania received from the Lockbox Proceeds, the Administrators have reached the conclusion that it is not cost-effective to promulgate a CVA in respect of these companies because of the comparatively small size of their estates. Moreover, and as I was told in November last year, it now appears likely that these Companies' unsecured creditors will in fact be paid in full. As a result, the issue of the assurances as to local priorities that could be given effect in a CVA is unlikely to be of any practical importance.

109. In these circumstances, I am satisfied that it would be in creditors' interests as a whole, and consistent with the general functions and duties of the Administrators of Nortel Romania and Nortel Finland, to utilise the most cost-effective means of paying their creditors, and that this is not by means of a CVA, but is by way of a proof of debt process followed by a distribution under the 2016 Rules.

Conclusion

110. For the reasons set out above, I was content to make the Orders on 9 June 2017.