Neutral Citation Number: [2020] EWHC 2933 (Ch)

Case No: CR-2020-LDS-000465

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTIES COURT IN LEEDS
INSOLVENCY AND COMPANIES LIST (ChD)

Leeds Combined Court Centre,
1 Oxford Row, Leeds LS1 3BG

Date: 11/11/2020

Before :

HIS HONOUR JUDGE DAVIS-WHITE QC
(SITTING AS A JUDGE OF THE HIGH COURT)

- -

IN THE MATTER OF TAYLOR PEARSON (CONSTRUCTION) LIMITED (in administration)

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Between :

MOULDS FENCING (TORKSEY) LIMITED AND 11 OTHERS	**Applicants**
- and -	
(1) JOHN WILLIAM BUTLER	
(2) ANDREW JAMES NICHOLS	
(Joint administrators of Taylor Pearson (Construction) Limited (In administration)	
(3) TAYLOR PEARSON (CONSTRUCTION) LIMITED (in administration)	**Respondents**

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Mr Tom Longstaff (instructed by **MD Law (Yorkshire) LLP**) for Moulds Fencing Torksey Limited and the 10 other Applicants
Miss Eleanor Temple (instructed by **LCF Law Limited**) for the Joint Administrators

Hearing date: 20 October 2020

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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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HIS HONOUR JUDGE DAVIS-WHITE QC (SITTING AS A JUDGE OF THE HIGH COURT)

Covid-19 Protocol: This Judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down will be deemed to be 10:30am on 11 November 2020 . A copy of the judgment in final form as handed down can be made available after that time, on request by email to BPC.Leeds@justice.gov.uk

His Honour Judge Davis-White QC :

Introduction

1. On 20 October 2020, I held a remote hearing of two applications brought within the administration of Taylor Pearson (Construction) Limited (the "Company"). The administrators are Messrs Butler and Nichols, licensed insolvency practitioners of the firm of Redman Nichols Butler (the "Administrators").

2. The first application, dated and issued on 3 September 2020, (the "Creditors' Application") was brought by Moulds Fencing (Torksey) Limited, a creditor of the Company, together with 11 other creditors of the Company (together the "Creditors"). The Creditors are, apparently, represented by Begbies Traynor (SY) Limited ("Begbies Traynor"), which firm has instructed the current solicitors acting for the Creditors. The Creditors represent by value about 16% of the total debts of the Company

3. By its terms the Creditors' Application sought (among other things) (1) pursuant to paragraphs 74 and/or 75 of Schedule B1 to the Insolvency Act 1986, the revocation of proposals "purported to have been deemed approved" on 21 July 2020, (2) an order

that the Administrators "be required" to make an application pursuant to paragraph 83 of the said Schedule B1 ("Schedule B1") to place the Company into creditors' voluntary liquidation and (3) a prohibition of the Administrators using the deemed approval procedure in relation to any future proposals regarding the company in administration. As I shall explain, further relief was sought at the hearing before me, primarily that the Company be placed into compulsory liquidation.

4. As regards the Creditors' Application, the Creditors assert that there are further creditors who support them. The Administrators have indicated that there are at least 14 creditors who support or have no objection to the Company remaining in administration and to a proposed distribution, the subject of the other application before me, being made to unsecured creditors. They have written to creditors and told them that if a creditor does not respond by 12 noon on 18 September, the assumption will be made that that creditor has no objection to the Company remaining in administration and the proposed distribution being made.

5. The second application was one issued on 7 October 2020, by the Administrators, seeking an order pursuant to paragraph 65(3) of Schedule B1 for permission to make a distribution to all unsecured creditors in the sum of £150,000.

6. Before me Mr Tom Longstaff represented the Creditors. The Administrators were represented by Ms Eleanor Temple. I am grateful to both of them for their written and oral submissions,

7. At the end of the hearing, having considered and applied the guidance given in authorities such as *Re GHE Realisations Limited* [2006] 1 WLR 287; *Re MG Rover Belux SA/NV* [2007] BCC 446 and *Re Nortel Networks UK Limited* [2015] EWHC 2506 (Ch); Mr Longstaff having indicated that the Creditors consented to, or at the least did not oppose, the making of the proposed distribution by the Administrators or the order sought in that respect and notice of the intention to make the application having been given to creditors and no dissent having been registered, I made the order sought by the Administrators, permitting them to make the proposed distribution to unsecured creditors. I also determined that I would not grant relief on the Creditors' Application but said that I would give my reasons for that decision in writing, later. These are those reasons.

8. The Creditors' Application raises a number of issues regarding the application of the three objectives of administration set out in paragraph 3 of Schedule B1. In short, the Creditors say that the objectives of administration, set out in Schedule B1, and their effect have been misunderstood and misapplied throughout the administration of the Company. Although the Creditors have raised some fairly narrow legal points they have attacked the administration and its management on a number of bases and it is therefore necessary to examine the position in detail.

Schedule B1

9. Before turning to the facts of this case it is helpful to set out or summarise some of the key provisions of Schedule B1 that I was referred to.

10. First of all, the purpose of administration comprises a hierarchy of objectives and is set out in paragraph 3:

"***Purpose of administration***

3-

(1) The administrator of a company must perform his functions with the objective of—

(a) rescuing the company as a going concern, or

(b) achieving a better result for the company's creditors as a whole than would be likely if the company were wound up (without first being in administration), or

(c) realising property in order to make a distribution to one or more secured or preferential creditors.

(2) Subject to sub-paragraph (4), the administrator of a company must perform his functions in the interests of the company's creditors as a whole.

(3) The administrator must perform his functions with the objective specified in sub-paragraph (1)(a) unless he thinks either—

(a) that it is not reasonably practicable to achieve that objective, or

(b) that the objective specified in sub-paragraph (1)(b) would achieve a better result for the company's creditors as a whole.

(4) The administrator may perform his functions with the objective specified in sub-paragraph (1)(c) only if—

(a) he thinks that it is not reasonably practicable to achieve either of the objectives specified in sub-paragraph (1)(a) and (b), and

(b) he does not unnecessarily harm the interests of the creditors of the company as a whole.

11. Before me, for convenience, the objective in paragraph 3(1)(a) was referred to as "Objective A", that in paragraph 3(1)(b) as Objective 3(1)(b) as "Objective B" and that in paragraph 3(1)(c) as "Objective C". I use the same terminology.

12. As I shall explain, in this case the Administrators drafted their proposals on the basis that the purpose of the administration had become Objective C. Although the administration had commenced on the basis that Objective B could be achieved, in the light of the situation that had emerged by the time that their proposals were drafted, the administrators considered that Objective C was the objective to be properly pursued. The result was, the Administrators say, that they were not required to submit their proposals to unsecured creditors for their approval. One of the main submissions of the Creditors is that the Administrators were incorrect in this respect.

13. The manner in which administrators' proposals fit into Schedule B1 can briefly be summarised as follows.

14. In broad terms, administrators may be appointed, and an administration commence, either by court order or an appointment made by the company or its directors or an appointment made by a qualifying chargeholder. In each case, the administration will come into being where there is a sufficient prospect of the objective in paragraph 3 being achieved. Where the Court makes the order, this is a jurisdictional requirement of the order being made. Where there is an "out of court" appointment, then this is achieved (at least in part) by the requirement of a statement from the proposed administrator(s) that in his opinion the purpose of administration is reasonably likely to be achieved.

15. However, although the purpose of administration sets out a hierarchy of objectives, the position is that a particular objective is not fixed immutably but can change with time. Thus, Rimer LJ pointed out in *Key2 Law (Surrey) LLP v De'Antiquis* [2011] EWCA Civ 1567; [2012] B.C.C. 375 at [98] that an administration order may be made where one of the objectives is reasonably likely to be achieved, but:

> "*it is fallacious to proceed from that to the conclusion that the purpose of the administration order … is to enable the achieving of that particular objective and that alone. It is not. The order is made for the purpose of administration explained in para.3, which keeps all the administrator's options open; and … an administrator who assumes his office with the thought that he might be able to achieve the purpose of administration in one particular way may quickly find that circumstances compel him to change tack and seek to achieve it in another way*" (see also *R. (on the application of Monarch Airlines Ltd (in admin.)) v Airport Coordination Ltd* [2017] EWCA Civ 1892 at [56]).

16. It is the Administrators' position that the Objectives in this case have (justifiably) changed over time.

17. Once appointed, an administrator must formulate and put forward proposals in accordance with paragraph 49:

> **"*Administrator's proposals***
>
> *49—*
>
> *(1) The administrator of a company shall make a statement setting out proposals for achieving the purpose of administration.*
> *(2) A statement under sub-paragraph (1) must, in particular–*
> *(a) deal with such matters as may be prescribed, and*
> *(b) where applicable, explain why the administrator thinks that the objective mentioned in paragraph 3(1)(a) or (b) cannot be achieved.*
> *(3) Proposals under this paragraph may include–*
> *(a) a proposal for a voluntary arrangement under Part I of this Act (although this paragraph is without prejudice to section 4(3));*
> *(b) a proposal for a compromise or arrangement to be sanctioned under Part 26 of the Companies Act 2006 (arrangements and reconstructions).*
> *(4) The administrator shall send a copy of the statement of his proposals–*
> *(a) to the registrar of companies,*
> *(b) to every creditor of the company, other than an opted-out creditor, of whose claim and address he is aware, and*

(c) to every member of the company of whose address he is aware.

(5) The administrator shall comply with sub-paragraph (4)–

(a) as soon as is reasonably practicable after the company enters administration, and

(b) in any event, before the end of the period of eight weeks beginning with the day on which the company enters administration.

(6) The administrator shall be taken to comply with sub-paragraph (4)(c) if he publishes in the prescribed manner a notice undertaking to provide a copy of the statement of proposals free of charge to any member of the company who applies in writing to a specified address.

(7) An administrator commits an offence if he fails without reasonable excuse to comply with sub-paragraph (5).

(8) A period specified in this paragraph may be varied in accordance with paragraph 107.

18. Sub-paragraph (2)(b) confirms that the hierarchy of objectives in paragraph 3 is to be applied. However, it is for the administrator to make the relevant decision. As summarised by Sealy and Milman (*Annotated Guide to the Insolvency Legislation*, 23 Edn 2020), in *Davey v Money* [2018] EWHC 766 (Ch) Snowden J held that the court should not interfere with an administrator's decision unless the choice of statutory objective was made in bad faith or was clearly perverse. He also went on to say that, on the facts before him, a failure to give the explanation required by para.49(2)(b) did not invalidate the administrators' further actions or prevent them from seeking to achieve the third objective (para.3(1)(c)) of realising property in order to make a distribution to one or more secured or preferential creditors.

19. In this case Mr Longstaff says that the Administrators failed to apply the statutory hierarchy of objectives set out in paragraph 3 correctly. Part of his case is that this resulted in the Administrators failing to place their proposals before the unsecured creditors for their approval. The question of unsecured creditor approval of proposals is dealt with by paragraphs 51 and 52 of Schedule B1.

20. Paragraphs 51 and 52 of Schedule B1 provide:

Consideration of administrator's proposals by creditors

51—

(1) The administrator must seek a decision from the company's creditors as to whether they approve the proposals set out in the statement made under paragraph 49(1).

(2) The initial decision date for that decision must be within the period of 10 weeks beginning with the day on which the company enters administration.

(3) The "initial decision date" for that decision–

(a) if the decision is initially sought using the deemed consent procedure, is the date on which a decision will be made if the creditors by that procedure approve the proposals, and

(b) if the decision is initially sought using a qualifying decision procedure, is the date on or before which a decision will be made if it is made by that qualifying decision procedure (assuming that date does not change after the procedure is instigated).

(4) A period specified in this paragraph may be varied in accordance with paragraph 107.

(5) An administrator commits an offence if he fails without reasonable excuse to comply with a requirement of this paragraph.

52—

(1) Paragraph 51(1) shall not apply where the statement of proposals states that the administrator thinks–

(a) that the company has sufficient property to enable each creditor of the company to be paid in full,

(b) that the company has insufficient property to enable a distribution to be made to unsecured creditors other than by virtue of section 176A(2)(a), or

(c) that neither of the objectives specified in paragraph 3(1)(a) and (b) can be achieved.

(2) But the administrator shall seek a decision from the company's creditors as to whether they approve the proposals set out in the statement made under paragraph 49(1) if requested to do so–

(a) by creditors of the company whose debts amount to at least 10% of the total debts of the company,

(b) in the prescribed manner, and

(c) in the prescribed period.

(3) Where a decision is sought by virtue of sub-paragraph (2) the initial decision date (as defined in paragraph 51(3)) must be within the prescribed period.

(4) The period prescribed under sub-paragraph (3) may be varied in accordance with paragraph 107.

21. If there is a creditors decision process, the result must be reported to the court, the registrar of companies and any other prescribed persons, see paragraph 53 which provides:

"*Creditors' decision*

53—

(1) The company's creditors may approve the administrator's proposals–

(a) without modification, or

(b) with modification to which the administrator consents.

(2) The administrator shall as soon as is reasonably practicable report any decision taken by the company's creditors to–

(a) the court,

(b) the registrar of companies, and

(c) such other persons as may be prescribed.

(3) An administrator commits an offence if he fails without reasonable excuse to comply with sub-paragraph (2).

22. If the proposals are not put to a creditors' decision process, there must nevertheless be a report pursuant to Insolvency (England and Wales) Rules 2016 ("IR 2016"), r3.38(4) and (5) which provide:

"*3.38.—*

(4) Where the administrator has made a statement under paragraph 52(1) of Schedule B1 and has not sought a decision on approval from creditors, the proposal will be deemed to have been approved unless a decision has been requested under paragraph 52(2) of Schedule B1(3).

(5) Where under paragraph (4) the proposal is deemed to have been approved the administrator must, as soon as reasonably practicable after the expiry of the period for requisitioning a decision set out in rule 15.18(2), deliver a notice of the date of deemed approval to the registrar of companies, the court and any creditor to whom the administrator has not previously delivered the proposal."

23. If approved by creditors the administrator's proposals guide the manner in which the administrator carries out his functions and exercises his powers. It appears that this also applies where there is a "deemed" approval under IR 2016 r3.38(4) (see *Holgate v Reid* [2013] EWHC 4630 (Ch)). Paragraph 68 provides:

"68—

(1) Subject to sub-paragraph (2), the administrator of a company shall manage its affairs, business and property in accordance with–
(a) any proposals approved under paragraph 53,
(b) any revision of those proposals which is made by him and which he does not consider substantial, and
(c) any revision of those proposals approved under paragraph 54.
(2) If the court gives directions to the administrator of a company in connection with any aspect of his management of the company's affairs, business or property, the administrator shall comply with the directions.
(3) The court may give directions under sub-paragraph (2) only if–
(a) no proposals have been approved under paragraph 53,
(b) the directions are consistent with any proposals or revision approved under paragraph 53 or 54,
(c) the court thinks the directions are required in order to reflect a change in circumstances since the approval of proposals or a revision under paragraph 53 or 54, or
(d) the court thinks the directions are desirable because of a misunderstanding about proposals or a revision approved under paragraph 53 or 54."

24. If proposals are considered by or put to creditors through a relevant decision-making process but <u>not</u> approved, then paragraph 55 confers wide powers to the Court. That paragraph provides:

"Failure to obtain approval of administrator's proposals

55—

(1) This paragraph applies where an administrator–
(a) reports to the court under paragraph 53 that a company's creditors have failed to approve the administrator's proposals, or
(b) reports to the court under paragraph 54 that a company's creditors have failed to approve a revision of the administrator's proposals.
(2) The court may–
(a) provide that the appointment of an administrator shall cease to have effect from a specified time;
(b) adjourn the hearing conditionally or unconditionally;
(c) make an interim order;
(d) make an order on a petition for winding up suspended by virtue of paragraph 40(1)(b);
(e) make any other order (including an order making consequential provision) that the court thinks appropriate."

25. In addition, at any time there is a right given to creditors who meet a minimum critical mass to challenge later decisions of administrators: Paragraph 56 of Schedule B1 provides:

"Further creditors' decisions
56
(1) The administrator of a company shall seek a decision from the company's creditors on a matter if—
(a) it is requested in the prescribed manner by creditors of the company whose debts amount to at least 10% of the total debts of the company, or
(b) he is directed by the court to do so.
(2) An administrator commits an offence if he fails without reasonable excuse to seek a decision from the company's creditors on a matter as required by this paragraph."

26. An administration may be brought to an end in a number of circumstances. For present purposes I should refer to paragraph 79 of Schedule B1 which provides as follows:

"*Court ending administration on application of administrator*

79

(1) On the application of the administrator of a company the court may provide for the appointment of an administrator of the company to cease to have effect from a specified time.

(2) The administrator of a company shall make an application under this paragraph if—

(a) he thinks the purpose of administration cannot be achieved in relation to the company,

(b) he thinks the company should not have entered administration, or

(c) the company's creditors decide that he must make an application under this paragraph.

(3) ...

(4) On an application under this paragraph the court may—

(a)adjourn the hearing conditionally or unconditionally;

(b)dismiss the application;

(c)make an interim order;

(d) make any order it thinks appropriate (whether in addition to, in consequence of or instead of the order applied for)."

27. Among the other paragraphs of Schedule B1 that I was referred to are paragraphs 74 and 75, under which the Creditors' application is launched. So far as immediately material these provide:

"***Challenge to administrator's conduct of company***

74—

(1) A creditor or member of a company in administration may apply to the court claiming that–

(a) the administrator is acting or has acted so as unfairly to harm the interests of the applicant (whether alone or in common with some or all other members or creditors), or

(b) the administrator proposes to act in a way which would unfairly harm the interests of the applicant (whether alone or in common with some or all other members or creditors).

(2) A creditor or member of a company in administration may apply to the court claiming that the administrator is not performing his functions as quickly or as efficiently as is reasonably practicable.

(3) The court may–

(a) grant relief;

(b) dismiss the application;

(c) adjourn the hearing conditionally or unconditionally;

(d) make an interim order;

(e) make any other order it thinks appropriate.

(4) In particular, an order under this paragraph may–

(a) regulate the administrator's exercise of his functions;

(b) require the administrator to do or not do a specified thing;

(c) require a decision of the company's creditors to be sought on a matter;
(d) provide for the appointment of an administrator to cease to have effect;
(e) make consequential provision.
(5) An order may be made on a claim under sub-paragraph (1) whether or not the action complained of–
(a) is within the administrator's powers under this Schedule;
(b) was taken in reliance on an order under paragraph 71 or 72.
(6) An order may not be made under this paragraph if it would impede or prevent the implementation of–
(a) a voluntary arrangement approved under Part I,
(b) a compromise or arrangement sanctioned under Part 26 of the Companies Act 2006 (arrangements and reconstructions),
(ba) a cross-border merger within the meaning of regulation 2 of the Companies (Cross-Border Mergers) Regulations 2007, or
(c) proposals or a revision approved under paragraph 53 or 54 more than 28 days before the day on which the application for the order under this paragraph is made.

Misfeasance

75—

(1) The court may examine the conduct of a person who–
(a) is or purports to be the administrator of a company, or
(b) has been or has purported to be the administrator of a company.
(2) An examination under this paragraph may be held only on the application of–
(a) the official receiver,
(b) the administrator of the company,
(c) the liquidator of the company,
(d) a creditor of the company, or
(e) a contributory of the company.
(3) An application under sub-paragraph (2) must allege that the administrator–
(a) has misapplied or retained money or other property of the company,
(b) has become accountable for money or other property of the company,
(c) has breached a fiduciary or other duty in relation to the company, or
(d) has been guilty of misfeasance.
(4) On an examination under this paragraph into a person's conduct the court may order him–
(a) to repay, restore or account for money or property;
(b) to pay interest;
(c) to contribute a sum to the company's property by way of compensation for breach of duty or misfeasance.
(5) In sub-paragraph (3) "administrator" includes a person who purports or has purported to be a company's administrator.
(6) An application under sub-paragraph (2) may be made in respect of an administrator who has been discharged under paragraph 98 only with the permission of the court."

The Creditors do not in terms seek any of the relief identified in sub-paragraph (4).

Timing of the application under paragraph 74

28. Whilst reserving her position in the event this case goes further, Miss Temple did not rest her position on the provisions of paragraph 74(6)(c). She preferred to rest her submissions on the merits. That makes entire sense. I did not therefore hear argument as to (i) whether HH Judge Hodge QC was correct, in *Holgate v Reid* [2013] EWHC 4630 (Ch), to construe paragraph 74(6)(c) as encompassing cases of a "deemed" consent; (ii) whether any order I might otherwise be prepared to make, or which is sought, would fall foul of paragraph 74(6)(c), as impeding or preventing the implementation of the Administrators' proposals. As I shall go on to explain the proposals have largely been implemented and, as I understand it, at this stage apart from realisation of some real property all that substantively remains to be done is to make a distribution to the preferred creditors and to make one or more distributions to unsecured creditors. Furthermore, even if there were some limits on the Court under paragraph 74 it would still have to determine the position under paragraph 75.

The Facts

(a) The administration decision

29. The facts are set out in the evidence of Mr Butler for the Administrators and Mr Moulds, managing director of Moulds Fencing (Torksey) Limited. They are as set out below, which are findings of fact by me on such evidence.

30. Most recently, the Company has been involved in construction work across a number of sites. Following the announcement of "lockdown" due to the Covid-19 pandemic on 23 March 2020, the Company ceased work at its sites. Employees were placed on furlough under the government financial scheme. The result was cash flow difficulties. Mr Butler was approached. A telephone conversation took place between Mr Butler, the directors of the Company and the Company's accountant on 30 March 2020 in order to review the Company's financial position and discuss available options. The agreed outcome was that the directors would seek further funding for the Company.

31. The directors were unsuccessful in their attempts to obtain sufficient funding. A further (virtual) meeting was held involving the directors of the Company their lawyer and a potential funder of the Company. It was considered that if the company had been able to obtain funding, it would have been likely to have been able to trade out of its immediate financial difficulties. Various options were discussed. It was concluded that administration was the preferable route ahead and that Objective B could be achieved. The main reasons underlying this conclusion were as follows:-

(1) In administration, the business could be marketed as a going concern. The business was well established and there was a pipeline of work. Alternatively, the administrators could look to complete or sell the work in progress.

(2) Completing or selling some projects would minimise a potential bond claim against the Company.

(3) The Administration process was quicker, and assets could be protected during lockdown.

(4) The moratorium afforded by Schedule B1 would prevent creditors taking further action.

(5) Some staff could continue to be employed and claim furlough if the business was to be sold as a going concern, thereby protecting jobs.

32. Formal instructions were provided to Mr Butler from the directors on 14 May 2020 to assist with placing the Company into administration. Mr Butler and Mr Nicholls were appointed as Joint Administrators on 15 May 2020.

33. Mr Butler made his first on site visit on 18 May 2020 in order to review documents, identify assets, review the work in progress and establish a strategy. Due to lockdown and the various restrictions in place it had not been possible for Mr Butler to follow his usual practice, prior to any administration, of making a number of site visits and obtaining some preliminary advice from agents regarding potential realisations.

34. Agents were appointed. They reported back by letter dated 20 May 2020. They considered that given the current lockdown restrictions, the fact the sites had ceased to operate and travel restrictions, it would be very difficult to market the business and unlikely that the business could be sold as a going concern. They recommended sale of the chattel assets/stock by way of a timed auction on-line. That sale took place on 22 June 2020 achieving proceeds of just under £70,000 (including VAT). Most employees were made redundant on 21 May 2020. Two members of staff were retained to assist in bringing accounts and records up to date.

35. A quantity surveyor was also instructed to review and value work in progress. Various meetings were held between the quantity surveyor and the directors in the latter part of May and early June. The conclusion was reached that at least one project could be completed within the administration which would have resulted in a substantial realisation, not available in a liquidation scenario. However, following further enquiries, the quantity surveyor came to the conclusion (communicated to Mr Butler by email dated 22 June 2020) that it was not financially viable to complete the project for various reasons. These included matters which had come to light such as the fact that some works had been paid for even though the works had yet to be carried out, more work was required than originally anticipated and the Employer had already released half of the retentions even though Practical Completion had not been certified. In the light of this report, a scheduled site meeting was cancelled. It was clear that the project could not be completed for the benefit of the administration.

36. Mr Butler confirms in his evidence that, prior to receiving this report it had always been the administrators' view that Objective B could be achieved. With the benefit of this report the conclusion was reached, having reviewed the financial position and likelihoods, that the financial position and likely return to creditors would not be better in an administration scenarios compared with a liquidation scenario, financially the outcome for unsecured creditors being very similar to that of a liquidation. In financial terms, he estimated that the outcome would be very similar on administration or liquidation and that relevant costs would be roughly the same in

both scenarios. There being no "better" result for creditors, the conclusion reached was that Objective C properly applied and could be achieved.

37. As regards the financial outcome, Mr Butler produced in evidence a revised version of a document showing a comparison of the estimated outcome on a liquidation and an administration. The original version was considered by the Administrators in reaching their conclusion regarding the question of the purpose of the administration. That original was later provided to the Creditors and is exhibited by Mr Mould. On the revised document, the estimated balance available for unsecured creditors, after payment of preferred creditors, in an administration was some £442,612 and in a liquidation was some £443,434. The revisions came about because certain errors were identified in the original in the process of checking the document for the purposes of putting it into evidence on the application before me. The differences between the two were not significant in terms of the estimated dividend to unsecured creditors which was originally 20% in each case, revised downwards, in the revised version, to 19% in each case. Unsecured creditors were estimated, at the time of the proposals referred to below, as amounting to in excess of £2.3 million.

38. Mr Mould asserts that it is "far from clear" that the financial figures were prepared and considered by the Administrators at the time that Mr Buter asserts that they were considered. In the absence of cross-examination, I accept Mr Butler's evidence on this point. It is not helpful for Mr Mould's evidence (which has obviously been professionally prepared and which contains little evidence but a great deal of submission) to spend time and ink on trying to undermine Mr Butler's evidence in this manner when cross-examination was not proposed (and was clearly not appropriate).

39. I also reject Mr Mould's suggestion that, if it was prepared and considered prior to the Proposals being delivered, the outcome statement shows figures which are "*suspiciously similar*" and "*appears to have been prepared in such a way as to justify the Joint Administrator's conclusion, without giving proper consideration of the issues*".

40. Another point raised by Mr Mould is that the estimated outcome statement "*begs the question why the Company was placed into administration in the first place*". However, that is to completely ignore the history of the matter as described by Mr Butler. Realisations were originally thought to have been greater in an administration than on a liquidation. The estimated outcome statement was prepared when the position was very different to that anticipated at the time when the Company had entered administration. First, the hope of the business being sold as a going concern had evaporated and then, later, the hoped-for better realisation by way of a specific project being completed also evaporated.

(b) the Administrators proposals (the "Proposals")

41. The Proposals were uploaded to a dedicated website on 9 July 2020. There is a factual issue between the parties as to whether the Proposals were delivered within the time period laid down by the relevant administration regime. I shall return to this issue later.

42. As regards the substance of the Proposals, they commence with an Executive Summary which makes clear that the proposals themselves are set out in Appendix 1

to the document, that the Administrators were then pursuing Objective C and that, subject to any assets caught by security, it is likely that there would be sufficient funds to enable a dividend to be paid to the unsecured creditors.

43. Under section 5 of the document the proposed work to be undertaken included administration (including statutory reporting); investigation of pre administration conduct of the company and its directors (with the two main objectives of identifying what realisable assets there might be and to report under the Company Directors Disqualification Act 1986); realising assets; dealing with creditors (including examining secured creditors secured claims (if any) and paying out on them; reviewing tax claims and taking appropriate action (eg where appropriate appealing assessments); responding to creditor correspondence; dealing with the creditors committee (if any); dealing with any dividend payable to unsecured creditors from the prescribed part (of sums caught by a qualifying floating charge)) and dealing with their discharge. In the body of the document it is not suggested that they would be seeking authority to make any other distributions to creditors.

44. As I have said, the actual proposals are set out in Appendix 1 to the document. Paragraph 4 deals with the Objectives of administration. Having explained the relevant hierarchy of Objectives, the proposals go on to explain the factual circumstances in which the Administrators had concluded that it was not possible to re-structure the existing business or propose a company voluntary arrangement and that Objective A could not be achieved. As I do not understand any criticism to be made of this analysis I need say no more about it.

45. As regards Objective B, paragraph 4.4 of the Proposals, a paragraph much criticised by the Creditors, states as follows:

> "4.4 [Objective B] *is normally achieved by means of a sale of the business and assets as a going concern (or a more orderly sales process than in liquidation). In this case, there has been no sale of the business as a going concern and all the employees have been made redundant. Accordingly, the Joint Administrators do not consider it likely that* [Objective B] *will be achieved and have therefore proceeded to* [Objective C].

46. The Proposals then go on to give a detailed account of how the Joint Administrators had sought to achieve the objective of the Administration. These matters deal with the position up to the date of the Proposals and the strategy going forward from there. In large part, the ongoing strategy reflects the matters set out earlier in the document that I have briefly summarised.

47. Part 8 of the Appendix deals with the approval of the Proposals. Paragraph 8.1 states the belief of the joint administrators that neither of the first two administration objectives can be achieved and that therefore pursuant to paragraph 52(1)(c) of Schedule B1 they are not required to see creditor approval of the Proposals. However, it is also explained (in paragraph 8.2) that the Administrators can be required to seek a creditors' decision on whether to approve the Proposals if requested by creditors whose debts amount to at least 10% of the Company's total debts. The procedure involved, requiring the request to be made within eight business days from

the date on which the Proposals were delivered and for security to be given for the expense of seeking such a decision was also set out. Paragraph 8.3 concludes by pointing out that if no decision is requested the Proposals would be deemed to be approved pursuant to rule 3.38(4) IR 2016.

48. Paragraph 9 of the Appendix sets out a summary of the Proposals. After dealing with protecting preserving and maximising realisation of company assets, the summary includes the making of distributions to any secured or preferential creditors. As regards unsecured creditors, the possibility of a distribution to unsecured creditors is acknowledged if the Administrators first seek the court's permission in accordance with paragraph 65(3) of Schedule B1. As regards the ending of the Administration, the Proposals envisage that in the event there is no remaining property permitting a distribution to the Companies creditors, the administrators would file a notice of dissolution of the Company pursuant to paragraph 84 of Schedule B1. Alternatively, in the event that they think that a distribution will be made to unsecured creditors (and have not sought court permission and are otherwise unable to pay a distribution whilst the company is in administration) the administrators proposed that they would move the company from administration to creditors voluntary liquidation pursuant to paragraph 83 of Schedule B1. In the further alternative, and in the event that there were no likely funds to distribute to unsecured creditors, the Administrators make clear that they might seek to place the Company into compulsory liquidation in order that proceedings could be brought where such proceedings could only be brought by a liquidator.

49. Mr Moulds (and to some extent Mr Longstaff's skeleton argument) proceeded on the basis that the Proposals were that there would be a distribution to creditors by the Administrators and that this was the or a major purpose of the administration and a term of the Proposals. An example is paragraph 29 of Mr Moulds' first witness statement where he asserts that the "Joint administrators had already indicated that they would make a distribution to unsecured creditors". In part, this is said to be a conclusion flowing from the facts that the administrators' description of the further steps to be taken in the administration envisaged the securing and/or realisation of assets and that the Proposals envisaged the likelihood that there would be assets available for distribution to creditors. However, the securing of assets and their realisation says nothing in itself about what assets will then be available and it would be a normal function of the administrators to carry out this role whichever Objective they were pursuing. So far as distribution to creditors is concerned, the Proposals on their face make clear that the Administrators were not proposing that there would definitely be a distribution to creditors in the administration (provided sufficient assets were realised). Indeed, one possibility the Proposals covered in express terms was that the Company might be moved from administration to creditors' voluntary liquidation in order to enable a distribution to be made to creditors.

50. One difficulty about the above analysis is that Mr Butler in his first witness statement appears to assert at one point that a distribution to unsecured creditors in the administration was one of the incidents proposed by the Administrators. If so, and in my view this is in fact what became a proposal in the light of the situation as it developed after the issue of the Proposals, this suggests an inadequacy in the drafting of the proposals. However, the question which then arises, and which I will address below, is whether such a matter can properly be an incidence of administration and, if

it can be, whether or not it is possible to envisage that aim pursuant to Objective C or whether the existence of such aim is only compatible with pursuit of Objective B.

51. A later passage in Mr Butler's witness statement makes clear, in my view, that the decision to ask the court to permit a distribution, rather than leaving distribution to take place in a liquidation, was a later decision, made after the Proposals had been circulated and approved (see e.g. paragraph 23). Indeed, in an email sent to Begbies Traynor dated 24 July, Mr Butler wrote that "Creditors are likely to receive a return in this administration/any subsequent liquidation", which again suggests that at this time the position was open in the minds of the Administrators and they had not concluded that they would necessarily be seeking to implement a distribution to creditors.

52. There having been the relevant statement by the Administrators, the Proposals were not made the subject of the procedure for obtaining a creditor decision upon them. I deal with the rationale for this below but at this point make clear that I reject the suggestion of Mr Moulds that the Administrators have "*cherry picked the proposal they thought would pave the way for deemed approval of the Proposals*". I also reject his assertion that the Administrators have "*sought to "pigeonhole" the Administration into Objective C…to bypass creditors' ability to scrutinise the Proposals.*" There is no evidence to that effect (other than it is a possible inference from the facts) and such a serious allegation could not be established in this case, on the evidence before me, without cross-examination.

Events after the Proposals

53. I have referred to certain realisations above. Expert advice from the quantity surveyor that I have referred to continued to be given after the Proposals had been issued. By the time of Mr Butler's first witness statement the Administrators had secured or realised assets of just over £298,000. In addition, they had agreed (in principle) the sale of the commercial property owned by the Company in the sum of £200,000 (having taken the benefit of expert advice). Heads of terms had been agreed and funding availability was due to be confirmed by the purchaser immediately to enable a date to be set for exchange of contracts. Mr Butler expressed the concern in his witness statement that any delay to that process (for example, as might be caused by a hiatus while the company goes into, and as a result of, liquidation) could harm creditors financially given uncertainties in the commercial property market. Although this is disputed by Mr Moulds, by way of bare assertion, I accept Mr Butler's evidence.

54. Correspondence complaining about the Administrator's actions appear to have commenced on about 14 July 2020. Emails from Begbies Traynor to Redman Nichols Butler starting with that date are in evidence. They were apparently written initially on behalf of 5 creditors. They start by demanding lists of creditors and confirmation of the date the Proposals were deemed to be delivered to creditors and then move onto to demanding particular text to be included in the Proposals, which, they asserted, should be re-issued, and asserting that the Administrators were unable to use the deemed approval procedure (that is not putting the matter to a decision of the creditors) and that they were pursuing the incorrect Objective. By email dated 24 July 2020, among other things, they confirmed that they represented creditors with claims

in excess of 10% of the total unsecured debt and that they requested a meeting to be convened to consider approval of the Proposals in any event.

55. By email dated 24 July 2020, Mr Butler wrote back explaining that since the estimated financial position, which was prepared from information obtained from the Company's records, further information had come to light meaning that the estimated liabilities were greater than those previously estimated. The total value of estimated debts at that stage was such that Begbies Traynor's clients did not meet the 10% threshold. The proposals accordingly were deemed approved, not having been challenged by the requisite creditor mass within the time period provided by Schedule B1.

56. Mr Moulds' position, in his second witness statement, was that the information about the extra creditors of the company came to the attention of the Administrators between 17 and 21 July 2020 and that it was "*withheld tactically to prevent Begbies Traynor from being able to obtain support from further creditors in time*." I am not satisfied on the evidence that the Administrators deliberately took the tactical course suggested. That is a matter that would have had to have been challenged directly and cross-examination would no doubt have been required to resolve the issue. This is another example of a collateral issue of bad faith being thrown at the Administrators.

Complaints raised by Mr Moulds

57. Scattered through his evidence, Mr Moulds makes various assertions. Some of these assertions seem not to have any real foundation in the evidence. Some appear to be an attempt to throw "mud" at the Administrators, but their relevance is otherwise unclear. As a general matter, my starting point is that the onus lies on the creditors to make out their case. Where there is a relevant conflict of factual evidence I am unable to resolve the same without cross-examination unless the position is clear in the documents or the written evidence from a witness can be ignored on the sorts of grounds that are now well established (such as internal inconsistency, inconsistency with other uncontovertible evidence and so on). I have already dealt with a number of these assertions. I now turn to the main ones.

(a) The initial decision to place the company into administration

58. There are a number of assertions in the evidence, and (to a lesser extent) by Mr Longstaff in submission, that the Company should never have been placed into administration in the first place. As I understood it, this basic assertion (and connected evidential assertions) are relied upon in support of the (now primary) proposition that the Company should now be placed by the Court into compulsory liquidation, even though that this was the Creditors case did not become clear until after the exchange of skeleton arguments in this case and a request for clarification by the Administrators' Counsel.

59. The first point to note is that challenges to the placing of a company into administration are primarily governed by paragraph 81 of Schedule B, which provides:

> **"***Court ending administration on application of creditor*
>
> ***81—***
>
> *(1) On the application of a creditor of a company the court may provide for the appointment of an administrator of the company to cease to have effect at a specified time.*
> *(2) An application under this paragraph must allege an improper motive–*
> *(a) in the case of an administrator appointed by administration order, on the part of the applicant for the order, or*
> *(b) in any other case, on the part of the person who appointed the administrator.*
> *(3) On an application under this paragraph the court may–*
> *(a) adjourn the hearing conditionally or unconditionally;*
> *(b) dismiss the application;*
> *(c) make an interim order;*
> *(d) make any order it thinks appropriate (whether in addition to, in consequence of or instead of the order applied for)."*

60. The second point to note is that under r3.58 IR 2016, any such application has to be served on (among others) the appointors which has not been done in this case.

61. The third point to note is that complaints about the conduct of the "administrators" before they were appointed (for example, it is said by Mr Moulds that "What the administrators appear to have done is to create a false impression to creditors before the administration that Objective B will be pursued…") cannot, in my judgment, fall within paragraph 74 or 75 of Schedule B1.

62. The final point to make in this context is that I am not satisfied on the evidence that the initial decision to place the Company into administration in the belief that Objective B could be achieved was unreasonable. True it was that the Company had ceased immediate trading before that as a result of lockdown but that does not, in my view, of itself show that the Company's business might not be capable of being saved and sold as a going concern. A shut down for lockdown is not quite the same as termination of trading on a final basis. I do not accept therefore that the Creditors have established that "*the Joint Administrators must have known from the outset that this* [sale of the company's business as a going concern] *would not be achievable*".

63. I also reject Mr Moulds' assertion that it must have been clear that Objective B could not be achieved as at the date when it became clear that the sale of the business as a going concern was not possible (20 May 2020). Mr Butler's evidence is that after that date there was still a reasonable hope that at least one project would be capable of being completed in the administration and that the realisations from that would, for the benefit of all creditors, be greater than in a liquidation.

64. On the evidence as it is before me, I also reject Mr Moulds' suggestions that the Administrators took undue time in reaching the conclusions that they say that they reached, or in formulating and putting forward the Proposals that they did. Mr Mould impliedly suggests, at the best, incompetence and, at the worst, something more, in saying that:

"*16. … It is not clear why the Proposals were only filed on 21 July 2020, over two months after the Joint Administrators were appointed in respect of the Company, with which they had been familiar since March 2020."*

65. I do not accept this implicit criticism at all, nor the hypothesis upon which it is based. As regards the hypothesis on which the allegation is based, there were no grounds to assume that the Administrators had been "familiar" with the Company since March to a depth that meant they should have produced their Proposals much earlier. Indeed, inter-solicitor correspondence had revealed that the Administrators had, with the benefit of specialist advice, investigated the position and that expectations had changed and new facts come to light. I am not satisfied that this was a situation where the Administrators had failed to put forward their Proposals as soon as reasonably practicable after the Company first entered into administration: see paragraph 49(5)(a) Schedule B1. This is one of a number of pejorative comments which have no basis and, in any event, the relevance of which are wholly unclear, other than as some form of "mudslinging". Mr Mould's position in this respect amounts to little more than assertion and could only be established (if at all) following cross-examination or the provision of far more material than I have before me. I deal separately below with the legal analysis carried out by the Administrators. As regards timing, I accept that the administration and its management has been affected by the Covid-19 pandemic as detailed by Mr Butler in his evidence and set out by the Administrators' solicitors in correspondence.

(b) The Proposals

(i) alleged late distribution

66. The first complaint is a technical one that the Proposals were made late and outside the eight weeks beginning with the date on which the Company entered administration (see paragraph 49 of Schedule B1). Other than being asked to take this into account in some ill-defined manner as against the Administrators it was unclear to me what substantive relief was being sought in this respect.

67. This issue was not addressed by Mr Longstaff in his Skeleton argument but was dealt with orally before me.

68. The original complaint made by MD Law on behalf of the Creditors (see their letter dated 31 July 2020) was that the Proposals were sent to creditors (by post) under cover of a letter dated 9 July 2020. By the time the matter came before me it was common ground that the Proposals were uploaded to the relevant website set up by the Administrators on 9 July 2020 (and not sent by post). It is also common ground that, at the same time, a letter was "issued" dated 9 July 2020, referring to the upload of the proposals.

69. The revised position of the Creditors was that this letter had been posted. The letter, they asserted, was posted under r1.49(5)(b) IR 2016 and set out the availability of the proposals on the Website. As it was sent by post, the deemed delivery of the proposals was on 13 July and therefore the Proposals were delivered after the relevant eight-week deadline.

70. The position of the Administrators was that the letter in question was placed, with the Proposals, on the relevant website pursuant to an earlier notice dated 26 May 2020.

71. The dispute between the parties turned on resolution of a factual issue: was the 9 July letter posted by post (only) or was it uploaded to the website validly in accordance with the IR 2016, such that the Proposals were delivered in time?

72. Mr Moulds initial witness statement asserted that the letter was "sent" to creditors and went on to say that "assuming it was sent by first class post" the letter would have been deemed delivered on 13 July. Mr Butler asserted that the letter was not sent by post but was uploaded to the website that I have referred to

73. I was invited by both sets of parties to resolve this issue in their respective favours. It suffices to say that I am not satisfied on the evidence that the letter was sent (only) by post or by post at all and accordingly I am not satisfied that the Proposals were distributed outside the period allowed by the statutory regime.

(ii) The Objectives at the time of the Proposals

74. A number of, what appeared to me, to be alternative positions were taken by the Creditors before me as regards the decision of the Administrators to pursue Objective C. As I understand it those positions were as follows (though not necessarily in this order of priority):

(1) In this case the Administrators wrongly rejected Objective B. They were in fact pursuing it or should have pursued it. A distribution to creditors within the Administration was within Objective B ("Proposition 1");

(2) In this case, Objective C could not be pursued because it would result in unnecessary harm to creditors under paragraph 3(4) of Schedule B1 ("Proposition 2");

(3) Objective C cannot be pursued where (as in this case) there is any prospect (or at least it is envisaged that there will be) a distribution to the Company's unsecured creditors, whether within or without the administration. Instead only Objectives A or B can apply and if they do not the Company should not be permitted to remain in administration ("Proposition 3").

75. At the time of the Proposals, the Administrators clearly envisaged that following their realisation of Company assets, a distribution to creditors would be likely (whether within the administration, if permission of the Court was received or in a liquidation). As I have said, I do not consider that the Proposals include a definitive proposal that the distribution would be in the administration or in a liquidation: the position was left open. As I read the evidence, the Administrators considered that financially the unsecured creditors would be in no worse and no better a financial position, in terms of the assets available for distribution to them, whether the Company remained in administration or went into liquidation.

76. The Administrators statement in paragraph 4.4 of the Proposal document that:

"4.4 [Objective B] *is normally achieved by means of a sale of the business and assets as a going concern (or a more orderly sales process than in liquidation).*

> *In this case, there has been no sale of the business as a going concern and all the employees have been made redundant. Accordingly, the Joint Administrators do not consider it likely that* [Objective B] *will be achieved and have therefore proceeded to* [Objective C]."

is criticised as being too narrow a description and justification for not pursuing Objective B. The Administrators have accepted that a fuller explanation could have been given. In this case, Objective B might have been in play if the Administrators had considered that there could be benefits to the unsecured creditors in the administration over and above financial benefits of greater realisations in respect of assets. For example, if there was a timing benefit to creditors in making a distribution in the Administration.

77. As I read the Administrators' evidence, at the time of the Proposals it was open as to whether a distribution to unsecured creditors would be sought to be made in the Administration or in a liquidation following the Administration. The continuation of the administration and the pursuit of recoveries and payments to preferential creditors would not have caused unnecessary harm to creditors. The unnecessary harm identified by the Creditors under Proposition 2 is a delay in distribution, because if made in the administration court sanction would have had to be sought which would cause delay, and extra costs because the Administrators estimated outcome indicated extra costs of some £100s. As regards delay, I do not accept this. If I am correct and distribution within the administration or within a liquidation were both possible then delay in administration was not necessarily on the cards. Further and in any event, an application could have been got ready and mounted during the period before distribution was ready to be made and thereby avoid undue or any delay in the process. As regards costs, the outcome statement was a projection. The extra costs were de minimis and do not, in my view, attract the epithet of "unnecessary harm". Accordingly, I reject Proposition 2.

78. However, although I consider that the Administrators were correct to proceed (or that at the least it was reasonably open to them to proceed, as in *Davey v Money*)) on the basis that the continuation of the administration would not unnecessarily harm unsecured creditors, that does not mean that it follows that unsecured creditors would necessarily be in a better position in the continued administration than they would otherwise be. It may be that the subsequent decision to make a distribution (subject to court permission) in the administration does at that stage reflect that they are in such a better position than they would be in a liquidation in terms of timing but that is because of subsequent developments and decisions after the Proposals were put forward. I should add that the limitation put on the "better result" words of Objective B by the phrase "(without first being in administration)" were not explored before me. However, it seems to me that if administrators were of the view that a better result would flow from the continuation of the administration rather than the Company then being placed into liquidation they would in fact be pursuing Objective B. Accordingly, I also reject Proposition 1.

79. That leaves Proposition 3. That emerged as the primary submission of the Creditors and the reason why they submit that the Company should immediately be placed into liquidation.

80. In support of that proposition, Mr Longstaff prayed in aid a line of cases saying that distribution could not be pursued as an aspect of any Objective in paragraph 3 of Schedule B1 or that distributions to creditors were not among the functions of an administrator (see e.g. *Re GHE Realisations Limited* [2005] EWHC 2400 (Ch), [2006] BCC 139; *Re Lune Metal Products Ltd* (in administration) [2006] EWCA Civ 17209, [2007] BCC 217). However, these cases were decided under the predecessor administration regime to that now set out in Schedule B1 and before there was power (with court sanction where necessary) to make distributions in the administration both to and unsecured creditors (see paragraphs 64 and 65 of Schedule B1).

81. Mr Longstaff also prayed in aid paragraph 651 of the relevant Explanatory Notes issued by the DTI:

> *"The purpose specified in paragraph 3(1)(c) deals mainly with those cases where the company is not viable and has no business that can be sold as a going concern. All that can be done is to sell the company's remaining assets in order to make a distribution to one or more secured or preferential creditors. A hypothetical example might be:*
>
> > *Company C is a service company whose business and reputation were built around its excellent standards of customer service. But a number of key personnel have recently left, the quality of the company's service and its reputation have suffered badly, customers have become dissatisfied and the company is no longer able to attract and retain business. It has been making losses for a number of months and is unable to pay its debts. The company is then placed in administration. The administrator reviews the company and concludes that its business is not viable and a sale is not possible. The administrator markets the company's assets and realises funds that are sufficient to make a part-payment to the secured creditors, and there are no funds available to pay unsecured creditors, except for those resulting from the operation of the ring-fence (see section 252). The administrator reports to the creditors and explains why it was not reasonably practicable to achieve either a company rescue or a better return for unsecured creditors."*

82. I accept that the "main" cases dealt with by paragraph 3(1)(C) of Schedule B1 may be those where no distribution to unsecured (whether within administration or liquidation) is envisaged but it does not seem to me that this Explanatory Note can limit the scope of that paragraph. Here the purpose at the time of the Proposals was to make realisations of the company assets and to make a full distribution to preferential creditors. A better result for creditors in administration was not a clear possible objective to be pursued because the Administrators considered that there was no better financial result for them and, at that stage, it was not clear that there would be a better timing outcome either. I turn to the last related submission in this respect.

(iii) Was a creditors' decision necessary: paragraph 55 of Schedule B1?

83. In reliance on paragraph 55(1)(c) of Schedule B1 "*that neither of the objectives specified in paragraph 3(1)(a) and (b) can be achieved"*, the Administrators did not submit the Proposals to a creditors decision making process. Mr Longstaff submits that the structure of paragraph 55(1)(c) is such that in circumstances where a distribution (at the end of the day) to unsecured creditors is envisaged then Objective

A or B must apply (or none of the three Objectives). He says that this must be so because creditor engagement on the Proposals is only avoided under Paragraph 55(1) where they have no relevant "interest" in the outcome of the Proposals; either because they will be paid in full or because they will be paid nothing. The short answer to that seems to me threefold. First, if I am correct that there can be circumstances where Objective C can properly be pursued even though unsecured creditors may receive a distribution at the end of the day, then that falls within the express wording of the paragraph. Secondly, in the particular circumstances of this case, at the time of the Proposals it might be said that unsecured creditors did not have a "relevant interest", not because they would not receive anything or because they would receive a full return but because they would be no better and not harmed by an administration, compared with a liquidation. Thirdly, in the case of paragraph 55(1)(b), creditors would receive something (out of the prescribed part) and might therefore have an interest in the conduct of the administration so far as it might bear on such a distribution, but nevertheless paragraph 55(1)(b) removes from them a right to a decision on the proposals.

84. In those circumstances, I reject Proposition 3. I also reject the proposition that the Creditors have been unfairly harmed by the manner in which the Proposals were not put to a creditors' decision-making process. It also follows that there is no scope for paragraph 79 of Schedule B1 to apply.

Events since the Proposals were approved

85. Mr Moulds asserts that the Administrators have unduly delayed in making an application to the Court for permission to make the distribution to unsecured creditors. Given the stance taken by the Creditors and the general position as a result of the pandemic I do not accept that submission.

The relief sought

86. Looking at the position more generally, the Administrators have all but completed realising assets and have authority to make a distribution to unsecured creditors and have funds to pay preferential creditors. There is in any event little point now in putting the Proposals before the creditors for their consideration and approval: they have been largely implemented (save for realisation of the last property). This is so, even if I am incorrect in my previous findings of fact and law.

87. As regards future proposals: it does not seem to me likely that the Administrators will be making any new or revising the original Proposals. It is not appropriate to make a pre-emptive order that the deemed consent procedure cannot be used in relation to the same. The relevant head of relief that is sought, in any event appears to depend on a prior judicial decision (which I have declined to make) that the Proposals should have been placed before creditors and that it is appropriate to order that that course is now followed.

88. Similarly, there seems little point at this stage in now placing the Company into liquidation (whether creditors' voluntary or compulsory), even if my earlier findings are wrong.

89. If another distribution to unsecured creditors is to be made the Company will have to be placed into liquidation or the court will have to be asked for permission to distribute. I cannot predict what will happen in the future. Circumstances may change. However, the Creditors will have the ability in effect to challenge either course. Further, under paragraph 56 of Schedule B1 they are in a position to require a decision of the Administrators to be submitted to the creditors for their decision. It is difficult to see that they would wish to prevent a distribution. It is difficult to understand what benefit there would be to the creditors in placing the Company now into compulsory liquidation as sought.

90. For these reasons I dismissed the Creditors' application.

If a draft order dealing with consequential matters cannot be agreed by the time of handing down then I will give directions for a remote hearing in relation to such matters as are not agreed and for the settling of an appropriate form of order. If a final order cannot be agreed it would assist in the parties could agree the envisaged directions order.