IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)
[2023] EWHC 1647 (Ch)

No. CR-2021-002181

Rolls Building
Fetter Lane
London EC4A 1NL

Friday, 9 June 2023

Before:

MR JUSTICE MICHAEL GREEN

IN THE MATTER OF: **BULB ENERGY LIMITED (IN ENERGY SUPPLY COMPANY ADMINISTRATION)**

AND IN THE MATTER OF: **THE INSOLVENCY ACT 1986**

AND IN THE MATTER OF: **THE ENERGY ACT 2011**

MR R FISHER KC and MR H PHILLIPS (instructed by Linklaters LLP) appeared on behalf of the Applicant Energy Administrators.

J U D G M E N T

MR JUSTICE MICHAEL GREEN:

1 On 24 November 2021, Bulb Energy Limited ("the Company"), the well-known energy supply company with some 1.5 million domestic customers, was placed into administration by order of Adam Johnson J. This was the first special energy administration order under the Energy Act 2011, which modifies the ordinary company administration regime provided for under Schedule B1 of the Insolvency Act 1986. In particular, the administrators are required to prioritise ensuring the continuation of energy supplies "at the lowest cost which it is reasonably practicable to incur" (see s.95(1)(a) of the Energy Act). The administrators who were appointed are Mr Matthew Cowlishaw, Mr Matthew Smith and Mr Daniel Butters, all licensed insolvency practitioners at Teneo Financial Advisory Limited.

2 There are two applications before me brought by the administrators in relation to their remuneration and certain costs:

1) The Remuneration Application – the administrators seek the approval of the court to their remuneration for the 9-month period from their appointment on 24 November 2021 to 2 September 2022 in the sum of £24,969,221 plus VAT.

2) The Pre-Appointment Costs Application – the administrators seek the approval of the court for certain pre-appointment costs in the sum of £3,181,920.67 plus VAT.

These are very substantial amounts.

3 The applications were first before me on 23 February 2023, having been adjourned by ICC Judge Barber on 10 November 2022. She had allowed the administrators to draw and pay 55 per cent of the claimed remuneration and pre-appointment costs as an interim measure. At the February hearing I increased that to 75 per cent, including in relation to further applications for remuneration that had been approved by the Secretary of State.

4 As at the February hearing, Mr Richard Fisher KC has appeared on behalf of the administrators, together with Mr Henry Phillips, and I have benefitted from their clear submissions, both written and oral.

5 At the February hearing, the administrators invited me to adopt a broad approach to the applications in line with the approach taken by Snowden J (as he then was) in *Re Nortel Networks NV* [2019] EWHC 1182 (Ch). Mr Fisher submitted that the remuneration and costs for which approval was sought will be discharged from drawings made under a limited recourse funding agreement ("the funding agreement") entered into between the company and the Secretary of State for Business, Energy and Industrial Strategy ("BEIS") that was put in place at the time of the administration and which was approved by Adam Johnson J. (I should say that BEIS has now become the Department of Energy, Security and Net Zero, but I will continue to refer to it as "BEIS" or to the Secretary of State, as appropriate.)

6 BEIS is the stakeholder with an immediate economic interest in the amount of the remuneration and pre-appointment costs sought, i.e., it is the paying party. That is because:

1) The funding agreement is repayable as an expense of the administration in priority to other creditor claims;

2) In the light of the significant sums already drawn under the funding agreement it is unlikely that the Company would be able to repay the funding agreement in full, irrespective of the amount of the remuneration and pre-appointment costs;

3) On that basis, the amount of the approved remuneration and costs therefore directly affects the amount of the recoveries that BEIS will receive from the Company. It does not affect the amount that other creditors will receive because they are already out of the money, as it is said;

4) While the Secretary of State has a power to modify the conditions of energy supply licences in order to seek to mutualise any shortfall in recoveries under the funding agreement among other licence holders under s.168 to 169 of the Energy Act 2004, whether or not that power is exercised and on what terms is ultimately a matter for the Secretary of State to determine in accordance with his public law duties. The immediate paying party remains BEIS and BEIS is logically economically motivated to minimise the amount of the remuneration and pre-appointment costs so as to maximise its recoveries from the Company.

7 Mr Fisher therefore submitted that the work undertaken by the administrators and the sums sought by way of the remuneration and pre-appointment costs applications have been subject to scrutiny and approval by BEIS, which is well-placed to ensure value for money and assess the proportionality and reasonableness of the fees incurred against the yardstick of the policy-led objective underpinning the Company's special administration. BEIS has agreed what it considers to be reasonable and proper remuneration for the administrators and has approved the amount of remuneration and the pre-appointment costs. He therefore suggested that the court should follow the approach taken in *Re Nortel Networks* and be satisfied that the sums sought were proportionate, fair and reasonable and can therefore be approved.

8 However, I was concerned at the February hearing that this was a very large sum of money effectively being paid by the taxpayer and that the court, which is required to approve any such remuneration, had no real evidence that the remuneration had been scrutinised carefully by an insolvency expert with knowledge as to the way large scale insolvencies should be managed and charged for on a reasonable basis. I felt that I could not be satisfied that the broad approach taken in *Re Nortel Networks* should be followed on the facts of this case without further materials or investigation being conducted as to the reasonableness of the remuneration sought. Indeed, in *Nortel Networks* itself, the creditors had employed an independent insolvency practitioner to go through the evidence to test whether the amounts sought were reasonable or not and in a later *Nortel* case Snowden J had, indeed, appointed an independent remuneration assessor. In this case, there was no direct evidence from BEIS as to precisely the approach that it had adopted in approving the remuneration.

9 I was also concerned there may be other creditors affected by a decision on the administrators' remuneration, including the Company's secured creditor, Sequoia, which had sent a letter shortly before the February hearing expressing the view that the recent movement in energy wholesale prices which delivered economic benefits to the Company under the terms of certain post-sale arrangements with Octopus Energy Group Limited, to whom the vast majority of the Company's business had been sold on 22 December 2022, and that that meant that "the court should no longer proceed on the basis that BEIS is the only stakeholder with an economic interest in the remuneration application and that it is therefore appropriate for the court to scrutinise that evidence more closely than it might otherwise have done".

10 I have already mentioned mutualisation and I was concerned that other market participants may ultimately carry some of the economic burden of the remuneration by reason of any shortfall on the recoveries under the funding agreement in the event that a mutualisation

order is made by the Secretary of State. As a result of these concerns, I was not prepared to approve the remuneration at the February hearing and took up Mr Fisher's alternative suggestion of appointing an independent assessor under para.21.3 of the Practice Direction: Insolvency Proceedings in accordance with what Snowden J had done in one of the *Nortel* cases.

11 I invited the administrators to prepare draft terms of reference for the court to approve concerning the appointment of an insolvency practitioner to act as an independent assessor and I asked for three potential candidates to be identified for the role. In the event, only two suitable candidates were identified and proposed and I selected one of them, a Mr Russell Downs, a very experienced insolvency practitioner. I am very grateful to Mr Downs for preparing a comprehensive, clear and well-reasoned report which is just what I envisaged. He has also kindly appeared today in court to answer any questions that I might have had but, in the end, the report has really spoken for itself.

12 On 17 March 2023, I therefore directed that Mr Downs be appointed under s.70(1) of the Senior Courts Act 1981 and CPR 35.15 to act as an independent assessor in relation to the fixing of the remuneration and pre-appointment costs. I also settled and approved the terms of reference for Mr Downs' appointment. As I have said, Mr Downs has significant experience of large scale insolvencies and the remuneration of officeholders, having been one of the administrators of Lehman Brothers International (Europe) and several other Lehman Group entities and one of the special managers in the Carillion liquidation, all whilst a partner at PwC.

13 The terms of reference, among other things, instructed Mr Downs to:

1) act as an independent assessor and prepare a report containing his independent opinion as to whether the remuneration and pre-appointment costs were fair, reasonable and commensurate with the work properly undertaken by the Energy Administrators;

2) base the report on his professional judgment and experience of comparable matters, having regard to the objective of the ESC administration, the factors set out in r.76(5) of the Energy Supply Company Administration Rules, the principles set out in para.21.2 of the Practice Direction: Insolvency Proceedings and the information and evidence provided by the administrators in support of the applications;

3) consider if any part of the relevant remuneration was unfair, unreasonable or not commensurate with the nature and extent of the work undertaken and whether there were any factors weighing against its approval;

4) have regard to a number of specific factors, including:

    a) the type of work undertaken;

    b) the efficiency with which it was undertaken;

    c) the appropriateness of the deployment of resources as between the Company, the administrators' team and their MNA advisors;

    d) the appropriateness of allocation of task by reference to seniority;

    e) the appropriateness of the discounted hourly rates; and

f) the level of pre-administration costs incurred by the administrators before their appointment in respect of the legal fees of solicitors and counsel.

Mr Downs circulated the report containing his findings on 22 May 2023. His overall professional view was that:

> "The remuneration request made is fair, reasonable and commensurate with the nature and extent of the work properly undertaken by the officeholders."

14 Before looking at the detail of Mr Downs' report I should set out the general regime that is applicable to the fixing of remuneration and approval of pre-appointment costs. In particular, we are talking about the special energy administration regime rules. The overall context is therefore the objective of an ESC administration, which is set out in s.95 of the Energy Act 2011 as follows:

> "(1) The objective of an energy supply company administration is to secure—
>
> (a) that energy supplies are continued at the lowest cost which it is reasonably practicable to incur; and
>
> (b) that it becomes unnecessary, by one or both of the following means, for the ESC administration order to remain in force for that purpose."

15 The administrators are required to manage the affairs, business and property of the company and to exercise and perform all of their powers and duties so as to achieve the objectives set out in s.95 (see s.94(3) of the Energy Act). The effect of s.95(1) is that the primary and overriding objective of an ESC administration is to secure the continuance of energy supplies at the lowest cost which it is reasonably practicable to incur. While not necessarily part of the remuneration rules, I have always thought it material that the statute specifically requires this as their primary objective. To my mind, that makes it relevant to the consideration of their own remuneration and I was pleased to see that Mr Downs specifically addressed it in his report.

16 Remuneration itself is governed by Part 8 of the 2013 Rules. The basic regime is set out in r.76(1) to (3), which is as follows:

> 1) "The Energy Administrator is entitled to receive remuneration for the Energy Administrator's services;

2) the remuneration shall be fixed by reference to the time properly given by the Energy Administrator and the Energy Administrator's staff in attending to matters arising in the energy supply company administration;

3) the remuneration of the Energy Administrator shall be fixed by the court and the Energy Administrator must make an application to the court accordingly."

Accordingly, the administrators are entitled to receive remuneration and, as Mr Fisher said in his skeleton argument, that is an important starting point.

17 The court is then required to fix that remuneration by reference to the time properly given in attending to the matters arising in the administration. Remuneration cannot be fixed on any other basis, such as a percentage of value, unlike in an ordinary administration. The time properly given by the administrators is therefore the ultimate benchmark for fixing their remuneration.

18 Rule 76(5) of the 2013 Rules goes on to identify certain matters to which the court must have regard when fixing remuneration. These are:

a) the complexity or otherwise of the case;

b) the respects in which in connection with the energy supply company's affairs there falls on the Energy Administrator any responsibility of an exceptional kind or degree;

c) the effectiveness with which the Energy Administrator appears to be carrying out or to have carried out the Energy Administrator's duties, as such; and

d) the value and nature of the property with which the Energy Administrator has to deal.

As Mr Fisher submitted, these factors inform the court's assessment of whether the time spent by the administrators has been properly given to the matters arising in the ESC administration. They provide a yardstick against which the court can assess whether and to what extent the time spent by Energy Administrators has been proportionate to the requirements of the particular ESC administration. The requirements of r.76(5) were reflected in the terms of reference for Mr Downs' appointment.

19 Turning to the Insolvency Practice Direction, in an ordinary administration applications to the court to fix the basis and approve the amount of an office holder's remuneration are subject to the Insolvency Practice Direction. The overarching objective is to fix and approve remuneration at a level which is "fair, reasonable and commensurate with the nature and extent of the work properly undertaken". The Insolvency Practice Direction identifies nine guiding principles which are intended to assist in the assessment of "fair, reasonable and commensurate remuneration". Those principles, which are set out in para.21.2, were reflected in the terms of reference for Mr Downs' appointment.

20 However, as Mr Fisher submitted, and I agree, it is important to recognise that not all aspects of the Insolvency Practice Direction are as easily applicable in the context of the

policy-driven special administration regime or such as to carry the same weight as they might in a normal administration. For example, in an ordinary administration, the fourth guiding principle provides that the remuneration of an office holder "should reflect the value of the service rendered, not simply reimburse the office holder in respect of the time expended and costs incurred". In an ordinary administration, the value of the service rendered can usually be assessed by reference to the financial benefit delivered to creditors. That is not necessarily the case in a special administration. The value of the service rendered in that context is ultimately referable to the value of the social and policy-driven goals mandated by the statute.

21 Turning to the Pre-Appointment Costs Application, the 2013 Rules contain specific provisions for the notification and approval of unpaid pre-energy supply administration costs. These are defined in r.2(1) as:

> a) fees charged and
>
> b) expenses incurred by the administrator or another person qualified to act as an insolvency practitioner before the energy supply company entered energy supply company administration but with a view to its doing so.

Rule 20(2)(k) requires the administrators' proposals to contain a statement of any pre-energy supply company administration costs charged or incurred by the Energy Administrator. A statement complying with the requirements of rr.22(2)(k) and 20(3) was included in the administrator's statement of proposals filed on 19 January 2022.

22 Having included such a statement, court approval is now needed to pay the relevant costs and r.37 provides as follows:

> "Where the Energy Administrator has made a statement of pre-energy supply company administration costs under r.20(2)(k) the Energy Administrator must, before paying such costs, apply to the court for a determination of whether and to what extent the unpaid pre-energy supply company administration costs are approved for payment."

The 2013 Rules do not provide any indication of the approach that the court should adopt to approval of the pre-appointment costs. However, by analogy with the position in relation to the Remuneration Application, Mr Fisher suggested that the court should be satisfied that such pre-appointment costs had been properly incurred and, again, I think that that must be right.

23 Before looking at Mr Downs' report I should just deal with the position of other stakeholders and the notice that was given to them of this hearing. Notice was provided to:

1) Watson, Farley and Williams, who were acting on behalf of Sequoia by email on 26 May 2023 to which was attached a copy of Mr Downs' report;

2) the company's creditors by a notice on the administration website hosted by the administrators on 31 May 2023 - the administrators did not post a

copy of Mr Downs' report on the website, but invited creditors to contact them if they had any questions or concerns or required further information in relation to the applications;

3) GEMA and BEIS by letters dated 1 June 2023; and

4) the FCA, by an email dated 2 June 2023.

Save in respect of Sequoia, the administrators have received only one response or query, other than to acknowledge the receipt of the notices. On 3 June 2023, one creditor responded to the notice posted on the administration website to ask if the "forthcoming hearing for Bulb is to determine if anyone is getting paid". On 7 June 2023, the administrators responded, to explain that the hearing is in relation to the Energy Administrator's remuneration.

24 On 1 June 2023, Watson, Farley and Williams emailed Linklaters stating that they were taking instructions as to whether Sequoia wished to appear at or attend the hearing of the adjourned applications. Watson, Farley and Williams also asked if an updated estimated outcome statement was available and requested a copy of the same.

25 As to that,

(1) first, shortly before the February hearing the administrators had shared a draft estimated outcome statement ("EOS") with Sequoia. That February EOS showed a marked improvement in the anticipated outcome for the company, primarily driven by the movements in wholesale energy prices which, in turn, resulted in significant post-completion adjustment payments to the company under the terms of the sale agreement with Octopus Energy.

(2) the cumulative effect of those improvements was illustrated by graphs exhibited to Mr Cowlishaw's 8th witness statement. In short, there remained a material estimated deficiency of assets to enable repayment of the funding provided by BEIS under the funding agreement. However, the estimated deficiency had improved from around £2.6 billion in October 2022 to around £246 million in February 2023.

(3) the trajectory of that improvement prompted Watson, Farley and Williams to write to the administrators on 21 February 2023 and I have already quoted from that letter earlier in this judgment.

(4) at the time of the request on 1 June 2023, the administrators were in the process of preparing an updated version, both for the purposes of this adjourned hearing and because they had separately agreed to provide an updated version to Sequoia in June and this was shared with Sequoia as soon as it was available on 6 June 2023.

(5) as explained in Mr Cowlishaw's recent 9th witness statement, the June EOS shows a relatively modest improvement in outcomes as compared to the February EOS. If Sequoia is subordinated to all Schedule 2 liabilities, and these are explained in Mr Cowlishaw's 8th witness statement, the June EOS estimates a shortfall of around £220 million to BEIS, which can be compared with the £240 million in the February EOS. If Sequoia has priority over all the Schedule 2 liabilities the June EOS estimates a shortfall of around £47.5 million to BEIS, which can be compared to around £74 million in the February EOS. Moreover, there is at least a possibility that a material charge to tax will

be incurred and payable as an administration expense and in priority to floating charge realisations.

(6) accordingly, as was the case at the last hearing, the Energy Administrator's current best estimate is that BEIS remains the party with the immediate economic interest in the amount of the remuneration and pre-appointment costs.

(7) finally, I was told that having received the June EOS on 7 June 2023 Sequoia confirmed that it did not intend to attend the hearing of the adjourned applications today. I take it from that that it does not object to the remuneration that is being sought.

26 I now should turn to Mr Downs' report, which Mr Fisher has helpfully summarised in his skeleton argument. Mr Downs' overall assessment, having considered the remuneration request and terms of reference with the benefit of his professional judgment and experience, is that the remuneration and pre-appointment costs sought by the administrators is reasonable and there are "no factors on my mind weighing against the approval of the relevant remuneration in the amount sought".

The general methodology applied by Mr Downs to assess whether the remuneration sought is fair and reasonable and commensurate with the nature and extent of the work properly undertaken is explained at paras.8.7 to 8.8 of his report. In broad terms, it involved a two-stage process.

27 In the first stage, Mr Downs reviewed all the material at a high level and certain areas in greater detail to form a preliminary view on the reasonableness of the remuneration. The nature and outcome of that first stage review is explained in detail in section 4 of the report. In summary:

1) Mr Downs considered the materials and concluded that he had been provided with sufficient and adequate material to draw the conclusions reached (see para.4.7). He also considered that the materials "certainly meet the requirements of the IPD" [that is Insolvency Practice Direction at para.4.4] and that the specific disclosures required by para.21.4 of the Insolvency Practice Direction were present and provided "a strong positive justification supporting the claim for remuneration";

2) Mr Downs considered the statutory objective of the company's administration and concluded that, "The work of the office holders under the review period has enabled the administration objectives to be met. Supply has continued and activity to secure a rescue or sale has been undertaken, which ultimately closed after the review period in question." (Paragraph 4.11);

3) Mr Downs considered the various factors set out in r.76(5) of the 2013 Rules at para.4.12 and readily concluded that, "This falls into the framework of a significant insolvency carrying a high profile attendant risk, a multitude of stakeholders and an extended period of activity post-appointment." (Paragraph 4.13);

4) Mr Downs considered the approach to resourcing and formed the preliminary view, subject to the second stage of his assessment, that the approach was "wholly reasonable , given the results and progress achieved";

5) Mr Downs considered the administrators' charge-out rates. He concluded that they were reasonable and noted that they were 16 per cent lower than the rates charged by

the administrators of Simple Energy Limited, the Company's parent (Paragraph 4.16).

28 In the second stage, Mr Downs tested his preliminary conclusion by conducting a further detailed review of the evidence for each workstream undertaken by the administrators. As part of that second stage review Mr Downs sought to review and score each workstream identified in the evidence against five criteria which he identified by reference to the IPD and the terms of reference. The nature and outcome of that second stage review is explained in detail in section 5 of the report and in summary:

1) The five criteria identified by Mr Downs were:

    a) Objective – which is the extent to which a workstream aligned with meeting the objective of the Energy Administration;

    b) value add/lowest cost – which is the outcomes produced by each workstream;

    c) delegation to company staff – which is the extent to which company staff were utilised in each workstream;

    d) team mix – which is the appropriateness of the seniority of staff used; and

    e) risk.

2) Mr Downs then, by reference to all of the evidence, including that specifically presented in Mr Cowlishaw's witness statements, scored each workstream against each of the criteria, with 1 being the best score and 4 being the worst. The results for four of the criteria excluding risk were aggregated to provide a relative scale. Mr Downs then revisited the results for those workstreams and activities which he considered posed a higher level of operational or other risk. Mr Downs took that approach because he has "the strong opinion that where a practitioner believes they face specific risk then as part of the measures to mitigate that they must be reasonably entitled to deploy their own specialists to manage those concerns" (see para.5.6 of the report);

3) Applying that methodology Mr Downs was able to conduct a focused review on those workstreams which scored less favourably and could then be updated if further evidence was identified. Having done so, including a number of discussions with the officeholders, Mr Downs concluded that the second stage review "did not highlight any workstream where I had concerns it was not sufficiently aligned to an objective, yielded questionable benefit or was managed from a resource perspective in a suboptimal way" (para.5.9). The conclusions were summarised in tables set out at para.5.10 and Appendix D of the report and it should be noted that the work undertaken in connection with the lowest performing workstream, which was the restructuring plan workstream, was work that the Energy Administrators were obliged to undertake under the terms of the funding agreement.

4) Mr Downs then performed a further cross-check in s.6 of the report to see if there was an obvious alternative strategy available to the administrators which might have reduced the time spent attending to the matters arising in the ESC administration. Mr Downs could not identify any alternative strategy (see para.6.2 and 6.3);

5) following that process Mr Downs' overall assessment was that: "The preliminary conclusion remained valid for all workstreams and I had no concerns that any of the workstreams contained remuneration that was unfair, unreasonable or not commensurate with the nature of the work properly undertaken. (Paragraph 8.11)."

29 Turning to his assessment of the pre-appointment costs, Mr Downs' assessment is in s.7 of his report. That section needs to be read in the context of the general comments made by Mr Downs at para.3.6, namely:

> "Against a backdrop of the Company being the first ESC administration there was a preliminary phase of activity for the officeholders designate to familiarise themselves with the situation. In addition, the prospective appointees identified the "business as usual" trading strategy and the funding agreement was put in place on that basis. The proposed approach was consistent with the policy objectives of BEIS and Ofgem and thereby gave the best and arguably the only chance of meeting the statutory objectives. Linklaters were also heavily involved in this phase. As we all know well, the move to appoint the officeholders did proceed and their decision to adopt the usual model of leading a significant day one team to take control of the business immediately and transition to a different or modified operating procedure within the business was entirely appropriate and reasonable."

30 The key conclusions reached by Mr Downs in relation to the pre-appointment costs are:

1) that pre-appointment planning was "essential and critical" and it "would be unthinkable to assume the objectives could be met if this work had not taken place – the strategy would have fallen apart, given the uncertainty created" (para.7.6);

2) that it was "reasonable that significant teams from Teneo, Linklaters and counsel were working over this period as a precursor to the appointment going ahead" (para.7.8);

3) that considering the pre-appointment fees of Teneo, Linklaters and counsel and certain disbursements in the round he had no concerns that any of the fees charged were unfair, unreasonable or not commensurate with the nature of the work properly undertaken (see para.8.11 to 8.12);

4) while a minor amount of work done in the pre-appointment period was not necessary to undertake during that time it "would have otherwise been done after the appointment and, in any event, I did not identify any duplication of tasks" (para.8.12).

31 As I said before, I am very grateful to Mr Downs for the care he has taken in reviewing the material provided by the administrators in preparing his report. Even though I place heavy reliance on his report and conclusions, it is still my decision to make. His appointment does not usurp the role of the court. Rather, it assists the court in evaluating the evidence put forward and gives comfort that the large remuneration sought has been properly scrutinised

by someone with great knowledge in this area. He has concluded independently of the administrators and of BEIS that the sums sought are fair, reasonable and commensurate with the work undertaken. I also rely on the important fact that BEIS, as the party with the most direct economic interest in the amount of the remuneration to be paid, has approved the figures.

32 I am therefore now satisfied that the sums sought in the applications were properly incurred and are fair, reasonable and commensurate with the achievement of the policy-led statutory objectives.

33 I will, therefore, approve the administrators' remuneration in the sum of £24,969,221 plus VAT and the pre-appointment costs in the sum of £3,181,920.67 plus VAT.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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