Neutral Citation Number: [2017] EWHC 3299 (Ch)

Case No: CR-2016-006154 & others

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

Royal Courts of Justice
Rolls Building, Fetter Lane
London, EC4A 1NL
Date: Thursday 14 December 2017

Before:

MR. JUSTICE SNOWDEN

IN THE MATTERS OF:-

NORTEL NETWORKS UK LIMITED	**No. CR-2016-006154**
NORTEL GmbH	**No. CR-2009-000033**
NORTEL NETWORKS NV	**No. CR-2009-000034**
NORTEL NETWORKS S.P.A.	**No. CR-2009-000035**
NORTEL NETWORKS BV	**No. CR-2009-000036**
NORTEL NETWORKS POLSKA SP.Z.O.O	**No. CR-2009-000037**
NORTEL NETWORKS HISPANIA SA	**No. CR-2009-000038**
NORTEL NETWORKS INTERNATIONAL FINANCE & HOLDING BV	**No. CR-2009-000039**
NORTEL NETWORKS (AUSTRIA) GmbH	**No. CR-2009-000040**
NORTEL NETWORKS SRO	**No. CR-2009-000041**
NORTEL NETWORKS ENGINEERING SERVICE KFT	**No. CR-2009-000042**
NORTEL NETWORKS PORTUGAL SA	**No. CR-2009-000043**
NORTEL NETWORKS SLOVENSKO S.R.O	**No. CR-2009-000044**
NORTEL NETWORKS FRANCE SAS	**No. CR-2009-000045**
NORTEL NETWORKS AB	**No. CR-2009-000046**
NORTEL NETWORKS (IRELAND) LIMITED	**No. CR-2009-000047**
NORTEL NETWORKS S.A.	**No. CR-2009-000048**
NORTEL NETWORKS OY	**No. CR-2009-000049**
NORTEL NETWORKS ROMANIA SRL	**No. CR-2009-000050**

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

- -

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

Hearing date: 14 December 2017

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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

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Introduction

1. This is an application by the joint administrators ("the Administrators") of Nortel Networks UK Limited ("NNUK") and 18 other companies in the Nortel Group of companies ("the EMEA Companies"), for an order extending the Administrators' terms of office by a period of 12 months, to 13 January 2019.

2. The history of the Nortel Group is set out in a number of earlier judgments which I have given in relation to these administrations. In brief, NNUK and the EMEA Companies (together "the Companies") formed part of the Nortel Group of companies operating in Europe, the Middle East and Africa. The Nortel Group operated a global networking solutions and telecommunications business based on the development, licensing and maintenance of intellectual property and the marketing of products and services based on that intellectual property.

3. On 14 January 2009, the (Canadian) parent company of the Nortel Group and certain of the Canadian Nortel companies sought protection under the Companies' Creditors Arrangement Act to facilitate the reorganisation of the Nortel Group for the benefit of its creditors. On the same day, certain of the Nortel Group companies which were registered in the US filed for bankruptcy protection under Chapter 11 of the US Bankruptcy Code for the same purpose.

4. NNUK and the EMEA Companies were placed into administration by order of Blackburne J on the same day, the Judge being satisfied that the COMI of each of the EMEA Companies was in the UK. The Administrators' terms of office have been extended on four previous occasions, most recently by myself on 2 December 2015, when I extended the administrations by 24 months to 13 January 2018: [2015] EWHC 3618 (Ch).

The conduct of the Administrations

5. The EMEA Companies were all incorporated elsewhere in the EU and had establishments in the Member States in which they were incorporated. Accordingly, following the appointment of the Administrators, it was possible that creditors might have sought to open secondary proceedings in the EMEA Companies' "home" Member States. The Administrators considered that it would be in the interests of the EMEA Companies' creditors as a whole to avoid such secondary proceedings being opened because they were considered likely to disrupt and/or prevent the EMEA Companies' participation in a coordinated global reorganisation or sale of the Nortel Group's businesses, thereby reducing the value which might be realised for the benefit of their creditors. It was also considered that the opening of secondary proceedings would increase costs, multiply formalities and cause delay.

6. Accordingly, and in order to discourage the opening of secondary proceedings by the creditors, the Administrators gave various assurances in their Statements of Proposals (and elsewhere) that if creditors did not seek to open secondary proceedings, the Administrators would ensure that they would be in no worse position than if secondary proceedings were in fact opened. This had the desired effect and no secondary proceedings were opened in relation to any of the EMEA Companies apart

from Nortel Networks S.A. ("NNSA"). In relation to NNSA, secondary proceedings were opened in France on 28 May 2009 by the French Commercial Court and the business, property and affairs of NNSA in so far as they are situated in France have, since that date, been under the control of the French Liquidator.

7. Following its collapse, the Nortel Group worked together towards a coordinated global reorganization; and, that having failed, towards a coordinated global sale of the business and assets of the Group. 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 were subsequently sold for US$4.5 billion.

8. The net sale proceeds, totalling approximately US$7.3 billion, were paid into escrow bank accounts in New York ("the Lockbox"). Following extensive negotiations and three formal mediation processes, all of which failed, court hearings took place simultaneously in both the US and in Canada in which the two courts were asked together to determine the proper allocation of the net sale proceeds ("the Allocation Dispute").

9. On 12 May 2015, the US and Canadian Judges determined that the Lockbox monies should be allocated according to a modified form of a pro rata basis across individual Nortel Group companies and by reference to the percentage of the "Allowed Claims" for which each estate is liable out of the total amount of all "Allowed Claims" for which they are, in aggregate, liable.

10. On 23 July 2015, shortly after the decisions of the US and Canadian courts on the Allocation Dispute, I ordered that the Administrators be at liberty to make such distributions to the unsecured, non-preferential creditors of NNUK as they considered appropriate. I also authorised them to promulgate CVAs in respect of all of the other Companies, where appropriate giving effect to the assurances given to local creditors, and in the case of NNSA providing for a claims determination mechanism and other compromises and arrangements as might be thought appropriate: [2015] EWHC 2506 (Ch).

11. The US and Canadian decisions in the Allocation Dispute were subject to motions seeking clarification and reconsideration, and they were also subject to appeals in the US and Canada. On 12 October 2016, before all of the appeals had been finally determined, a global settlement of the Allocation Dispute was reached ("the Global Settlement") and on 3 November 2016, I made an order giving the Administrators permission to enter into the various agreements constituting the Global Settlement. I also extended the date for the making of distributions in relation to NNUK: [2016] EWHC 2769 (Ch).

12. The Global Settlement became effective on 8 May 2017. Shortly before it did so, the Administrators applied for directions to facilitate the process of distribution of the assets of the Companies to their unsecured creditors. Directions were necessary because certain claims had been intimated against some of the Companies which might have ranked for priority payment as administration expenses, but the Insolvency Rules provide no express mechanism to require such claims to be made in a timely manner. On 9 June 2017, I gave directions that the Administrators could, by notice and suitable advertisement, require administration expense claims to be made and set a (soft) bar date in relation to such claims, so as to enable distributions to be

made to unsecured creditors without regard to any expense claims not made by the bar date: [2017] EWHC 1429 (Ch).

13. Since then, the bar dates for the making of expense claims against the relevant Companies have all passed (with the exception of Nortel Italy where the bar date is 22 December 2017). In the case of each expense claim which has been intimated, a settlement has been reached, or the expense reserve which had previously been made has been released, or the Administrators are well advanced in their discussions with the claimant concerned.

Distributions

NNUK

14. On 27 July 2017, the Administrators of NNUK were able to make an initial distribution of 22.1p in the £, and on 5 December 2017 they made a second distribution of 16.5p in the £.

15. The Administrators of NNUK anticipate receiving further distributions from NNL (Canada) before mid-2018 and that they will receive further realisations from other EMEA Companies during the course of 2018. Those realisations will then be available for payment of a further dividend or dividends.

The CVA Companies

16. A CVA has been proposed and approved without modification in respect of each of the other Companies apart from Nortel Finland, Nortel Romania and NNSA. The dates within which unsecured claims were to be made under the CVAs have all passed and the CVA Supervisors paid substantial first dividends on 5 December 2017 in line with the CVA Supervisors' expectations. First distributions to creditors of Nortel Ireland and Nortel Hungary are expected either later this month or early January 2018, and to creditors of Nortel Italy in February 2018.

17. In relation to these companies there remain some recoveries to be made from third parties and some inter-company claims to be sorted out. The Administrators anticipate that this process will be completed during the course of 2018 with the payment of second and if necessary final dividends before the end of that year. Once that process has been completed, steps will need to be taken to distribute any surplus and to ensure that the appropriate procedure is followed to dissolve each company in its place of incorporation.

Nortel Finland and Nortel Romania

18. CVAs were not promulgated for Nortel Finland and Nortel Romania because it was not thought necessary to do so. A standard administration distribution has therefore been put into effect and on 5 December 2017, the Administrators of Nortel Finland and Nortel Romania made a first interim distribution of 95p in the £. Similar considerations and a similar timetable are applicable to the remaining steps in these administrations as are applicable to the Companies which are subject to CVAs.

NNSA

19. The CVA anticipated for NNSA has not yet been proposed, primarily because the NNSA Secondary Liquidator is proceeding with his own claim process following receipt of its part of the monies from the Global Settlement. However, the Administrators of NNSA anticipate proposing a CVA in the first or second quarter of 2018, with a claims bar date sometime in the third quarter of 2018.

Extending the Administrators' terms of office

20. Paragraph 76(1) of Schedule B1 to the Insolvency Act 1986 provides that:

> "The appointment of an administrator shall cease to have effect at the end of the period of one year beginning with the date on which it takes effect."

21. Paragraph 76(2)(a) of Schedule B1 provides that:

> "...on the application of an administrator the court may by order extend his term of office for a specified period..."

22. The Court's discretion under paragraph 76(2)(a) is not circumscribed in any express way, but it is readily apparent that it should be exercised in the interests of the creditors of the company as a whole, and that the Court should have regard to all the circumstances, including (i) whether the purpose of the administration remains reasonably likely to be achieved, (ii) whether any prejudice would be caused to creditors by the extension, and (iii) any views expressed by the creditors. In that regard, where a company is making distributions to its unsecured creditors within the administration process, it is likely to be appropriate that the administrator's term of office should be extended to allow the distributions to be made, rather than to require the company to go into liquidation, which might well increase the costs or delay the distribution process with no countervailing benefit.

23. Paragraph 76(2)(a) is supplemented by rule 3.54 of the Insolvency (England and Wales) Rules 2016 which provides that:

> "(1) This rule applies where an administrator makes an application to the court for an order …to extend the administrator's term of office under paragraph 76(2) of Schedule B1.
>
> (2) The application … must state the reasons why the administrator is seeking an extension.
>
> (5) Where the court makes an order extending the administrator's term of office, the administrator must as soon as reasonably practicable deliver to the creditors a notice of the order together with the reasons for seeking the extension given in the application to the court."

24. In this case, the reasons required by rule 3.54 are given in the evidence of one of the Administrators, Mr. Stephen Harris. After setting out the material facts in some detail, Mr. Harris concludes,

> "106. For the reasons set out in this statement, the Joint Administrators consider that, at this point in the administrations, moving any of the Companies into a liquidation process would be hugely disruptive to the affairs of the Companies and damaging to creditors' interests. If the Companies were to be forced into liquidation at this stage, the permission given by the Court to the Joint Administrators of NNUK, Nortel Finland and Nortel Romania to make distributions would be frustrated. In the case of the CVA Companies, without an extension, the Joint Administrators would be unable to fulfil the terms of the CVAs which have been approved by the creditors of each CVA Company. In the case of NNSA, the Joint Administrators would not be able to promulgate the CVA as currently envisaged. The Joint Administrators remain of the view that there are no obvious benefits to any creditors if the Companies were to go into liquidation at this stage and there would be considerable amounts of disruption and wasted costs.
>
> 107. To date, the administrations and the CVAs have proceeded successfully and the statutory purposes of the administrations as set out at paragraph 3(1) of Schedule B1 to the 1986 Act are capable of further achievement by way of making distributions to creditors, including by way of the CVAs. Accordingly, the Joint Administrators consider that the orders sought by the Extension Applications are in the best interests of each of the Companies."

25. I accept Mr. Harris' evidence and those reasons as a proper basis for the exercise of my discretion as sought by the Administrators.

26. It is plainly appropriate for NNUK, Nortel Finland and Nortel Romania to remain in administration for the time being to enable the proof and distribution process to be completed. It is also plainly appropriate for the Administrators to remain in office in relation to NNSA so as to be able to propose a CVA as an efficient means of distributing its assets. If, for some reason, it is not thought appropriate to do so, the Administrators can seek further directions.

27. In relation to the remaining Companies where distributions to creditors are being effected by the CVA Supervisors (who are also the Administrators) under the terms of each CVA, the Administrators, in their capacity as such, continue to have a role to play. As Administrators, they will continue to determine the expense claims, make recoveries on the inter-company claims, and determine the assets to be made available for distribution by themselves in their capacity as CVA Supervisors. It is envisaged that they will remain in office as Administrators until the CVAs have run their course, whereupon each CVA Company can then be dissolved without the unnecessary intervention of another insolvency process.

28. If any of the Companies were to move into liquidation at this stage, further costs and delay would inevitably be incurred which would not be in the interests of the Companies' creditors. Conversely, the Companies' creditors will suffer no prejudice from the continuation of the current regimes.

29. For completeness, I should add that the Administrators wrote to the members of the Companies' creditors' committees (where established) to notify them of this application and the Companies' creditors were notified of this application generally by notice published on the "Nortel EMEA Administration proceedings website". None of the creditors has voiced any objection to the extensions sought.

Brexit and the period of the extension

30. The period of extension sought by the Administrators is only one year, namely to 13 January 2019. That is largely because of the uncertainty caused by the fact that on 29 March 2017 HM Government gave notice of the United Kingdom's intention to withdraw from the European Union. That withdrawal is expected to take effect on 29 March 2019.

31. The uncertainty arises because the administrations and existing CVAs of the Companies are main proceedings for the purposes of Council Regulation (EC) No. 1346/2000 on Insolvency Proceedings, and any CVA in respect of NNSA would be a main proceeding for the purposes of Regulation (EU) No. 2015/848 of the European Parliament and of the Council on Insolvency Proceedings (recast). Pending the completion of any withdrawal agreement between the UK and the European Council, it is uncertain whether and if so, how, either the original Insolvency Regulation or the recast Insolvency Regulation will apply to the administrations of the Companies or the CVAs and what, if any, recognition will be given to the Administrators or the CVA Supervisors by the courts of the EU Member States after 29 March 2019.

32. Given this uncertainty, the Administrators consider, and I agree, that it is prudent not to extend the administrations beyond 29 March 2019 at this stage.

33. Subject to reaching final agreement with the Local Tax Authorities, the Administrators consider that it should be possible to complete the administrations of the Companies other than NNUK, NNSA (and possibly NNIF, which is the Company responsible for making distributions of the EMEA group's surplus to NNUK) within a one year extension period.

34. The Administrators intend to seek further directions in late 2018 in respect of the administration of any of the Companies which is likely to continue beyond 13 January 2019. By that time, it is hoped that the position of the administrations and CVAs after the withdrawal of the United Kingdom from the European Union will be clearer.

Conclusion

35. For the reasons that I have given, I propose to grant the one year extensions sought by the Administrators.