Neutral Citation Number: [2018] EWHC 1812 (Ch)

Case No: 539 of 2009 / CR-2009-000048

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

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

Date: 17 July 2018

Before :

MR. JUSTICE SNOWDEN

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IN THE MATTER OF NORTEL NETWORKS SA (IN ADMINISTRATION)

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

- -

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

Hearing date: 12 July 2018

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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 joint administrators (the "Administrators") of Nortel Networks SA (in administration) ("NNSA"), made with the consent of the NNSA Conflict Administrator. The Administrators seek an Order setting an "Expense Bar Date" by which creditors must notify them of any claim which they assert ranks as an administration expense and thus has priority for payment over the claims of ordinary unsecured creditors (an "Expense Claim"). The Administrators' underlying reason for seeking such an order is that unless the court gives directions setting a time limit by which such claims have to be made, the need to reserve indefinitely for any such potential claim would mean that it would be impossible to make any, or any meaningful, distribution to unsecured creditors of NNSA.

2. The proposed Expense Bar Date is 29 January 2019, which is intended to dovetail with the anticipated timetable for the promulgation of a company voluntary arrangement ("CVA") which will enable a distribution to be made to the unsecured creditors of NNSA next year. It is anticipated that copies of the proposed CVA will be sent out to all of NNSA's ordinary unsecured creditors by the end of August 2018, with a meeting of unsecured creditors to take place in the early Autumn, leading to a bar date for the submission of unsecured claims in the CVA (the "CVA Bar Date") in mid-January 2019. The order sought would require notice to be sent by 31 August 2018 to all persons who it is thought might be likely to be intending to assert an Expense Claim, calling for submission of any such claim by 29 January 2019. Accordingly, if and to the extent that any creditors wish to assert ordinary unsecured claims in NNSA's CVA as well as (or as an alternative to) Expense Claims in the NNSA Main Proceeding, then the applicable bar date for the submission of all such claims will be more or less the same.

3. The order sought is in materially the same terms as the various orders which I granted in June last year in relation to the other 18 Nortel EMEA entities including in particular Nortel Networks UK Limited ("NNUK"): see Re Nortel Networks UK Ltd and others [2017] EWHC 1429 (Ch), [2018] Bus LR 206. All but three of the orders made last year contemplated the operation of an Expense Bar Date in conjunction with the promotion and operation of a CVA.

Background

4. My judgment last year briefly set out the background to the Nortel administrations and the reasons why I considered that I had jurisdiction to make orders of the type sought. I shall not repeat that background and reasons but the judgment should be referred to for further detail.

5. The particular background to this application is that, uniquely among the Nortel EMEA entities, there is a secondary (liquidation) proceeding (the "NNSA Secondary Proceeding") in France in relation to NNSA, in addition to the main (administration) proceeding which is under the supervision of this Court (the "NNSA Main Proceeding").

6. Under the terms of the NNSA Settlement Deed entered into as part of the Global Settlement in late 2016 (see Re Nortel Networks UK Ltd and others [2016] EWHC 2769 (Ch), [2017] Bus LR 590), it was envisaged that the NNSA Secondary Proceeding would be primarily responsible for the payment of priority creditors and the payment of any tax through its distribution process. Various sharing mechanisms were also put in place between the NNSA Main Proceeding and the NNSA Secondary Proceeding.

7. At the time of my judgment in June last year, it was thought that all such priority claims against NNSA might be resolved (substantially or in their entirety) in the NNSA Secondary Proceeding. For these reasons, the Administrators determined that it was appropriate to wait for the NNSA Secondary Proceeding to make further progress, before promulgating a CVA in respect of NNSA pursuant to the permission that I had granted in July 2015: see Re Nortel Networks UK Ltd and others [2015] EWHC 2506 (Ch), [2017] 2 B.C.L.C. 555, esp. [43] to [48]. It was hoped that if sufficient progress was made, it might not be necessary to make an application of the type now made.

8. However, although good progress has been made in the NNSA administration (both the Main Proceeding and the Secondary Proceeding) and the Administrators are shortly intending to promulgate a CVA to enable distributions to be made to unsecured creditors of NNSA, there remain four known categories of potential Expense Claim against NNSA which have not yet been asserted (still less adjudicated upon). The need to reserve for the potential existence of such Expense Claims means that even if the CVA is approved by the unsecured creditors, no or no substantial payments could be made under it.

The known potential Expense Claims

9. The four identified categories of potential Expense Claims for NNSA are as follows.

French Employee Claims

10. The Administrators believe there are approximately 494 former employees of NNSA who were made redundant in the NNSA Secondary Proceeding. Of these, 176 (the "French Employees") brought claims in the French Courts against a number of Nortel entities, including NNSA and NNUK. Settlement agreements have now been reached (and approved by the French Court) as between the French Employees, NNUK, NNSA, the Administrators and NNSA's Secondary Liquidator (the "Employee Settlements"). Under these Employee Settlements, all claims were released and waived as against any Nortel Group entity other than NNSA.

11. As against NNSA, the French Employees have only ever asserted claims in the NNSA Secondary Proceeding. In that regard, recital 27 in each of the Employee Settlements envisaged that any unsecured creditors in the NNSA Secondary Proceeding would be entitled, in addition to claiming in the NNSA Secondary Proceedings, to submit a claim in the NNSA Main Proceeding for any unpaid balance of their unsecured claims. This would enable the French Employees to submit claims in the NNSA CVA. Over the last few days, letters have been sent to the Administrators and directly to myself by a number of the French Employees which appear to refer to their intention to submit claims for such unpaid balance.

12. No French Employee has ever asserted an Expense Claim in the NNSA Main Proceeding. However, a number of letters sent to me by some of the French Employees in October and November 2015 in relation to NNUK did characterise such claims as Expense Claims; and there is a sentence in the letters that I have recently received from some of the French Employees that refers to amounts being paid in the NNSA Main Proceedings "in a privileged manner". Whilst being very unclear, that sentence might indicate an intention to assert an Expense Claim.

SNMP

13. A substantial claim has been brought by SNMP International, Inc. and SNMP Research, Inc. (together, "SNMP") who were former software licensors to the Nortel group's US and Canadian entities, against the US and Canadian debtors. The claim relates to alleged fees due for pre- and post-insolvency use of SNMP's software, together with a claim for damages for alleged breach of intellectual property rights in connection with the sale of the global Nortel business: see paragraphs [32] – [35] of my judgment of last year ([2018] Bus LR 206 at 213).

14. In accordance with the bar date order granted last year in relation to NNUK, the Administrators sent an Explanatory Letter and Demand Form to SNMP, so that it could (if it saw fit) assert an Expense Claim against NNUK (as SNMP had previously intimated it might). No response from SNMP was forthcoming. Accordingly, the prospect of any such claim now being made against NNSA is thought to be very remote. However, the concern is that if such a claim was made, its size might be such that it would, alone, prevent any distribution to unsecured creditors under the NNSA CVA until it could be adjudicated upon.

The Landlord's claim

15. GIE Les Jeunes Bois, the former landlord of premises occupied by NNSA (the "Landlord"), has filed a number of claims totalling in excess of €50 million in the NNSA Secondary Proceeding for termination, rent arrears and dilapidations in respect of a finance lease contract dated 15 July 1999. It is not clear to the Administrators whether the Landlord intends to assert these claims (or any of them) against the NNSA Main Proceeding and, if so, whether they would be asserted as an Expense Claim or otherwise. The Landlord has not articulated its position in this regard, nor has it fully particularised its claims, but there is at least a risk that it may seek to assert these claims (or some of them) as Expense Claims (either wholly or in part) in the NNSA Main Proceeding.

The French Tax Authority

16. Following receipt by NNSA and the other Nortel EMEA entities of their allocation of the sale proceeds arising from sale of Nortel's global business, the Administrators anticipated receiving claims from some or all of the local tax authorities for tax payable on those sale proceeds by each of the entities. This was one of the key drivers for the Administrators making applications for bar date orders in relation to the other Nortel EMEA companies last year.

17. The terms of the NNSA Settlement Deed provided for the burden of any tax liability arising as a result of any action taken by the Administrators after their appointment or by the Secondary Liquidator to be allocated equally between the NNSA Main Proceeding and the NNSA Secondary Proceeding.

18. The Administrators have been advised by their local tax advisers that the amount due from NNSA to the Direction des Grandes Entreprises (the "French Tax Authority") in respect of the receipt of the Sale Proceeds was €24,131,397. The NNSA Secondary Proceeding duly filed a tax return to 31 December 2017 reflecting this advice, and on 11 May 2018 the Administrators paid the sum of €12,065,698.50 to the French Tax Authority.

19. The Administrators have taken tax advice in France as to the mechanisms available to achieve tax finality in the context of the insolvency of a company. However, there is no recognised procedure by which tax clearance can be secured in France until the expiry of the relevant limitation period, which is four years from the filing of the relevant tax return. Accordingly, absent an order setting an Expense Bar Date, the Administrators will not have certainty regarding the quantum of tax paid in May 2018 (or of any post-filing tax claims that may be asserted by the French Tax Authority) for a number of years.

20. The Secondary Liquidator has taken primary responsibility for liaising with the French Tax Authority and the Administrators have historically had little contact with the French Tax Authority. However, the Administrators intend to engage more fully with the French Tax Authority in the future: specifically, by no later than 29 October 2018, the Administrators intend to submit to the French Tax Authority a pro forma tax calculation for the period from 1 January 2018 up to the exit from administration.

21. The Administrators also understand that they will be required to submit a "long form" tax computation for each of the years of NNSA's Secondary Proceeding, so as to permit NNSA to utilise its losses (which have not been usable for tax set-off purposes to date). The Administrators intend to submit this "long form" tax calculation together with the pro forma calculation by 29 October 2018. The Administrators anticipate that, if accepted, this "long form" tax calculation will result in a refund of all post-appointment tax paid to date on the basis that there has been no taxable income and therefore no tax payable.

22. Whilst there could, in theory, be other unknown categories of potential Expense Claims, given the very long time during which NNSA has been in administration and the wide publicity given to the case, this is thought to be a very remote possibility.

<u>The Order sought</u>

23. Apart from the change to the relevant dates, and apart from not containing any special form of notification or explanatory letter to any of the French Employees (given that none of them have clearly intimated any intention to make an Expense Claim against NNSA), the draft order sought is in materially identical form to that which I considered in relation to the other Nortel EMEA companies last year: see [2018] Bus LR 206 at paragraphs [59] – [70]. The proposed order includes a provision for a general advertisement to be placed in "Les Echos", a well-known business publication in France.

Notice of this Application

24. On 7 June 2018, notice of the Administrators' intention to make the Application was placed on the Administrators' website. On 22 June 2018, further notice was placed on the website, giving notice of the time and place of the hearing on 12 July 2018. Copies of the application, the draft order and the evidence in support were uploaded to the website at about the same time.

25. In addition, specific notice was given to the known categories of potential Expense Claimants as follows.

Notice to the French Employees

26. On 11 June 2018, the Administrators wrote to the various lawyers who (between them) were understood to represent all of the 176 French Employees. The Administrators also gave notice to the NNSA Works Council lawyer who appears to represent the majority of the 494 former employees of NNSA (though precisely which former employees is unclear). On 22 June 2018, the Administrators wrote again to the same lawyers, giving notice of the 12 July 2018 hearing.

27. From about 6 July 2018 last week, email letters in near identical form were received by the Administrators and myself from a number of the French Employees. Those letters stated that since 1 January 2018 the writer had no longer been represented by one of the lawyers previously instructed (Mr. Metin) and requested that all correspondence sent to Mr. Metin since that date be forwarded to the writer's personal address. None of those letters expressly referred to the Application.

28. The Administrators had not previously been informed that Mr. Metin was not acting for the relevant French Employees. By an email to the Administrators' solicitors on 9 July 2018, Mr. Metin confirmed that he no longer represents any of the French Employees. Having received such confirmation, on 10 July 2018 the Administrators then emailed the 149 French Employees for whom they held email addresses, attaching copies of all correspondence sent to them c/o Mr. Metin since 1 January 2018, including notice of the hearing on 12 July 2018 and copies of the draft Order and evidence in support. The Administrators also sent hard copy letters to the remaining 27 French Employees (for whom they only hold a postal address), as well as 6 French Employees whose email addresses returned a delivery failure notification, giving them details of how to access copies of all the correspondence sent to Mr. Metin since 1 January 2018.

29. In addition, on 11 July 2018, the day before the hearing, a letter was sent by Mr. Joly, a former employee and union representative at NNSA, to the Conflict Administrator, with copies for information to the Administrators and myself. That letter complained of the short notice to employees of the hearing by email, and demanded that the Administrators should henceforth communicate with all of the former employees of NNSA in writing rather than by email. It also sought the appointment of Mr. Joly to the creditors' committee of NNSA.

30. Notwithstanding the contents of Mr. Joly's letter, I am satisfied that the Administrators did all that was reasonably necessary to alert the French Employees who had previously indicated an intention to make a claim against NNSA to the forthcoming hearing. Specifically, I think that it was both reasonable and professionally appropriate for them to have communicated with lawyers who, so far as they had been informed, acted for the French Employees, rather than communicating directly with the French Employees. In any event, none of the letters received (including that from Mr. Joly) indicated any opposition to the order that is sought by the Administrators. That order does not itself immediately alter or affect the rights of the French Employees, but simply sets out a process under which those rights can, if thought appropriate, be asserted as an Expense Claim, can be adjudicated upon and, if established, paid.

31. That said, out of an abundance of caution, the Administrators indicated that they would have no objection to the inclusion in my order of an express provision giving any person permission to apply to vary or discharge the order if such person considers that he had inadequate (or no) notice of the hearing and would have wished to oppose the making of the order. I will include such a provision in the order that I make, but to provide some certainty for the Administrators before the notices are due to be sent out at the end of August 2018, I shall specify that any such application must be made by 4 p.m. on 9 August 2018. This will enable me to adjudicate upon such application in good time before the end of August.

Notice to SNMP

32. On 11 June 2018, the Administrators wrote to SNMP's legal representatives to give them notice of the present Application and describing the effect of the Bar Date Order sought. On 22 June 2018, the Administrators wrote to SNMP's lawyers giving notice of the hearing scheduled for 12 July 2018. No response was received to those letters.

Notice to the Landlord

33. On 11 June 2018, the Administrators wrote to the English solicitors for the Landlord, giving notice of the present Application and describing the effect of the Bar Date Order sought. The Landlord's solicitors confirmed on 9 July 2018 that the Landlord did not intend to appear at the hearing, but reserved its right to assert an Expense Claim in accordance with any Expense Bar Date.

Notice to the French Tax Authority

34. The Administrators have been in direct correspondence since May 2018 with the French Tax Authority regarding the NNSA Main Proceeding and the Administrators' intention to issue the present Application. On 15 June 2018, the Administrators wrote to the French Tax Authority, notifying it formally of the Application and the effect of the proposed Bar Date Order in relation to NNSA. On 22 June 2018, the French Tax Authority was given notice of the hearing along with copies of the draft order and evidence in support. The Administrators received no response to these notices.

The Law

35. In my judgment last year, I held that it is permissible for the court to use its power to give directions under paragraph 63 of Schedule B1 to the Insolvency Act 1986 (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: see Re Nortel Networks UK Ltd & Others [2017] EWHC 1429 (Ch), [2018] Bus LR 206 at [71]-[92].

36. I also held that the discretionary question for the court is whether it is just to give directions of the type sought, (i) having regard to the need to protect the interests of persons who might have Expense Claims, but also (ii) recognising the need to facilitate an efficient conclusion to the insolvency process: see paragraph [93].

Discretion

37. For the following reasons, I consider that it is just and appropriate to give directions in the form sought, requiring creditors who might wish to assert an Expense Claim to do so by the Expense Bar Date of 29 January 2019, and authorising the Administrators to make funds available to the unsecured creditors through a CVA (if approved) without making any retention for any such claims which have not been notified.

38. NNSA has now been in administration for nine years, and there is a substantial fund of money available for distribution to unsecured creditors. The Administrators are now ready to promulgate a CVA, and there is an obvious and strong commercial interest in enabling such a distribution to occur through a CVA if that is approved by the unsecured creditors.

39. The sheer size of some of the known potential Expense Claims means that, in the absence of a Bar Date, large reserves may have to be made for them, with the result that no (or substantially no) distributions to ordinary unsecured creditors may be possible through any CVA. The continued uncertainty and prejudice to unsecured creditors caused by the possible existence of such claims is manifestly undesirable.

40. The effect of the order (if granted) would not be to extinguish any late Expense Claims, though it might (depending on the circumstances) be to reduce or exhaust the funds available to pay them. As I noted in my earlier judgment at [94], the potential issue in this case is between administration expense creditors and ordinary unsecured creditors, which does not raise quite the same level of concern as might be the case if it were sought to make a distribution to shareholders without providing for the claims of all possible creditors.

41. There has been substantial publicity in relation to the administration of NNSA, and the Administrators have been careful to keep creditors regularly informed of progress. Realistically, it is difficult to see how any person having a legitimate Expense Claim against NNSA could still be unaware of the need to make that claim, or of the potential benefits to him in doing so.

42. In relation to all of the known potential Expense Claimants, there will be five months between the date on which an explanatory letter is sent to them and the Expense Bar Date. The French Tax Authority will also have (at least) three months between the Administrators' submission of the tax calculations and the Expense Bar Date. This is a substantial further period of time to enable an Expense Claim to be formulated, and the Administrators have had no indication from any potential Expense Claimant or from the French Tax Authority that they would be unable to comply with the proposed timetable.

43. There is an obvious administrative benefit to all concerned in making the date for notification of any Expense Claims approximately the same as the date for submission of unsecured claims in the CVA (if approved).

Conclusion

44. I consider that the time has now come to put anyone who might wish to assert an Expense Claim against NNSA on notice that they should not be permitted to delay making such claim any longer, given the prejudice that any further delay will cause to the interests of NNSA's unsecured creditors.

45. I also consider that the specific provisions of the order sought relating to notice and the provision for dealing with late claims provides more than adequate safeguards for the interests of potential Expense Claimants.

46. Accordingly, I will make the order sought by the Administrators with the addition of permission to any person to apply by 9 August 2018 for it to be varied or set aside.