



Neutral Citation Number: [2019] EWHC 2778 (Ch)

Case No: CR-2009-000045

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

Liverpool Civil and Family Court
Vernon Street, Liverpool

Date: Tuesday 22 October 2019

Before :

MR JUSTICE SNOWDEN

IN THE MATTER OF NORTEL NETWORKS FRANCE S.A.S.

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

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

Hearing date: 16 October 2019

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

MR JUSTICE SNOWDEN

MR JUSTICE SNOWDEN :Introduction

1. This is my judgment following the adjourned hearing of an application (the “Application”) by the joint administrators (the “Administrators”) of the above-named company (“NNF” or the “Company”) for an order approving part of their remuneration as administrators and/or nominees and/or supervisors of a company voluntary arrangement (“CVA”) in respect of the Company.
2. The hearing follows an earlier hearing and judgment given in this matter on 19 September 2019: [2019] EWHC 2447 (Ch). I shall not repeat the background to the administrations and the Application which is set out in that earlier judgment.
3. In the Application, the Administrators sought approval of the final instalments of their fees for the administration and CVA covering periods from 3 September 2016 to 7 June 2019 (Period 1) and from 8 June 2019 to the termination of their appointment (Period 2) in a combined total of £1,678,692.77.
4. In the earlier judgment I indicated that, in contrast to similar applications which I have heard for approval of remuneration in respect of other Nortel group companies, in the case of the Company, the Application was not supported by any substantial creditor or other stakeholder which had an economic interest in its outcome, and there was no such creditor or other stakeholder which had subjected the fees claimed to independent scrutiny. In particular, the Creditors’ Committee of Nortel Networks France S.A. (“NNSA”), the shareholder of the Company, which does have such an interest because NNF has paid all of its creditors in full together with interest, declined to express any view on the merits of the Application because it had not been sufficiently involved in the administration of the Company. The NNSA Creditors’ Committee stated instead that it expected the Court independently to scrutinise the remuneration claimed in the Application.
5. The consequence was that, for reasons that I explained in my earlier judgment, I decided to appoint an independent assessor, Mr. Philip Wallace, to provide a report to me pursuant to s.70 Senior Courts Act 1981 and CPR 35.15.
6. In doing so, I also expressed two concerns in paragraph 43 of my judgment: the first was that the assessment process should not cause any more delay than was necessary given the desire to have this matter resolved before the potential departure of the United Kingdom from the European Union on 31 October 2019; the second was that the assessment process should not result in disproportionate expense.
7. The first concern has been allayed: I received Mr. Wallace’s report in a timely manner on 11 October 2019 (the “Report”). I have also been told that the process of dissolving the Company without liquidation under French law has been initiated and that the Administrators’ appointment will consequently cease at midnight on 28 October 2019.
8. The second concern as to costs also underlay what I said in the final paragraph of my judgment, namely,

“The amount initially suggested for the retention on account of the combined costs of the assessment exercise was £200,000. I have reduced that to £150,000 in the expectation that it should be possible to achieve production of the desired report for less than that sum. In saying that, I do not intend to prejudge the question of whether, and if so, to what extent, any of the costs of the Administrators and their lawyers in relation to the assessment should be paid from that retention.”

The Assessor’s Report

9. Mr. Wallace’s Report is generally very supportive of the Administrators’ claim for remuneration. He advises that the vast majority of the fees claimed are fair, reasonable and commensurate with the nature and extent of the work undertaken and to be undertaken in this complex insolvency. I have no hesitation in accepting Mr. Wallace’s recommendation that I should approve the bulk of the fees claimed.
10. The only issue that Mr. Wallace raises in relation to specific charges is that the charge out rates for E&Y London in the CVA should not be approved at rates 15% above those agreed in the Administration for Period 1. Mr. Wallace advises that the total remuneration sought should be reduced on this account by £34,781. A similar reduction in the rates sought for Period 2 would result in a reduction in the cap for that period of £1,315.
11. In his Report, however, Mr. Wallace is critical of the Administrators’ failure to engage with creditors of the Company and with the NNSA Creditors’ Committee over the issue of remuneration at a much earlier stage in the proceedings. The gist of Mr. Wallace’s criticisms in this respect are summarised in the following extract from the conclusions to his report (paragraph references are to the paragraphs of his report),

“The Administrators and Supervisors should have sought the approval of the Creditors’ Committee [of NNF] for some part of their remuneration while that Committee still had a statutory responsibility to approve the office holders’ remuneration (paragraphs 61 to 68 and 75). They did not.

In various reports to creditors, both as Administrators and as Supervisors, there has been inaccurate or incomplete information provided regarding the officeholders’ remuneration (paragraphs 57.6, 74, 106 and 107).

The Administrators did not seek to engage the NNSA Creditors’ Committee in the detailed affairs of NNF until March 2019 (paragraphs 71 to 73).

The Administrators incurred costs unsuccessfully trying to persuade the NNSA Creditors’ Committee to support the Application as regards their remuneration notwithstanding the

Committee having had limited involvement in the NNF insolvency before March 2019 (paragraph 72).

From early 2018, it was apparent that it was no longer appropriate for the Creditors' Committee [of NNF] to approve the officeholders' remuneration. Under those circumstances, best practice would have been for the officeholders to seek to engage with the Creditors' Committee of NNSA at an early stage to consider amongst other things the reasonableness of their remuneration. Although the officeholders ultimately sought such an engagement, this was not until the case was nearly concluded. Had the NNSA Committee been approached in, say, March 2018 rather than a year later, it is certainly possible that they would have been equally disinterested in supporting any remuneration application. However, it is also possible that approached in the right way and at the right time, the Committee would have been much more helpful, leading to a significant reduction in cost."

12. In his conclusions, Mr Wallace elaborated on that last point as regards costs,

"The Administrators and Supervisors have been unable to persuade the Creditors' Committee of NNSA to provide support in relation to that part of the Application seeking approval of the Court for their proposed remuneration ... This has led to increased costs. First, the Administrators incurred costs in providing information to the Committee and attending meetings with them. Second, when it became apparent that the Administrators were unlikely to persuade the Committee to provide that support, costs were incurred in bolstering the information to be provided to the Court in support of the Application, both to help the Court but also with an eye to the possibility that the Court might decide to appoint an assessor."

13. I should specifically record that I am very grateful to Mr. Wallace for the thoroughness and candour of his report.

Remuneration

14. For their part, whilst the Administrators have not entirely welcomed Mr. Wallace's criticisms, they have accepted them and not sought to contest the specific reductions suggested on account of charging rates. They therefore seek approval for their remuneration in the reduced amount of £1,642,598 for Periods 1 and 2.
15. In so doing, the Administrators have not contested Mr. Wallace's recommendation that the reductions of £34,781 and £1,315 should not be offset by the fact that the Administrators have overrun their total budgeted costs for Period 2 by about £71,051. That recommendation, which I accept, reflects the fact that a substantial amount of the overrun relates to the increased work on this Application, and may therefore have

been caused by the lack of engagement to which Mr. Wallace referred. I also welcome the fact that the Administrators have, very sensibly, not sought to increase their claim in respect of Period 2 to cover the overrun.

16. I shall accordingly authorise the Administrators and Supervisors to retain the total sum of £1,642,598 in respect of their work in the Administration and CVA. They should refund the balance of the amount referred to in my earlier order in accordance with the undertakings that they gave on that occasion.

The Costs of the Assessment

17. I also have to deal with the costs of the assessment exercise itself. In my earlier judgment appointing Mr. Wallace, I authorised the Administrators to retain up to a maximum of £150,000 to pay for the assessment exercise, whilst expressing the view that it ought to be capable of being done for less, and obtaining an undertaking that the Administrators would refund any part of that amount that I might order.
18. I am now told by the Administrators that the costs of the assessment to 14 October 2019 (including the costs of the Assessor and the other costs referred to below) total £185,570.85. The Administrators have therefore sought a variation to increase the cap of £150,000 in my earlier order to cover this amount, together with a further increase of about £35,000 to £220,000 to include the costs incurred since 14 October 2019, and the estimated costs of this adjourned half-day hearing (but not including the Administrators' time costs of travelling to Manchester and attending the hearing).
19. The incurred costs claimed are as follows.
20. Mr. Wallace's fees have been agreed at £62,400 on a time basis at a rate of £650 per hour. The Administrators have also provided Mr. Wallace with secretarial support at a cost of about £2,000. The legal fees of the Administrators' solicitors, Herbert Smith Freehills LLP, in connection with the engagement of Mr. Wallace and providing him with an introduction to his assessment, are estimated to be about £25,000.
21. Most of the remaining costs are the time costs of the Administrators and their staff which amount to £96,170.75. Of that amount, £40,095.33 is said to relate to matters such as retrieving and providing documents to Mr. Wallace to assist him with his review, and providing him with an introduction to the materials. The rest relates to the Administrators providing answers to questions which Mr. Wallace raised in the course of preparing his Report and producing memoranda in support of the position of the Administrators in relation to the costs claimed.
22. The question that arises is whether, and if so, to what extent, these costs of the assessment exercise should be met from the Company's assets; or whether, and if so, to what extent, they should be met from the Administrators' own resources.
23. The issue arises because Mr. Wallace is of the opinion that if the Administrators had taken the course suggested in his Report, there would at least have been a reasonable prospect of costs being saved in relation to this Application and the assessment exercise. Mr. Wallace points out, first, that a significant part of the Administrator's

remuneration from 2016 and 2017 could have been approved by the creditors of the Company whilst its Creditors' Committee was still functioning. At the time, that Committee would have thought that the creditors still had an economic interest in scrutinising the level of the Administrators' fees. Mr. Riddiford was ultimately constrained to accept that point.

24. Secondly, and more significantly for present purposes, Mr. Wallace points out that if the NNSA Creditors' Committee had been approached earlier, it might have been willing to provide some independent scrutiny of the amounts claimed by the Administrators, upon which I could have relied in the same manner which I did in relation to other Nortel companies such as Nortel Networks NV (Nortel Belgium) [2019] EWHC 1182 (Ch).
25. In that regard, I must, however, take into account, as Mr. Wallace noted, that there is no certainty that any costs would have been saved by attempting to involve the NNSA Creditors' Committee at an earlier stage. As Mr. Riddiford pointed out, the NNSA Creditors' Committee comprised three creditors who had not shadowed the administration of NNF from the start in the same way, for example, as the Pension Fund Trustees of NNUK did in relation to Nortel Networks NV (see paragraph [39] of my earlier judgment). Nor did they show much enthusiasm to become involved when they were belatedly approached earlier this year. As such, there is a significant possibility that the assessment exercise would have been required in any event.
26. Taking these points into account, as well as the outcome of Mr. Wallace's Report overall, I consider that it would not be appropriate for all of the costs of the assessment exercise to be paid out of the assets of the Company which would otherwise be available to be distributed to NNSA. Instead, I consider that I should make an order that requires the Administrators to bear some of the burden of the costs of the assessment exercise.
27. In deciding how to apportion the assessment costs, further factors which I should also take into account are that the fees which have been approved to be paid to the Administrators in the sum of £1,642,598 include some time costs of the Administrators belatedly approaching the Creditors' Committee of NNSA and seeking to engage with them. It is not possible, however, to be precise about the amounts involved in that regard. On the other hand, as I have indicated above, the Administrators have accepted that they should bear the overrun costs of £71,051 in respect of Period 2.
28. Taking these factors into account as best I can, in an admittedly approximate way, I consider that I should authorise the Administrators to retain £100,000 of the £150,000 and to return the balance to the Company to be dealt with in accordance with the agreement for division of the Company's assets on its dissolution.
29. In very broad terms, I am authorising the Administrators to retain just less than half of the likely total costs of the assessment exercise, and making a very rough assumption that the sums included in the £1,642,598 may offset the overrun costs. Put another way, there is a real possibility, but no certainty, that the Administrators could have avoided the assessment exercise, and although the creditors of NNSA will still have to bear some of the costs of the assessment exercise, they have the benefit of knowing that the Administrators' much larger bill of costs has been subject to proper scrutiny.

Confidentiality

30. As a final, and unrelated, matter, I should record that I have also ordered that a small number of paragraphs of Mr. Wallace's Report and two of its Appendices should be redacted and not be open to inspection without the leave of the court until after 31 December 2020. I consider that this limited order is justified for reasons of commercial sensitivity so as to avoid any risk of prejudice to the on-going administration of NNSA.