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Case No: CR-2021-001111

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

IN THE MATTER OF DOLFIN FINANCIAL (UK) LTD
AND IN THE MATTER OF THE INVESTMENT BANK SPECIAL ADMINISTRATION REGULATIONS 2011

The Rolls Building, London EC4A 1NL

Date: 26/01/2023

Before:

CHIEF INSOLVENCY AND COMPANIES COURT JUDGE

- -

BETWEEN:

DOLFIN ASSET SERVICES LIMITED

Applicant

- and -

(1) ADAM STEPHENS (IN HIS CAPACITY AS JOINT SPECIAL ADMINISTRATOR OF DOLFIN FINANCIAL (UK) LTD)
(2) KEVIN LEY (IN HIS CAPACITY AS JOINT SPECIAL ADMINISTRATOR OF DOLFIN FINANCIAL (UK) LTD)

Respondents

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DAN MCCOURT FRITZ (instructed by **STEWARTS LAW LLP**) for the **Applicant**
JAMIL MUSTAFA (instructed by **DWF LLP**) for the **Respondents**

Hearing dates: 12 January 2023

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Approved Judgment

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This judgment was handed down remotely with circulation to the parties' representatives by email. It will also be released to the National Archives for publication. The date and time for hand-down is deemed to be 10:00 hrs on 26 January 2023.

CHIEF INSOLVENCY AND COMPANIES COURT JUDGE BRIGGS

Chief ICC Judge Briggs:

Introduction

1. Dolfin Financial (UK) Ltd ("DFL") was incorporated on 5 November 2010 and traded as an independent wealth-management investment firm. It was regulated by the Financial Services Authority ("FSA") and subsequently by the Financial Conduct Authority ("FCA"). The regulatory regime with which DFL had to comply included the Client Assets Sourcebook ("CASS").

2. Client money balances were held by DFL in segregated accounts. Securities held were kept on a safe custody basis, with the majority held through several sub custodians in electronic form. Some asset forms held included complex bond instruments and assets subject to sanctions. In addition to client assets, DFL held its own assets (the "House Assets").

3. In 2019 DFL promoted two new products, the "Vostok Fund" and "Wave Fund". These funds were blockchain projects in which cryptocurrency was to be issued as tokens. In mid-2019 an investment company entered into a sale and purchase agreement to obtain some tokens on a purported promise that there was little or no risk. Subsequently the Wave tokens decreased in price and increased the number diluting the investment. The investment company did not receive a return and believed it was a victim of fraud. Proceedings were commenced. On 12 March 2021 the Financial Conduct Authority imposed restrictions on the Bank so that it could not conduct its regulated activities in the normal way. On 30 June 2021 it was placed into a special administration following a Court application by the directors. Adam Stephens and Kevin Ley of Smith & Williamson LLP were appointed Joint Special Administrators ("JSAs").

4. Prior to their appointment and following the restrictions imposed by the Financial Conduct Authority, the Bank planned an orderly wind-down of its business. This included a sale of its clients to Britannia Global Markets Limited for an initial consideration of £600,000 and an agreed deferred consideration. Following the appointment of JSAs, negotiations continued, with a sale agreement signed on 5 July 2021. Completion took place on 12 July 2021. Britannia did not accept all clients and some clients did not want a transfer. Accordingly, some clients remained with DFL.

5. Proposals for the administration were provided to creditors on 17 August 2021 and approved on 2 September 2021.

6. Pursuant to regulation 10 of the Investment Bank Special Administration Regulations 2011 (the "Regulations") the JSAs have three special administration objectives to fulfil:

    6.1. Objective 1 - to ensure the return of client assets as soon as is reasonably practicable ("Objective 1");

    6.2. Objective 2 - to ensure timely engagement with market infrastructure bodies and the Authorities ("Objective 2"); and

6.3. Objective 3 - to either rescue the investment bank as a going concern or wind it up in the best interest of the creditors ("Objective 3").

7. The first progress report for the period 30 June 2021 to 29 December 2021 was circulated to creditors on 28 January 2022. The second progress report for the period 30 December 2021 to 29 June 2022 was circulated to creditors on 27 July 2022.

Progress reports

8. In its capacity as client DASL has submitted two claims. The first for approximately £102,588,758 of funds and assets held for DASL's underlying clients under sub custody arrangements. The second for approximately £687,189 held by the Bank under an execution only, and custody service agreement. DASL is appointed to the creditor and client committee in the administration (the "Committee"). DASL purports to be among the largest clients.

9. The remuneration claimed by the JSAs is divided into two different periods. First the period before their appointment where the JSAs were assisting in the process of an orderly wind down and advising on the Special Administration Regime ("SAR"). Secondly the period after their appointment which continues.

10. In his first statement Mr Symes acknowledges that the pre-appointment remuneration was approved by the Committee on 15 December 2021. This case does not, therefore, concern the first period.

11. The first progress report provides the client/creditor with an update on how the special administration has been progressed in the first six months. It informed the client/creditors that DFL had client assets of approximately £1.453bn as at 30 June 2021 and that the focus was to gain control of the client assets and perform a CASS reconciliation to ensure there was no material shortfall. Although DFL had ceased to trade on the appointment of the JSAs 10 former employees were retained to assist with the reconciliation. The JSAs reported that returning client assets had been complicated by two factors. First the manner in which DFL conducted its "Tier 1 Visa investment business" and secondly due to the complexity of bonds it held.

12. The post-administration costs are set out in section 6. In particular the JSAs informed the client/creditors that:

> "The basis of our remuneration may be fixed:
>
> • as a percentage of the value of the property with which we must deal; or
>
> • by reference to time properly spent by us (when in office) and our staff in attending to matters arising in the Special Administration, or
>
> • as a set amount; or
>
> • by any combination of the above.

> The basis upon which we may be remunerated is a matter for the Committee to consider and approve by way of resolution in accordance with the Regulations and Rules."

13. Under a sub-heading "The JSA's time costs to 29 December 2021" the report states:

> "During the period from 30 June 2021 to 29 December 2021, we incurred total time costs of £1,756,446.98, which represents approximately 3,371.40 hours at an average charge out rate of £520.98 per hour.
>
> Appendix C provides a detailed analysis of time costs incurred by reference to the grade of staff used and work done. The information is provided in accordance with SIP 9. A detailed narrative of the tasks undertaken in respect of each work activity is also set out within Appendix C."

14. Clients and creditors were directed to the Smith & Williamson LLP website for further information.

15. The estimated outcome is expressed to be a return of client assets in full subject to deductions required to pay the associated costs. The JSAs reported that they were working with the Committee to agree the basis and methodology for allocating costs incurred in pursuing Objective 1.

16. On 18 February 2022 DASL, through its solicitors Stewarts Law LLP, wrote expressing concern about the level of fees. DASL stated that the fees incurred in meeting Objective 1 are particularly high and requested further information:

> "our client requests a line by line breakdown of post-appointment unpaid WIP during the period 30 June 2021 to 29 December 2021 that includes the date, narrative (redacted where required), hours, amount, rate, descriptor and grade of fee earner for all WIP incurred…also highlight within the line by line breakdown those cost entries that go toward meeting Objective 1 of the special administration. Alternatively please provide separate WIP breakdowns for each of the three objectives…[and] where the WIP entries incurred under Objective 1 are in relation to the JSAs' work on any expressions of interest received then our client would be grateful if the JSAs could also highlight those entries."

17. There was no immediate response. DASL wrote again on 14 March 2022:

> "In accordance with Rule 201(3), our client is now entitled and intends to apply to the court to seek that the JSAs are compelled to comply with our client's request. Our client has instructed us to prepare their application immediately and issue it without further reference to you."

18. The chasing letter provoked a response four days later from solicitors DWF LLP acting for the JSAs:

> "For the reasons explained below, and relying on rule 201(2)(b) of IBSAR to comply with the above request for information, the JSAs do not consider that it would be proportionate to provide the information DASL seeks, as the time and cost of preparation of the information would be excessive, and not in the interest of the estate as a whole."

19. It is not in issue that reasons were given by this letter, albeit it is said they were succinctly explained. The reasons for refusal were expanded upon in a follow-up letter dated 13 April 2022. The following is of note. First, attention was drawn to the rules that govern remuneration: the Investment Bank Special Administration (England and Wales) Rules 2011 (the "Rules"). Secondly, it was explained that the JSAs had not at that stage advanced to the Committee the basis upon which they wish remuneration to be fixed. Thirdly, the JSAs had not requested remuneration to be drawn. Fourthly, the pursuit of Objective 1 had been challenging and that whilst the sales process (including the sale of the residual client book (the "RCB")) was ongoing the JSAs did not consider it appropriate to fix the basis for remuneration. Fifthly, the JSAs were concerned that as DASL were bidding for the RCB the provision of a line-by-line breakdown may give rise to unfairness in the sales process.

20. The concern expressed by DASL about the level of fee earner undertaking work was thought to be misconceived given the basis had not been fixed and the JSAs' view as to the complexity of the work undertaken: "By their very nature special administrations have a specific complexity to them which requires a higher level of seniority of fee earner". Addressing proportionality of compliance with the request for further information the JSAs said:

> "Whilst the Statement asserts that the information requested can be easily produced based entirely around the fact the JSAs have a time recording system, your client has failed to consider the size of the task and the extensive amount of duplication of work that would be incurred in providing a further breakdown of 3,371.40 hours of post-appointment remuneration incurred during the Relevant Period (represented by thousands of individual time entries). This is because the time entries are recorded by multiple fee earners conducting work which often will span various 'estates' of the special administration (eg. House, client money pool, client asset estates). For example, a call involving various parties addressing various issues involving the special administration requires an analysis of the work discussed and considered on that call in order to provide any meaningful breakdown of the Requested Information which is not readily available from a simple print out of the time entries."

21. The second report informed clients and creditors of the sale completion to Britannia and the completion of a sales and marketing process for the RCB. The JSAs reported that

work had begun on formulating a distribution plan ("DP") to return client assets as soon as possible and further remuneration information would be provided with the plan. After reporting on progress in respect of the objectives and the receipts and payments, the JSAs addressed the costs of the special administration.

22. The report reiterates that the basis of remuneration is a matter for the Committee and proceeded to give the time costs to 29 June 2022:

> "During the period from 30 December 2021 to 29 June 2022, we incurred total time costs of £1,068,112, which represents 2,025 hours at an average charge out rate of £527.45 per hour.
>
> At Appendix II we provide a detailed analysis of these time costs by reference to the grade of staff used and work done. The information is provided in accordance with SIP 9. A detailed narrative of the tasks undertaken in respect of each work activity is also set out within Appendix II.
>
> Also attached at Appendix III, is a cumulative time analysis for the period from 30 June 2021 to 29 June 2022 which provides details of the special administrators' time costs since appointment. The JSAs have not yet drawn any post appointment fees and will seek approval from the Committee at the appropriate stage.
>
> Clients and creditors should be aware that some work is required by statute and may not necessarily provide any financial benefit to Clients and creditors. Examples would include dealing with former employees' claims through the Redundancy Payments Service and providing information relating to the Company and its former officers as required by the Company Directors' Disqualification Act 1986.

23. DASL responded to receipt of the second progress report in a similar way it did the first report by expressing concern about the fees incurred during the relevant period and asking for a line-by-line breakdown. In a letter dated 12 August 2022 DASL noted that a Committee resolution was yet to be passed in respect of the basis upon which remuneration would be charged and that:

> "We do not understand why these matters continue to be deferred and why the JSAs appear to be so reluctant to provide clear and detailed costs information on an ongoing basis."

24. It is unnecessary to repeat all the correspondence. It is sufficient to say that following an exchange of views, and a refusal to provide a line-by-line break down, DASL remained unsatisfied and issued an application for further information.

The Applications

25. The first application is dated 25 March 2022 ("Application 1") and seeks an order:

25.1. To compel the respondents to provide information in relation to their post administration remuneration charged during 30 June 2021 and 29 December 2021; and

25.2. extend time under rule 202.

26. The second application ("Application 2") was made in near identical form. Application 2 is dated 16 September 2022. Application 1 and Application 2 (together the "Applications") are supported by witness statements made by Mr Symes of Stewarts Law.

27. The witness statements of DASL and the JSAs do not advance the case much beyond the correspondence. The particular concern from the witness evidence and advanced at the hearing is the level of remuneration charged in meeting Objective 1 which included not only the transfer to Britannia but marketing, negotiations and dealings in connection with the RCB. Mr Symes explains that the purpose of the Applications is to discover "whether fee earners have been carrying out work which is appropriate to their level of seniority."

28. Mr Symes says that the JSAs failed to give a response to the request for the "line-by-line" analysis within the time provided by Rules.

29. Much of the evidence on both sides is given over to argument. Mr Symes challenges the reasons provided not to provide further information stating that the information required should be readily available, and that the information provided in the progress reports is insufficient for his client. He argues that his client's place on the Committee, where remuneration maybe approved, is irrelevant for the purposes of the Applications and that there is a real chance that the progress reports overstate the JSAs' remuneration. A third statement corrects an inaccuracy in the first witness statement but is not relevant to the outcome.

30. Mr Stephens gives evidence for both JSAs. He explains that Objective 1 is yet to be completed since the DP is to be formulated whereupon the proceeds from the RCB will be distributed to clients. His evidence is that the Applicant has had ample information, and the Applications are excessive and disproportionate [13]:

> "The Applicant has had ample information with regards to the JSAs' remuneration to and will, in due course, receive ample information with regards to the JSAs' remuneration with a view to full scrutiny of that information prior to the JSAs drawing any of their remuneration. This information will be provided in accordance with the JSAs' statutory obligations. The Application is clearly excessive and disproportionate in terms of a cost-benefit analysis because it would, if granted, force the JSAs to considerable unnecessary costs by both compelling the disclosure of partial information and that which is excessively detailed to the task of assessing the JSAs' remuneration. I say partial because it would not cover the entire period for which approval of the JSAs' remuneration would be sought in due course. I say excessively detailed because the Applicants seeks time sheets which are raw unprocessed WIP not scrutinised internally and therefore bypassing the first filter as to what the JSAs think should be charged and which they consider they

> might ask the creditors or, ultimately, the court to approve. Neither I nor my colleagues wish to withhold any information appropriate to a decision on remuneration, but we are mindful that the Application will force the incurrence of costs to a very limited productive end."

31. His evidence is that the progress reports provide information that is compliant with the Statement of Insolvency Practice 9 (the industry standard known as "SIP 9") which is required by insolvency practitioner regulators, and the progress report makes clear that the Committee may agree that remuneration is to be charged as a percentage of the insolvent estate, or as a fixed fee alternatively on a time cost basis. That has yet to be decided. If a time-cost basis is sanctioned by the Committee the remuneration claim may be refined following further work and a partner review.

The Rules

32. The SAR is designed to address failures that were evident from the collapse of Lehman Brothers in 2008. The SAR Regulations were made under the powers set out in Sections 233 and 234 of the Banking Act 2009, and apply to investment banks as defined under the Banking Act 2009 and came into effect in February 2011. The Regulations are supplemented by the Rules that came into force in June 2011.

33. By rule 196 of the Rules the JSAs are entitled to remuneration in pursuit of Objective 1 where it will be paid out of the client assets held by the investment bank, and in pursuit of Objectives 2 and 3 where it will be paid out of the estate of the investment bank. It may be fixed according to a percentage of the value of the property, by reference to time properly given or as a set amount. The decision as to the basis is for the Committee who shall have regard to the factors specified in rule 196(6) of the Rules.

34. The priority of payment to be paid out of client assets is provided by rule 135 which treats remuneration as an expense once it has been fixed under rule 196 of the Rules. Priority of payment out of the estates assets is provided by rule 134 which allows remuneration for work done to achieve Objectives 2 and 3 where "the basis" has been fixed.

35. Rule 122 sets out the content expected for a progress report. Rule 122(1)(g) provides:

> "a statement of the expenses incurred by the administrator during the period of the report, (irrespective of whether payment was made in respect of them during that period): the statement to contain a breakdown of expenses incurred in respect of the administrator pursuing Objective 1 of the Special Administration Objectives"

36. Rule 122(1)(h) requires the progress report to include a statement of whether the Financial Conduct Authority has given a direction to the special administrators to prioritise the objectives under Regulation 16 and whether that direction had been withdrawn.

37. The Applications are made pursuant to rule 201 of the Rules:

> "(1) If—

(a)within 21 days of receipt of a progress report under rule 122—

(i)a secured creditor,

(ii)an unsecured creditor with the concurrence of at least 5% in value of the unsecured creditors (including the creditor in question), or

(iii)a client with the concurrence of clients claiming for at least 5% in value of the client assets (including the client in question); or

(b)with the permission of the court upon an application made within that period of 21 days, any unsecured creditor,

makes a request in writing to the administrator for further information about remuneration or expenses (other than pre-administration costs) set out in a statement required by rule 122(1)(g) or (h), the administrator must, within 14 days of receipt of the request, comply with paragraph (2).

(2) The administrator complies with this paragraph by either—

(a)providing all of the information asked for, or

(b)so far as the administrator considers that—

(i)the time or cost of preparation of the information would be excessive, or

(ii)disclosure of the information would be prejudicial to the conduct of the administration or might reasonably be expected to lead to violence against any person, or

(iii)the administrator is subject to an obligation of confidentiality in respect of the information,giving reasons for not providing all of the information.

(3) Any creditor or client, who need not be the same as the person who requested further information under paragraph (1), may apply to the court within 21 days of—

(a)the giving by the administrator of reasons for not providing all of the information asked for, or

(b)the expiry of the 14 days provided for in paragraph (1),

and the court may make such order as it thinks just.

(4) Without prejudice to the generality of paragraph (3), the order of the court under that paragraph may extend the period

> of 8 weeks provided for in rule 202(4) by such further period as the court thinks just. ("emphasis added")

38. Rule 202(2) permits a qualifying client (or creditor) to apply to the Court for an order "in respect of the administrator's remuneration for services set out in rule 196(1)(b)".

39. An application may be made on the grounds that the remuneration charged, the basis fixed for remuneration, or the expenses incurred by the special administrator are excessive. Rule 202(7) provides a menu of orders that may be made on such an application.

40. Despite counsel's best efforts no authority has been discovered in respect of these provisions.

Discussion

41. The Applicant argues that the Rules need to be construed in a context where rule 201 permits an application for further information so that a client/creditor may apply for an order challenging remuneration under rule 202 of the Rules. Whilst I agree that interpretation should be viewed in the context of the statutory purpose, I am not persuaded that the reason for rule 201 is only to provide further information to a client/creditor to enable a better-informed application under rule 202. The purpose is to provide transparency.

42. The fixing of remuneration is governed by rule 196 of the Rules which is in similar form to the rules that govern administrations made pursuant to schedule B1 of the Insolvency Act 1986. First the elected committee is asked to fix the basis. If the committee fails to fix the basis the clients/creditors may do so at a meeting and where there has been a failure of both organs to fix the remuneration the special administrators may apply to court. Read as whole the challenges under rule 202(3) arise after the relevant event: rule 202(3)(a) allows a challenge where the remuneration has been charged (defined by rule 4 to mean work done) and fixed under rule 196; rule 202(3) (b) permits a challenge to the basis of remuneration (on the ground that the basis is inappropriate); and expenses incurred may be challenged rule 202(3)(c).

43. The Applicant contends that compliance with SIP 9 is insufficient for the purpose of a request under rule 201 which requires at the very least compliance with Part 6 of the Practice Direction on Insolvency Proceedings 2020. It is said that DASL is not currently able to make a challenge under rule 202 due to the lack of information. The JSAs argue that there is no requirement to provide a break down according to the Rules unless the basis is fixed and in any event SIP 9 is sufficient to provide the clients and creditors an idea of the time incurred in dealing with the estate. In any event the Practice Direction does not require a line-by-line break down.

44. The Applicant says there is no limitation on making a challenge under rule 202 in terms of time. The JSAs point out that a challenge to remuneration prior to the basis being fixed would be a very odd challenge indeed. It would be an empty challenge.

45. The Applicant argues that the definition of remuneration charged, is when the work is done: rule 4.2. Accordingly, an application for further information is not premature as claimed by the JSAs.

46. Although the Applicant seeks a "line-by-line" analysis and the request appears to be put the case high, it is argued that the court is not bound by the pleaded case as the Court may make any order it sees fit.

47. The JSAs argue that the time and cost of preparation is excessive and that the Court should give strong weight to the view of the JSAs since they are officers of the Court and under English law are given day to day control of the administration.

48. Any criticisms levelled at the JSAs that they have been slow to ask for their remuneration to be fixed, it is argued, is not justified as they have reacted to changing circumstances, selective of their priorities.

49. In oral argument the issue of jurisdiction to make any order for further information changed and expanded. This is because the issue has not been before the Court previously and counsel were seeking to assist in their submissions. I am grateful for their assistance.

Conclusions

Jurisdiction to make an order

50. The request for further information in respect of remuneration arises due to the circulation of the progress reports in which certain statements are required. The Rules require special administrators to provide details of the basis fixed for remuneration and if not fixed, the steps taken to fix. If the basis is fixed the progress report is to include a statement of the remuneration charged during the relevant periods irrespective of whether payment was made during the period of the report. Similarly, the report must include a statement of expenses incurred during the period of the report.

51. The obligation to provide a statement of the remuneration charged by the administrator during the period of the report is provided by rule 122(1)(f).

52. This obligation arises only "if the basis of remuneration has been fixed." If fixed the obligation endures irrespective of payment.

53. The right of a creditor or client to seek further information pursuant to rule 201 of the Rules appears at first sight to apply only to the statement required under rule 122 (1)(g) or (h). Quite some time was given over to this argument at the hearing.

54. It is accepted that rule 122(1)(h) is not relevant for present purposes.

55. Rule 122(1)(g) obliges the administrator to provide a statement of the expenses incurred by the administrator during the period of the report (again irrespective of whether the expenses are drawn). It is not relevant.

56. Despite rule 201 expressly stating that a request may be made in relation to a statement required by rule 122(1)(g) or (h) it also includes a reference to remuneration:

> "… for further information about remuneration *or* expenses…set out in a statement required by rule 122(1)(g) or (h)". (my emphasis)

57. The apparent difficulty of language is reconciled by reading rule 201 with an emphasis as supplied above: in the disjunctive. A request may be made in respect of a remuneration statement or an expenses statement produced in compliance with rule 122(1)(g).

58. This leads to the requirement of a remuneration statement. I am not persuaded that rule 201 provides a further or new obligation to provide a remuneration statement that floats free of the obligation in rule 122(1)(f). The rules are prescriptive so that a special administrator knows with some precision what his or her duties are when producing a progress report. The Rules do not provide that a statement of remuneration needs to be provided where rule 122(1)(f) does not apply. Read as a whole the Rules such a free floating requirement would be contrary to the scheme evident from the Rules..

59. It follows that a reference to "remuneration or expenses" in rule 201 is, in my judgment, a reference to a statement made in accordance with rule 122(1)(f) (in respect of remuneration) which only need be made once the basis is fixed. This is consistent with rule 122(1)(f)(ii) which provides that:

> "Where the report is the first to be made after the basis has been fixed, the remuneration charged by the administrator during the periods covered by the previous reports (subject to paragraph (5)), together with a description of the things done by the administrator during those periods in respect of which the remuneration was charged."

60. The sub-rule specifically anticipates that the basis of remuneration may not be fixed by the time of the first progress report or subsequent progress reports, but when it is fixed the rule 122(1)(f) statement must include the remuneration for the earlier periods. This is consistent with rules 134(1)(j), 135(1)(d) and rule 196(2), (3), (5)-(8).

61. In this case the JSAs provided information compliant with SIP 9 as a matter of good practice, and as I understand the correspondence, because they believe that they are bound by their regulatory body to do so.

62. I conclude that the reference "remuneration" in rule 201 is a reference to rule 122(1)(f) and there is no jurisdiction to make an order under rule 201 of the Rules.

63. The Applications are misconceived.

<u>The right to further information is not absolute</u>

64. The ability for a client or creditor to seek further information is provided by the Rules with little formality. A letter of request triggers the obligation for an administrator to comply with sub-paragraph 2 of rule 201 of the Rules. The administrator may comply by either providing the requested information or refusing to provide the information. If there is a refusal the administrator must provide reasons. There are three alternate grounds prescribed for refusal. First, the time and cost of preparation of the information would be excessive. Secondly, the disclosure of the information would be prejudicial to the conduct of the administration. Lastly, the administrator is subject to an obligation of confidentiality in respect of the information.

65. When refusing a request, the administrator is not required to prove to the requesting party that one or more of the alternate grounds apply. The language of subsection 2 of rule 201 is firmly couched in the subjective so that an administrator need only "consider" that one or more of the alternate grounds exist.

66. The language, to "consider", is not immeasurably different to language found in schedule B1 to the Insolvency Act 1986. Some examples are: (i) an administrator must perform his functions with the objective of rescuing the company as a going concern unless he "thinks" it impracticable; (ii) a statement of proposals is required, and where the first two objectives in paragraph 3 to schedule B1 cannot be achieved the administrator is to explain why he "thinks" they are unachievable; and (iii) an administrator shall make an application to end an administration if he thinks the purpose cannot be achieved.

67. In *Davey v Money* [2018] Bus LR 1903, Snowden J (as he then was) addressed the language used in paragraph 3(3) of schedule B1 [255]:

> " [The] use of the expression that the administrator 'thinks' rather than, for example, 'reasonably believes', is a clear indication that Parliament intended a degree of latitude to be given to an administrator in deciding upon the objective to be pursued, and that he is not lightly to be second-guessed by the court with the benefit of hindsight. In Lightman & Moss on the Law of Administrators and Receivers of Companies 6th ed (2017), para 12-022 it is suggested … that the appropriate standard of review by the court should be one of good faith and rationality. This would mean for example that an administrator's decision not to pursue the first objective will only be open to challenge if it was made in bad faith or was clearly perverse in the sense that no reasonable administrator could have thought it was not reasonably practicable to rescue the company as a going concern. I agree with that approach …".

68. It is appropriate to apply the same approach to the expression "considers".

69. This is not the occasion to carry out an international insolvency comparative. It is sufficient to state where Parliament has provided qualified, bonded and regulated insolvency practitioners with powers to make day-to-day and commercial decisions, the Court should lend reasonable weight to the exercise of any discretion and/or decision made. That is not to say that the decision-making process cannot be questioned or interfered with if a decision is made other than in good faith or is otherwise irrational.

Refusal to provide further information

70. In this case the JSAs refused to provide the further information on all alternate grounds: (i) the time and cost of preparation is excessive; (ii) disclosure would be prejudicial to the administration and (iii) some of the information requested is confidential.

71. It is not argued that the decision to refuse was made in bad faith.

72. Where the basis has not been fixed and there is no obligation to provide details of remuneration in a progress report the time and cost of preparation will be, self-evidently, excessive. In my judgment the refusal on this ground falls a long way short of irrational.

73. The JSAs explain that the provision of a "line-by-line" analysis is not a question of pressing a button (as contended by DASL). This is because the time costs are subject to partner review before costs are put to clients and creditors. In simple terms the JSAs record all the time devoted to the special administration and a sense check is later undertaken to ensure that the sums charged are fair and reasonable having regard to the statutory provision (rule 196(6) of the Rules). Mr Stephens says that the cost and time incurred in providing the information is great because all the time entries and narratives will need to be reviewed so that any break-down is properly allocated to the appropriate Objective. This is needed due to the complexity of the administration and overlap that arises between Objectives. This is relevant since remuneration will be paid from different sources dependent upon the Objective. The time taken to undertake the task will divert attention from progressing the special administration and may prove unnecessary and wasteful if the Committee fix the remuneration on a basis different to time cost. The reasoning in my view cannot to be described as perverse.

74. If the JSAs were required to provide a statement of remuneration in the absence of fixing the basis, given the evidence of Mr Stephens, it would be excessive and disproportionate to provide a "line-by-line" break down where a compliant SIP 9 report has been provided and further information about remuneration is imminent given the need to provide the DP.

75. The desire to understand what level of fee earner undertook what task is, on a general level, understandable. Information about the level of fee-earner on its own, however, may not satisfy a client or creditor as it will not tell the whole story. A senior fee earner may be appropriate given the task undertaken. The provision of that information prior to fixing the basis is undesirable. It may be irrelevant, and if it is irrelevant it is also disproportionate.

76. It is accepted that the JSAs should not provide information that is confidential. There is no argument that refusing to provide such information is not perverse.

77. On the face of it DASL were put into a difficult position since the basis of remuneration had not been fixed but the Rules required a challenge to remuneration to be made with a specific time (8 weeks) commencing on the delivery of the first progress report (the time limit applied equally to the second progress report). DASL did not have sufficient regard to the effect of rule 122(1)(f). It could have comforted itself in the knowledge that once the remuneration had been fixed by the Committee it would receive the appropriate remuneration statement in the following progress report pursuant to the rule. Time would begin to run from the date of the compliant report. I note, nevertheless that the Court has a discretion to extend time: rule 201(4) and rule 202(4). I also note that the Applicant was aware of the ability to seek an extension of time from the correspondence.

Summary

78. For the reasons given I shall dismiss the Applications.

79. I invite the parties to agree an order.