Neutral Citation Number: [2024] EWHC 3047 (Ch)

Case No: CR-2022-004911 and CR-2022-004912

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)
IN THE MATTER OF ORTHIOS ECO PARKS (ANGLESEY) LIMITED
AND IN THE MATTER OF ORTHIOS POWER (ANGLESEY) LIMITED
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Rolls Building
Royal Courts of Justice
7 Rolls Buildings
London EC4A 1NL

Date: 28 November 2024

Before:

INSOLVENCY AND COMPANIES COURT JUDGE GREENWOOD

- -

Between:

(1) LAURENCE PAGDEN (as Security Trustee under a Security Trust and Intercreditor Deed dated 24 December 2015)

(2) ASHER MILLER and STEPHEN MARK KATZ (as Joint Administrators of Orthios (Anglesey) Technologies Limited)

Applicants

- and –

CRAIG ANDREW RIDGLEY (as former Administrator of Orthios Eco Parks (Anglesey) Limited)

Respondent

- -

Mr Patrick Harty (instructed by **Kingsley Napley LLP**) for the **Applicants**
Mr Matthew Weaver KC (instructed by **Mezzle Law**) for the **Respondent**

Hearing dates 3-4 July 2024:

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JUDGMENT

This judgment was handed down remotely at 9.00am on 28 November 2024 by circulation to the parties or their representatives by e-mail.

ICC JUDGE GREENWOOD:

Introduction

1. On 29 March 2022, under paragraph 14 of Schedule B1 of the Insolvency Act 1986 ("**the Act**"), the Respondent, Mr Craig Ridgley, was appointed as administrator of Orthios Eco Parks (Anglesey) Limited ("**OEPAL**") and its wholly owned subsidiary, Orthios Power (Anglesey) Limited ("**OPAL**") (together, "**the Companies**") by Mr Robert Colin, acting in his capacity as the security trustee for various secured parties under a security trust and intercreditor deed dated 24 December 2015 (albeit subsequently amended) ("**the Security Trust Deed**"), and as such, acting as the holder of a qualifying floating charge in respect of the Companies' property.

2. Before me (in addition to various other associated applications) were two applications issued on 19 May 2023 ("**the Applications**") under rule 18.34 of the Insolvency Rules 2016 ("**the Rules**") for relief on the grounds that the remuneration charged by Mr Ridgley as the administrator of the Companies was "*excessive*", as was a fee which he agreed to pay his solicitors, Howes Percival LLP, in each case (with Mr Colin's agreement as security trustee) payable from and calculated as a percentage of the sale proceeds of certain property ("**the Land**") owned by the Companies but subject to a fixed charge and mortgage in favour of Mr Colin.

3. Essentially, the principal issues were:

    3.1. first, whether the court has jurisdiction under rule 18.34: whether sums paid to an administrator with the agreement of a secured creditor, from the proceeds of sale of property subject to a fixed charge, are "*remuneration*" or "*expenses*" subject in principle to the powers of the court under rule 18.34;

    3.2. second, if so, were the Applications issued within the time limit prescribed by rule 18.34(3), "*no later than eight weeks after receipt by the applicant of the progress report under rule 18.3, or final report or account under rule 18.14 which first reports the charging of the remuneration or the incurring of the expenses in question*", and if not, should that limit be extended;

    3.3. third, in any event, whether an order should be made on the application of these Applicants, the first of whom, Mr Laurence Pagden, was Mr Colin's immediate

successor as the security trustee under the Security Trust Deed, and applied in that capacity, and the second of whom were the administrators of an associated company, Orthios Anglesey (Technologies) Limited ("**OAT**"), an unsecured creditor of OEPAL, but were not themselves creditors; amongst other things, Mr Ridgley alleged that Mr Pagden was estopped by convention from mounting a challenge to his agreed fees and costs;

3.4. fourth, if so – if the court has jurisdiction under rule 18.34, if the Applications were issued in time, and if the Applicants are permitted to advance their challenges - were the sums agreed by Mr Colin in the present case, and subsequently paid to Mr Ridgley and Howes Percival from the relevant sale proceeds, "*excessive*", or fixed on an "*inappropriate*" basis, and if so, what order should be made.

The Background

4. The Companies were part of "**the Orthios Group**", a group of companies promoted as operating (or intending to operate) various businesses from or involving the use of the Land (a 213 acre site, the former Anglesey aluminium smelting site in Holyhead) - initially a biomass power station and "eco park", and subsequently, a recycling plant intended, amongst other things, to convert non-recyclable plastics into oil. Those projects - neither of which came to fruition - were conducted by separate operating companies within the Group, including in particular OAT, which itself owned various subsidiaries, and which employed most, if not all of the Group's staff.

5. Funding for the projects was raised by means of bonds issued to investors comprising Cresta Estates Limited ("**Cresta**", a private property investment company, which invested about £66 million both directly and indirectly, through MPB Eco Parks Limited, "**MPB**", which was lent about £45,035,000 by Cresta which it used to subscribe for bonds issued by OAT, which used that sum to lend to OEPAL) and in addition, retail investors, who numbered between 300-400, and who, taken together, invested some £26.4 million. According to the proposals made by Mr Ridgley on 18 May 2022 under paragraph 49 of Schedule B1 to the Act, OEPAL owed OAT an unsecured debt of £14,240,892 (being 80.26% of OEPAL's total unsecured debt); it was common ground that OAT was an unsecured creditor of OEPAL.

6. On 25 March 2022, by virtue of an event of default under an additional cross guarantee and debenture, Cresta appointed the Second Applicants - Mr Asher Miller and Mr Stephen Katz, both of Begbies Traynor (London) LLP - as administrators of OAT. On 29 March 2022, Mr Ridgley was appointed as administrator of OEPAL. Despite complaints that Mr Colin appointed Mr Ridgley without having consulted bondholders, it was not suggested that his appointments were, for that or any other reason, invalid.

7. The bonds issued directly to Cresta and the retail investors were secured, including by means of:

    7.1. a fixed charge and legal mortgage granted by OEPAL over its part of the Land (freehold title to which was registered at the Land Registry with title numbers CYM373297 (part), CYM414070, CYM342579, CYM346493 (part), CYM377968, CYM277964 and WA95065);

    7.2. a floating charge granted by OEPAL;

    7.3. a fixed charge and legal mortgage granted by OPAL over its part of the Land; and,

    7.4. a floating charge granted by OPAL.

8. That security was held by Mr Colin as security trustee on the terms of the Security Trust Deed.

9. As at 29 March 2022, the date of Mr Ridgley's appointment, the total sum thus secured was £85,862,770.40; the principal asset capable of (more or less) immediate realisation was the Land, which was subject to the fixed charge and legal mortgage; the value of the Land was far less than the amount of the debt secured by the fixed charge and mortgage; there was no real prospect of its realisation producing a surplus.

10. In those circumstances, in response to an email from Mr Carl Mifflin of Howes Percival Solicitors (acting for Mr Ridgley) sent on 20 April 2022, Mr Colin (apparently at that time advised by Sills & Betteridge Solicitors) wrote as follows (the letter is undated):

    "*Dear Mr Ridgley*

Orthios Eco Parks (Anglesey) Limited (in administration) and Orthios Power (Anglesey) Limited ('the Companies")

As you are aware, I am the holder (as security trustee) ***of fixed charges over the assets of the Companies most notably the land and buildings at the Penrhos site****. I note that the administrator needs to procure funding to cover the holding costs of the property whilst it is marketed and sold. I acknowledge that, by being in a position to discharge these holding costs to enable a more orderly disposal of the property than an immediate fire-sale of assets, this will enhance the likely realisable value of the Companies' fixed charge assets. I note that the administrator has secured an offer of funding (conditional on priority security in the administration of the Company) of £500,000 on the following terms:*

1. 12 month repayment period;

2. £7,500 approval fee;

3. £7,500 exit fee on repayment of the loan; and

4. Interest rate of 18% per annum on the balance borrowed under the loan from time to time.

I am willing to agree that the repayment of the loan, on the terms above, should be treated as a cost of realising the fixed assets in the administration of the Companies. I therefore agree that the loan can be repaid as a cost of realising the fixed charge assets (and therefore payable from the proceeds of any realisation of the assets in priority to any distribution under the fixed charges contained within the security) together with the costs of the administrator, agents and legal fees at the agreed rates as follows:

1. Agent's fees (Hilco Global): 2% of asset value

2. Best Administrative Services Limited fees: £35,000 per month

3. Administrators' fees: 5% of the asset value up to £25million and 15% of the asset value in excess of £25million

4. Solicitors' fees (Howes Percival LLP): 1% of the asset value up to £25million and 5% of the asset value in excess of £25million." (The emphasis is mine.)

11. In particular, that letter communicated Mr Colin's agreement, as security trustee, and acting in his capacity as the holder of the fixed charges given by the Companies in respect of the Land, to the sale of the Land and to the payment from the sale proceeds:

    11.1. to Mr Ridgley, of a fee equal to 5% of the proceeds up to £25 million, and 15% of the proceeds in excess of £25 million; and,

    11.2. to Howes Percival, of a fee in the sum of 1% of the proceeds up to £25million and 5% of the proceeds in excess of £25 million.

12. Accordingly, in Mr Ridgley's OEPAL Proposals dated 18 May 2022, at paragraph 6, under the heading "*Basis of the Administrator's remuneration*", and sub-heading "*Fixed Charge Realisation Costs*", he stated:

    "*6.1 As the property assets are subject to a fixed charge, it falls to the fixed charge creditor to agree the costs and expenses of realising those assets.*

    6.2 In considering the appropriate basis of for my remuneration, I engaged with HilCo regarding the potential value of the land who advised that, due to the highly specialist nature of the land, the value achieved could fluctuate substantially. I also considered that, due to the nature of the site (in particular the environmental and holding issues pending the marketing and sale process) a substantial amount of time costs would inevitably be incurred, which could end up being disproportionate to the eventual sale price of the assets. I therefore engaged with the secured creditor to agree a basis of remuneration that would provide a guaranteed return to the secured creditors of a fixed percentage of realisations, thereby giving a high degree of comfort and certainty to the secured creditor. It was agreed that a substantially lower percentage would be charged on realisations up to £25million as, under the priority arrangement in the security

documentation, the first £20million of secured creditors are retail as opposed to institutional investors. The security trustee was therefore keen to ensure that the remuneration structure gave the best possible opportunity for retail investors to recover their capital investment in the companies. The increased percentage to be charged on realisations in excess of £25million reflects the degree of risk being taken by the professionals of a substantial shortfall on costs as against time incurred in the event that the assets sell for less than £25million.

6.3 Approval was therefore sought from the secured creditor who agreed payment of our costs and those of our agents as follows;

• Agent's fees (Hilco Global): 2% of asset value

• Best Administrative Services Limited fees for maintaining the bond registers of £35,000 per month

• Administrators' fees: 5% of the asset value up to £25million and 15% of the asset value in excess of £25million

• Solicitors' fees (Howes Percival LLP): 1% of the asset value up to £25million and 5% of the asset value in excess of £25million."

13. In his evidence, Mr Ridgley said, "*Fundamentally, therefore, the agreement of my costs and expenses for realising the fixed charge assets … were* (sic) *a commercial and arm's length agreement between me and Mr Colin, negotiated and agreed by Mr Colin with the benefit of specialist legal advice*."

14. The Applicants' case was that these agreed expenses were excessive, contrasting starkly with the time value of the work done (which was in any event itself excessive because, amongst other things, of Mr Ridgley's failures to delegate and because much of the work produced nothing of ultimate value). The Applicants relied on the principles governing applications relating to the remuneration of office holders stated in Part 6, paragraph 21 of the Practice Direction: Insolvency Proceedings [2020] BCC 698 ("**the IPD**").

15. Furthermore, the obvious tenor of the Applicants' evidence was that this agreement, made between Mr Colin and Mr Ridgley ("**the realisation costs agreement**") was not

the product of a genuine negotiation, conducted in good faith, at arm's length, and in the best interests of those for whom each acted. Plainly, the Applicants suspect that the real purpose of the agreement was to benefit Mr Ridgley and/or others with whom he was associated, at the expense of the bondholders.

16. Mr Colin's background is as an independent financial advisor; as such he advised on schemes promoted by the Best International group of companies (the "**Best Group**"). The Best Group has been the subject of significant adverse publicity (such as, for example, a Times article entitled "*What happened to the £160m we put in "secure" investments?*" which referred to the Best Group, its co-founder Mr Jeff Hankin and to the Orthios Group) and has also been involved in schemes, including the investments in the Orthios Group, that have led to significant claims against the Financial Services Compensation Scheme ("**the FSCS**"). In a witness statement filed in support of an application to remove Mr Colin as security trustee, explained below, Mr Guy Enright, the FSCS's Recoveries Finance Manager, said that, "*the Best Group have been involved in the management of numerous failed investment schemes*" and that the FSCS had received approximately 706 claims for compensation in respect unsuitable advice given to retail investors which caused them to purchase bonds issued by the Orthios Group.

17. Mr Enright also said that as at the date of his statement (15 July 2022) the FSCS had paid £5.55 million in compensation in respect of those claims, and as a result was subrogated to those retail investors' rights and therefore interested in the insolvency of the Orthios Group in place of those retail investors. In the event, Cresta, MPB and the FSCS together held approximately 82% of the debts secured under the Security Trust Deed.

18. There was also evidence that the Best Group had a significant involvement in, if not control of, the financial management of the Orthios Group, and that it received substantial payments from it. In addition, Mr Mark Tailby, the founder and senior practitioner at "*Mercian Advisory*", where Mr Ridgely now works, had some prior involvement with the Best Group, having acted as administrator of Best Asset Management Limited ("**BAM**"), another entity within the Best Group, since December 2019, when he was appointed by BAM's Directors. Mr Ridgley was involved in the conduct of BAM's administration, and it was the Applicants' evidence that he was appointed by Mr Colin as the Companies' administrator having been introduced to Mr Colin by Mr Hankin.

19. Nonetheless, whilst the Applicants' concerns may well be justified, they are staunchly denied, and it was not positively submitted that the realisation costs agreement was (on these Applications) capable of being avoided or disregarded; in the absence of cross-examination and disclosure, and indeed, in the absence of more specifically stated allegations - particularly necessary if the suggestion is of serious misconduct, as appears to be the case - the court must (and I will) proceed on the assumption that the agreement was validly made, and that it binds the parties; in short, the court cannot, on these Applications, go behind or disbelieve Mr Ridgley's written evidence.

20. On 6 July 2022, Cresta and MPB made an application to remove Mr Colin as security trustee (there being no power in the Security Trust Deed allowing for the bondholders to remove him). Cresta relied, among other things, on what it considered to be the excessive remuneration and fees agreed by Mr Colin, his connections with the Best Group and his failure to consult any of the bondholders before appointing Mr Ridgley as administrator of the Companies or agreeing his fees. The application was supported by the FSCS. Although initially opposed, Mr Colin ultimately agreed to his own removal. He was thus removed by the Order of HHJ Malcolm Davis-White KC made on 12 October 2022 (after the sale of the Land, described below, on 9 September 2022) and replaced as security trustee by Mr Pagden (the First Applicant, acting in that capacity).

21. Again, it was not suggested that Mr Colin's removal affected the validity of the realisation costs agreement.

22. The Land was marketed and after receipt of various offers, which ranged between £4.1 million and £51 million, was sold on 9 September 2022 for £35 million. In consequence of the realisation costs agreement, and pursuant to its terms, Mr Ridgley was entitled to payment of £2,765,000 and Howes Percival to £755,000.

23. By his Progress Report for the period ending 28 September 2022 (signed on 26 October 2022) Mr Ridgley stated, under the heading, "*Administrator's remuneration*":

> "*6.1 Changes to charge out rates during the period of this report are detailed in appendix 3.*
>
> *Fixed Charge Realisation Costs*

6.2 As the property assets are subject to a fixed charge, it falls to the fixed charge creditor to agree the costs and expenses of realising those assets.

6.3 Approval was sought from the security trustee and, after negotiations of an appropriate costs structure, agreed payment of our costs and those of our agents as follows;

- *Agent's fees (Hilco Global): 2% of asset value*
- *Best Administrative Services Limited fees for maintaining the bond registers of £35,000 per month (such sums to be paid by the security trustee from the fixed charge distribution received)*
- *Administrators' fees: 5% of the asset value up to £25million and 15% of the asset value in excess of £25million*
- *Solicitors' fees (Howes Percival LLP): 1% of the asset value up to £25million and 5% of the asset value in excess of £25million*

6.4 As at the end of the end of the reporting period, there had been no remuneration drawn. Since that date however, based on the overall fixed charge realisations achieved so far of £35,000,000.00 and the fee structure above, total remuneration across the two estates has become payable of £2,750,000.00. Based on the apportionments of the asset values in the asset sale agreement this has meant that administrator's remuneration of £1,203,400 has become payable in respect of OEPAL and £1,546,600 in respect of OPAL.

Floating Charge Remuneration and Costs

6.5 As it is unlikely that there will be sufficient realisations to discharge the secured claims in full, the proposals contained a statement under Para 52 (b) of the Insolvency Act 1986 to the effect that the company has insufficient property to enable a distribution to be made to unsecured creditors other than by virtue of the prescribed part. Consequently, it fell to the security trustee to agree the basis of our remuneration in this regard also.

6.6 At the time of sending out the proposals, agreement was sought from the security trustee and it was proposed that such remuneration,

be based on the same percentages agreed in relation to the fixed charge realisation costs above namely 5% of the asset value of any floating charge assets and up to £25million (in aggregate) and 15% of the asset value in excess of £25million (in aggregate).

6.7 If assets are recovered, I first recover my costs and then distribute any balance to creditors as appropriate. I am seeking to recover a percentage of the property that I have to deal with, in order to remunerate me for the work that I undertake in respect of protecting and then realising that property. The percentage I propose to charge will also share the anticipated benefit with the creditors. I think the percentage I am seeking approval for reflects the risk that I am taking, the nature of the assets involved, and the complexity of the Administration, as highlighted above.

6.8 As indicated in the proposals, there are very little in the way of known floating charge assets that it is anticipated will result in any significant realisations being achieved.

6.9 An agreement to the proposed fee proposal was received from the security trustee on 23 June 2022.

6.10 For the benefit of creditors, the Association of Business and Recovery Professionals publish 'A Creditors' Guide to Administrators' Fees'. This document is available at the following website address, https://www.r3.org.uk/technical-library/england-wales/technicaI-guidance/fees/. A hard copy of this document can be obtained on request from our office."

24. By that Report, amongst other things, Mr Ridgley told creditors that under the realisation costs agreement, since the end of the reporting period (which is to say, between 28 September 2022 and 26 October 2022), £2,750,000 had "*become payable*", nothing having been "*drawn*" as at 28 September 2022. It was also explained, at paragraphs 6.5-6.9, that in respect of expenses, including remuneration, to be drawn from property subject to a floating charge, a separate agreement had been reached, on 23 June 2022.

Pursuant to that separate agreement, remuneration was drawn by Mr Ridgley in the sum of £115,848.88 by reference to realisations comprising a VAT refund (reported by Mr Ridgley in his Final Progress Report for the period to 27 March 2023).

25. Against that background, applications were made on 23 December 2022 and 31 January 2023 to extend the time within which to apply under rule 18.34, and the Applications themselves were made on 19 May 2023. Also before the court, issued on 11 July 2023, was Mr Ridgley's application to strike out the Applications made under rule 18.34, on grounds that the court has no jurisdiction under rule 18.34, that in any event, Mr Pagden is estopped from advancing such a challenge and again in any event, that the Applications were issued out of time.

The First Issue: Jurisdiction, and the Scope of Rule 18.34

26. The first question is whether the Applications were capable of being brought under rule 18.34 of the Rules. In my judgment, they were not.

27. Fundamentally, subject to the provisions of the Act and the Rules, property which is owned, held or controlled by an insolvent company in administration or liquidation, is available as the source of payment of certain defined expenses, and of certain debts, according to the nature of the company's (and others') proprietary rights and interests in respect of that property.

28. Thus, the company's free assets, beneficially owned, are the principal source of payment of both expenses and debts; its assets subject to a fixed charge or mortgage continue, unaffected, as before the insolvency, to be subject to the rights of the secured creditor, available in the first instance for payment of that creditor's debt; its assets subject to a floating charge are, to an extent specified in the statutory provisions, available for payment of expenses, preferential debts, and to a prescribed extent, unsecured debts, in priority to the payment of the secured debt; and finally, property held by the company, but not beneficially owned by it, continues, as before the insolvency, to belong to its beneficial owner, whose property rights are untouched; those assets cannot be used to meet either the expenses of the insolvency or to pay the unsecured, preferential or any other debts of the company; they may however, by an order of the court, be made to bear the office holder's costs of administering those assets.

29. In Re Leyland DAF Ltd [2004] UKHL 9, the issue, shortly stated, was whether the expenses of a winding-up were payable out of a company's assets subject to a floating charge; the decision was that they were not, reversing the decision of the Court of Appeal in Re Barleycorn Enterprises Ltd [1970] Ch 465. Whilst the effect of that conclusion has since been reversed by statute, and whilst in the present case, OEPAL was in administration, not liquidation, the House of Lord's explanation of the fundamental principles is nonetheless illuminating.

30. At [28] – [31], Lord Hoffmann said:

> "*28. The winding up of a company is a form of collective execution by all its creditors against all its available assets. The resolution or order for winding up divests the company of the beneficial interest in its assets. They become a fund which the company thereafter holds in trust to discharge its liabilities: Ayerst v C & K (Construction) Ltd [1976] AC 167. It is a special kind of trust because neither the creditors nor anyone else have a proprietary beneficial interest in the fund. The creditors have only a right to have the assets administered by the liquidator in accordance with the provisions of the Insolvency Act 1986: see In re Calgary and Edmonton Land Co Ltd [1975] 1 WLR 355, 359. But the trust applies only to the company's property. It does not affect the proprietary interests of others.*
>
> *29. When a floating charge crystallises, it becomes a fixed charge attaching to all the assets of the company which fall within its terms. Thereafter the assets subject to the floating charge form a separate fund in which the debenture holder has a proprietary interest. For the purposes of paying off the secured debt, it is his fund. The company has only an equity of redemption; the right to retransfer of the assets when the debt secured by the floating charge has been paid off. It is this equity of redemption which forms part of the fund held on trust for the company's creditors which arises upon a winding up.*
>
> *30. Putting aside any fixed charges, the position is therefore that if a company is in both administrative receivership and liquidation, its former assets are comprised in two quite separate funds. Those which were subject to the floating charge ("the debenture holder's fund") belong beneficially to the debenture*

holder. The company has only an equity of redemption. Those which were not subject to the floating charge ("the company's fund") are held in trust for unsecured creditors. In the usual case in which the whole of the company's assets and undertaking are subject to the floating charge, the company's fund will consist only of the equity of redemption in the debenture holder's fund.

31. In principle, each fund bears its own costs. The expenses of the administrative receivership are borne by the debenture holder's fund. The expenses of winding up are borne by the company's fund. The debenture holder has no interest in the winding up and the unsecured creditors have no interest in the administrative receivership. So there is no reason why either group should contribute to the expenses of the other. Occasionally (for example, if no receiver has been appointed) a liquidator will realise an asset forming part of the debenture holder's fund. As the debenture holder is entitled to the proceeds, it is right that he should pay the cost of realisation: see In re Regent's Canal Ironworks Co; Ex p Grissell (1875) 3 Ch D 411. But the debenture holder has no liability for the general costs of the winding up."

31. At [39]-[41], Lord Millett observed:

"*39. ... the question in this appeal, as formulated by the parties, is whether the expenses incurred by a liquidator in winding up an insolvent company are payable out of the assets comprised in a crystallised floating charge in priority to the claims of the charge holder. The question assumes importance only where, as is unfortunately often the case, the company has insufficient uncharged (or "free") assets to meet the costs of the winding up. ...*

40. ...

41. As formulated, the question appears to be concerned with priorities. But the real question is whether the expenses of a winding up are payable out of charged assets at all. If they are, there is no doubt that they are payable in priority to the claims of the charge holder. If they are not, questions of priority do not arise."

32. At [51], he continued:

"*51. Bankruptcy and companies liquidation are concerned with the realisation and distribution of the insolvent's free assets among the unsecured creditors. They are not concerned with assets which have been charged to creditors as security, whether by way of fixed or floating charge. Secured creditors can resort to their security for the discharge of their debts outside the bankruptcy or winding up. Assets subject to a charge belong to the charge holder to the extent of the amounts secured by them; only the equity of redemption remains the property of the chargor and falls within the scope of the chargor's bankruptcy or winding up. As James LJ observed in In re Regent's Canal Ironworks Co (1877) 3 Ch D 411, 427 charge holders are creditors "to whom the [charged] property [belongs] ... with a specific right to the property for the purpose of paying their debts". Such a creditor is a person who "is to be considered as entirely outside the company, who is merely seeking to enforce a claim, not against the company, but to his own property" per James LJ in In re David Lloyd & Co (1877) 6 Ch D 339, 344.*"

33. Finally for present purposes, at [62]-[63] Lord Millett observed:

"*62. In considering the incidence of the costs and expenses of the winding up it must be borne in mind that there are two distinct funds: (i) the proceeds of the free assets which belong to the company and are administered by the liquidator in a winding up and (ii) the proceeds of the assets comprised in a floating charge which belong to the charge holder to the extent of the security and are administered by the receiver. In principle, and save to the extent, if any, that statute may make provision to the contrary, the costs of administering each fund are borne by the fund in question. In principle, therefore, the expenses of a winding up are borne by the assets comprised in the winding up, that is to say the company's free assets, and the expenses of a receivership are borne by the assets comprised in the floating charge.*

63. The costs of realising a particular property, however, must be distinguished from the general expenses of the winding up or receivership. The costs of realisation are deductible from the proceeds of the property realised, whether it is realised by the liquidator or the receiver, for it is only the net proceeds of the property which are comprised in the winding up or receivership as the case

may be. Costs incurred in preserving an asset are treated in the same manner. The costs of preserving or realising assets comprised in a floating charge, if incurred by the liquidator, may therefore be recouped by him out of the charged assets in priority to the claims of the charge holder: see the Regent's Canal case 3 Ch D 411, 427."

34. These principles, subject to various specific statutory incursions, are reflected in the detailed provisions of the Act and the Rules. As can be seen, there are two aspects: first, as to whether a particular liability is capable of being satisfied - even in principle - from a particular source (or "fund"), and second, apart from that, as to the priority of payment (both within a single class or category of liabilities (such as expenses) or as between each such class (such as, for example, as between expenses and preferential debts)).

35. Thus, essentially, by virtue of sections 107, 115 and 175 (in voluntary liquidation) and sections 148 and 175 (in compulsory liquidation), the free, unencumbered assets of a company in liquidation are applied, first in payment of the expenses of the winding-up (including the liquidator's remuneration) and then, after payment of certain moratorium debts under section 174A, in payment of the company's preferential debts (defined at sections 386, 387 and Schedule 6 to the Act); only after that are they available for payment of the company's general, unsecured creditors.

36. By virtue of the Act, in addition to a company's free assets, the fund comprising its property subject to a floating charge is also available, in certain circumstances, for payment of the expenses of a liquidation, and of its preferential debts, and indeed, albeit to a particular "*prescribed*" extent only, for payment of its unsecured creditors.

37. Accordingly, section 175(2) provides that preferential debts - but only insofar as the assets available for payment of general creditors are insufficient to meet them - have priority over the claims of creditors secured by a floating charge: to that extent, they are to be paid out of property subject to such a charge. Moreover, by virtue of section 176ZA(1) (which reversed the effect of the decision of the House of Lords in Re Leyland DAF Ltd, mentioned above) again only insofar as the assets of the company available for payment of general creditors are insufficient to meet them, the expenses of the liquidation (including the "*remuneration of the liquidator*" – section 176ZA(4)) also have priority over any claims to property subject to a floating charge (meaning the claims of both the

chargee and of preferential creditors under section 175); to that extent, they too are to be paid out of property subject to such a charge. Accordingly, in a liquidation, both expenses and preferential debts are payable from floating charge assets in priority to the claims of the charge holder, but only insofar as the assets generally available for payment of creditors are insufficient to satisfy them.

38. Furthermore, by virtue of section 176ZA(3), in respect of litigation expenses, certain rules (6.44 *et seq*, and 7.111 *et seq* of the Rules) were introduced to restrict the application of subsection (1) to expenses authorised or approved by the floating charge holder and by the preferential creditor (or the court) – in other words, to the extent that property subject to a floating charge is first to be used to pay such expenses, those expenses must be authorised or approved by those who otherwise have a claim to payment from that property, those with an economic stake in the outcome.

39. In this context, section 176A was introduced with effect from 15 September 2003, by the Enterprise Act 2002. Essentially, it provides for a "*prescribed part of* [a] *company's net property*" to be made available (including in an administration) for payment of unsecured debts, and only therefore to be paid to the floating charge holder if and insofar as it exceeds that which is required to pay the unsecured creditors in full. The reference to a company's "*net property*" is (under section 176A(6)), to the amount of its property which would - but for section 176A - be available for satisfaction of the claims of floating charge holders; in other words, the amount remaining after payment (if justified under sections 175 and 176ZA) of expenses and preferential debts. This provision does not apply to fixed charge property.

40. In an administration, permission of the court is required to make a distribution to a creditor who is neither secured nor preferential unless it is made by virtue of section 176ZA (in other words, from the prescribed part). Section 175 of the Act applies in administrations, as it applies in a liquidation, in a case where the administrator decides (and if necessary, has permission) to make a distribution to a creditor or creditors under paragraph 65 of Schedule B1 (by virtue of paragraph 65(2)). Under paragraph 52(1)(b) of Schedule B1, if an administrator's statement of proposals (under paragraph 49) contains a statement 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)* [of the Act]", paragraph 51(1) does not apply, and the administrator is not under a duty to seek

approval of the proposals from the company's creditors. Essentially, that is because (in common with the other circumstances identified at paragraph 52(1)), there is, in that case, nothing of substance for the company's creditors to decide; seeking their approval is pointless.

41. As to the expenses of a liquidation, subject to the power of the court (under sections 156 and 112) to change their internal order of priority, the categories of expense, and the order in which, *inter se*, they are to be paid from available assets, are contained in the Rules. In compulsory liquidation, the relevant provisions are at rule 7.108-110; in particular, by rule 7.108(2), they make explicit that a liquidator's expenses are payable out of "*assets of the company available for the payment of general creditors*" and, by virtue of rule 7.108(2)(b), and subject to rules 7.111 to 7.116 (which as I have mentioned, deal with the particular case of litigation expenses), out of "*property comprised in or subject to a floating charge created by the company*" – reflecting the provisions of section 176ZA; they are *not* payable from fixed charge assets. The provisions in relation to voluntary liquidations are at rule 6.42, and are, for present purposes, materially the same.

42. In an administration, the order of priority of payment of "*expenses*" is governed by Chapter 10 of Part 3 of the Rules. Rule 3.50(1) provides that all "*fees, costs, charges and other expenses incurred in the course of the administration are to be treated as expenses of the administration*"; rule 3.50(2) provides that the expenses associated with the prescribed part must be paid out of that part - in other words, it is treated as a discrete fund from which specifically associated expenses must be deducted.

43. Rule 3.51 provides that (subject to paragraph 64A of Schedule B1, which concerns moratorium and pre-moratorium debts, and paragraph 99(1), which concerns the remuneration and expenses of a former administrator, and subject in any event to the court) the expenses of an administration are to be paid in the order of priority prescribed by Rule 3.51(2), including, at (2)(a), the "*expenses properly incurred by the administrator in performing the administrator's functions*" and at (2)(i), "*the administrator's remuneration the basis of which has been fixed under Part 18 …*".

44. Although paragraph 65 of Schedule B1 (which deals with distributions in administration) does not refer specifically to section 176ZA (by which a liquidator's expenses may be

paid from property subject to a floating charge), paragraph 70 of Schedule B1 provides that an administrator "*may dispose of or take action relating to property which is subject to a floating charge as if it were not subject to the charge*" and, paragraph 99 provides that where a person ceases to be the administrator of a company, his remuneration and expenses shall be charged on or payable out of property of which he had custody or control immediately before the time when he ceased to be administrator, and "*payable in priority to any security to which paragraph 70 applies*" - in other words, payable from property subject to a floating charge, in priority to the debt of the floating charge holder (to the effect of section 176ZA in liquidations). There is however no reference in paragraph 99 to payment of expenses or remuneration from property subject to a fixed charge, and therefore no warrant for payment of remuneration and expenses from such property. Further, by virtue of paragraph 71, it is only with the court's permission that an administrator might "*dispose of property which is subject to a security (other than a floating charge) as if it were not subject to the security*", where the court is persuaded that "*disposal of the property would be likely to promote the purpose of the administration*".

45. The upshot of these provisions is that in both liquidation and administration, the relevant expenses of the process, as specified in the Rules (and payable in the order of priority specified in the Rules, subject to alteration by the court) are to be satisfied from the company's free assets, and, in some cases, from its assets subject to a floating charge, but not, in any circumstance, from its assets subject to a fixed charge.

46. As to those assets, the "fund" comprising property subject to a fixed charge is substantially unaffected by either liquidation or administration. The practical effect within an insolvency of a legal mortgage or fixed charge is explained by the editors of ***Palmer's Company Law*** at 15.542:

> "*.... under the established principles of the law of security applicable both to personal and corporate insolvency, the holder of a valid and subsisting, fixed security over any of his debtor's property is entitled to enforce his right of realisation of that security, and so may effectively stand outside the insolvency process in satisfying the outstanding liability to such extent as the security is capable of yielding. Thereafter, if any unsatisfied balance remains due to the creditor in question, he may participate in the collective administration of the remainder of the debtor's estate, by proving for the balance and ranking for*

> *dividend according to the nature of the liability itself. Therefore, the assets within the insolvent estate which are comprised within any valid and unimpeachable fixed charge are predestined to remain outside the pool of assets available for distribution through the winding-up process itself, except in so far as they may turn out upon realisation to yield a greater amount than is still outstanding upon the debt or liability in relation to which they serve as security.*"

47. In contrast to the position of a creditor with the benefit of floating charge security, a creditor who holds a validly created, properly registered, fixed charge over any company property is effectively, certainly very largely, insulated from the policy driven incursions of statute by virtue of the proprietary title conferred by his security. In effect, to the extent of the realisable value of the property comprised in the security, that creditor stands apart from the collective process of the liquidation, or administration. In the event of a surplus on the realisation of his security, the creditor must of course account to the company, and should there be a shortfall, the creditor can maintain a claim for the unsatisfied balance.

48. In the present context, I say very largely rather than wholly insulated because, to a limited extent, in administration, the rights of a fixed charge holder in respect of his discrete "fund", in principle inviolable, have been diluted by statutory provision. Paragraph 71 of Schedule B1, referred to above, allows for an order to be made enabling an administrator to dispose of property subject to a fixed charge, as it were not subject to the security, an otherwise impermissible step. By virtue of paragraph 71(3), amongst other things such an order "*is subject to the condition that there be applied towards discharging the sums secured by the security … the net proceeds of disposal of the property*".

49. In Re James Rose Projects Ltd (In Administration), Townsend v Biscoe [2010] WL 3166608, administrators had been granted (ultimately by consent) an order under paragraph 71 which allowed for the sale of certain property notwithstanding that it was subject to fixed charges in favour of the previous owners of the property ("*the applicant creditors*" on the application before the judge, Registrar Simmonds). The order provided:

> "*IT IS ORDERED AND DIRECTED BY CONSENT THAT:*
>
> *(1) the* [administrators] *do have permission pursuant to Paragraph 71 (1) of Schedule B 1 of the Insolvency Act 1986 ("the Act")* [to] *dispose of 203 Larkshall*

Road, Chingford, Essex Title Number EGLl0189 and EGLI05825 ("the property") as if it were not subject to a legal charge in favour of [the applicant creditors]*;*

(2) ***the net proceeds of sale of the property*** *be applied in accordance with Paragraphs 71(3) and (4) of the Schedule B I of the Act* [emphasis added]*;*

(3) the [administrators'] *costs of and incidental to this application be paid as an expense of the administration incurred in the realisation of the property*".

50. The property having been sold by the administrators, the issue was how to calculate the "*net proceeds of sale of the property*", and in particular, which costs or expenses might properly be deducted from the gross sale proceeds before payment of the balance to the applicant creditors.

51. The applicant creditors' case was that the net proceeds comprised the gross sale proceeds minus only the estate agent's and solicitor's charges incurred in connection with the sale itself; the administrators' case was that in principle, they ought to be paid remuneration and disbursements incurred in connection with their conduct of the sale, from the proceeds of sale, as would have been the case, for example, had they been appointed as receivers rather than administrators, and therefore undertaken the same acts in a different capacity; in any event, said the administrators, the parties had agreed in correspondence that certain costs could be deducted, or the applicant creditors were estopped from denying that agreement.

52. In his judgment, the judge referred to Re Berkeley Applegate [1989] Ch 32. As to that decision, it sometimes happens that an office holder administers assets which fall outside the scope of the insolvency altogether, for example, because they are held on trust, and do not belong beneficially to the company. In such cases, the court has jurisdiction to allow him to recoup the costs and expenses (and indeed, "*remuneration*", in the sense of payment in return for his services) associated with the administration of that property, out of that property - Re Berkeley Applegate was an example. Those costs and expenses cannot be paid out the company's other assets, and similarly, the expenses of the insolvency not associated with the administration of the trust property cannot be paid

from the trust property; each class of property, each discrete fund, bears only its particular class of associated expense.

53. In Re Berkeley Applegate itself, certain assets had been found to be held on trust by the company in liquidation. Notwithstanding that the liquidator's duty to wind up the company's affairs necessarily involved dealing, to some extent, with assets held by the company as trustee, it was common ground that there was no statutory authority for the payment of any part of his expenses or remuneration out of the trust assets. Without deciding questions of incidence (in other words, which costs should be borne by which assets or class of assets) the deputy judge held that the court had jurisdiction to order payment of the liquidator's proper expenses and remuneration out of the trust assets. At 50B-G, he said:

> "*It is true that the legal title to the mortgages and to the clients' accounts is not vested in the liquidator but remains in the company; but the investors still need the assistance of a court of equity to secure their rights. ... As a condition of giving effect to their equitable rights, the court has in my judgment a discretion to ensure that a proper allowance is made to the liquidator. His skill and labour may not have added directly to the value of the underlying assets in which the investors have equitable interests but he has added to the estate in the sense of carrying out work which was necessary before the estate could be realised for the benefit of the investors. ..., if the liquidator had not done this work, it is inevitable that the work, or at all events a great deal of it, would have had to be done by someone else, and on an application to the court a receiver would have been appointed whose expenses and fees would necessarily have had to be borne by the trust assets. ....*
>
> *The allowance of fair compensation to the liquidator is in my judgment a proper application of the rule that he who seeks equity must do equity*."

And at 51A-B, he said:

> "*The authorities establish, in my judgment, a general principle that where a person seeks to enforce a claim to an equitable interest in property, the court has a discretion to require as a condition of giving effect to that equitable*

interest that an allowance be made for costs incurred and for skill and labour expended in connection with the administration of the property. It is a discretion which will be sparingly exercised; but factors which will operate in favour of its being exercised include the fact that, if the work had not been done by the person to whom the allowance is sought to be made, it would have had to be done either by the person entitled to the equitable interest … or by a receiver appointed by the court whose fees would have been borne by the trust property …; and the fact that the work has been of substantial benefit to the trust property and to the persons interested in it in equity … In my judgment this is a case in which the jurisdiction can properly be exercised."

54. Returning to the decision in Townsend v Biscoe, Registrar Simmonds referred, at [25], to Re Berkeley Applegate at [1989] Ch 32, 44G-H, where the deputy judge in that case commented (in relation to In re Marine Mansions Co. (1867) L.R. 4 Eq. 601, and In re Oriental Hotels Co. (1871) L.R. 12 Eq. 126):

> "*I do not find these two cases of very much assistance. In both of them the mortgagee could have sold regardless of the winding up and the liquidator was in effect selling on his behalf. The expenses which he incurred for the purpose of selling to the best advantage were of a different character from the expenses incurred by the liquidator in the present case. Nevertheless they recognise that where a mortgagee permits a liquidator to sell the company's property which is subject to his mortgage, he cannot claim the entire proceeds of sale without allowing the liquidator the costs which he has properly incurred in connection with the sale*."

55. Registrar Simmonds then concluded, at [26], that having allowed the administrators to proceed, and having taken no steps of their own to enforce their security, the applicant creditors:

> "…"cannot claim the entire proceeds of sale without ... allowing the costs properly incurred in connection with that sale" *(see Re Berkeley Applegate). Looked at conversely had the* [applicant creditors] *sought to enforce their security they would have incurred themselves the very expenses to make the*

> *properties saleable about which they now complain or sell the properties at a much reduced price*".

And at [29]:

> "*In my judgement* [counsel for the administrators'] *submission that to put an administrator selling property under Paragraph 71 … (so far as remuneration and recovery of disbursements) in a different position to a liquidator or receiver performing exactly the same function cannot have been an intention of Parliament must be a correct submission. To construe Paragraph 71 in the narrow way in which* [counsel for the applicant creditors] *submits would, in my judgement, render the whole of Schedule B 1 unworkable and redundant*."

56. The registrar also held that in any event the parties had agreed in correspondence regarding the deductions to be made, and/or that the applicant creditors were estopped from denying that agreement.

57. Townsend v Biscoe is therefore authority for the proposition that the expression "*net proceeds of sale*" in paragraph 71 of Schedule B1, means the proceeds of sale remaining after the deduction of costs, charges and expenses (including those incurred in the property's preservation) and including remuneration, rather than the proceeds of sale remaining after the deduction of merely the narrow classes of legal and estate agent's costs most immediately or closely associated with the sale. Part of the rationale of that conclusion was that, as in Re Berkeley Applegate, it would have been inequitable to allow the secured creditor/beneficial owner to claim payment of sale proceeds without deduction of the costs necessarily incurred in generating those proceeds. The amount payable under paragraph 71 is either that which is agreed between the administrator and the secured creditor, or, but only in the absence of agreement, that which is ordered by the court (and for example in Re MBI Clifton Moor Limited [2020] EWHC 1835, in which an order for sale was made under paragraph 71, the court made no decision regarding the amount of any proper deductions pending the possibility of an agreement between the administrators and the secured creditors: see [18]). It therefore follows that insofar as "*remuneration*" is chargeable as an element of the deduction under paragraph 71, the source of the right to payment, and the basis of calculation of the amount, falls wholly outside the provisions of Part 18 of the Rules, to which I now turn.

58. Insofar as remuneration, as an expense of the insolvency, is payable to an administrator, liquidator or trustee in bankruptcy, the machinery for its determination is contained in Chapter 4 of Part 18 of the Rules. The principal provisions, in summary and insofar as relevant to this case (concerning administration) are as follows.

59. By virtue of r.18.16(1), an administrator is entitled to receive "*remuneration*" for "*services as office-holder*", on a basis which must be fixed on one or other (or a combination) of the bases set out at rule 18.16(2), including as a percentage of the value of property dealt with, or of assets realised and/or distributed, or by reference to time properly given in attending to matters arising.

60. It is the duty of the creditors' committee to determine the basis of an administrator's remuneration: rule 18.18(2). If it fails to do so (or there is no committee) then the basis is to be fixed by a decision of the creditors by a decision procedure, except (under rule 18.18(4)) where, (i) a statement has been made under paragraph 52(1)(b) of Schedule B1 (that there are insufficient funds for distribution to unsecured creditors other than out of the prescribed part explained above), and (ii) either there is no creditors' committee or it has failed to make a determination, in which case, the basis of remuneration may be fixed by:

    60.1. the consent of "*each of the secured creditors*"; and,

    60.2. a decision of the preferential creditors in a decision procedure.

61. Under the Rules, the provisions governing "*decision making*" are in Part 15. Rule 15.31(4), which governs the calculation of creditors' voting rights, states that where a debt is wholly secured, its value for voting purposes is nil. Furthermore, by virtue of rule 7.4(2), a creditor whose debt is fully secured is not eligible to be a member of a creditors' committee in administration. It follows that under rule 18.18(2), the basis of an administrator's remuneration is to be fixed, initially at any rate, without reference to the views of fully secured creditors, except, possibly, in a situation falling under rule 18.18(4) where there has been a statement under paragraph 52(1)(b) of Schedule B1: in other words, where unsecured creditors will only (if at all) be paid from the prescribed part, from property subject to a floating charge, and the creditors' committee (and in such a case, there may not be a committee) has failed to fix a remuneration basis. In that case,

the rule requires the consent of either "*the secured creditors*", or (but only if preferential creditors are to be or have been paid) both the secured creditors and the preferential creditors. The rationale for that must be that in those cases, the basis of remuneration is to be fixed by those who will or may be affected by the decision, and by the extent to which the property in question – necessarily property subject to a floating charge – might be used to meet the expenses of the administration.

62. In my view, it follows that the references to "*secured creditors*" in rule 18.18(4) are references to creditors secured by floating, but not fixed charges; the holders of fixed charges have no stake or interest in the relevant process – as I have explained, their proprietary security rights are essentially untouched, and it is not property subject to their charges which is to be used as a source of payment of the administrator's remuneration.

63. Under rule 18.23, if the basis of an administrator's remuneration is not fixed under rule 18.18, then the administrator must apply to court for it to be fixed. Under rule 18.24, if it is fixed at a rate or amount which the administrator "*considers to be inappropriate*", he may request that the company's creditors increase or change it, or apply to court under rule 18.28. Where a request is made, if the basis was fixed by the committee, it is to be made to the company's creditors for approval by a decision procedure, except where:

    63.1. it has been fixed by the committee, but in circumstances where there is a paragraph 52(1)(b) statement, in which case the request is to be made for approval by either "*the secured creditors*", or (but only if preferential creditors are to be or have been paid) both the secured creditors and the preferential creditors (as under rule 18.18(4)); again, for the reasons explained, the reference to secured creditors in that rule must be a reference to creditors secured by a floating charge, not a fixed charge; or,

    63.2. the administrator has become the liquidator, in circumstances that are not presently relevant.

64. A court application under rule 18.28 in a case where remuneration was fixed under rule 18.18(4), must be made (by virtue of rule 18.28(5)) on notice to those whose approval was sought under rule 18.18(4), including therefore the holder of any relevant floating charge.

65. Under rule 18.29, if, after the basis of remuneration has been fixed, there has been a relevant, material and substantial change of circumstance, an administrator may ask those who fixed it, to change it, or apply to court. Rules 18.30 to 18.33 deal with other particular instances requiring some variety of change or reconsideration.

66. Crucially for present purposes, against the background of those preceding provisions, rule 18.34 then provides as follows:

> "*(1) This rule applies to an application in an administration, a winding-up or a bankruptcy made by a person mentioned in paragraph (2) on the grounds that—*
>
> *(a) the remuneration charged by the office-holder is in all the circumstances excessive;*
>
> *(b) the basis fixed for the office-holder's remuneration under rules 18.16, 18.18, 18.19, 18.20 and 18.21 (as applicable) is inappropriate; or*
>
> *(c) the expenses incurred by the office-holder are in all the circumstances excessive.*
>
> *(2) The following may make such an application for one or more of the orders set out in rule 18.36 or 18.37 as applicable—*
>
> *(a) a secured creditor,*
>
> *(b) an unsecured creditor with either—*
>
> *(i) the concurrence of at least 10% in value of the unsecured creditors (including that creditor), or*
>
> *(ii) the permission of the court, or*
>
> *(c) in a members' voluntary winding up—*
>
> *(i) ..., or*
>
> *(ii) ...*
>
> *(3) The application by a creditor or member must be made no later than eight weeks after receipt by the applicant of the progress report under rule 18.3, or final report or account under rule 18.14 which first reports the charging of the remuneration or the incurring of the expenses in question ("the relevant report").*"

67. The range of orders that might be made is set out at rules 18.36(4) and 18.37(4).

68. As a matter of construction and principle, one would not expect those entitled to complain under rule 18.34 to include a person not entitled even in principle to participate in the process of fixing remuneration under the preceding provisions. Accordingly, in this context, the natural meaning of "*secured creditor*" is, in my view, the same as the meaning of the same expression found at rule 18.18(4) and elsewhere, which is to say that it means a creditor secured by a floating charge, not a fixed charge; a fixed charge holder has no stake in the whole process for which Part 18 provides, which is undertaken (subject to rule 18.38, to which I shall come) without any reference to property subject to a fixed charge, without affecting such property, and without affecting a fixed charge creditor's rights. Remuneration is fixed, challenged and reviewed under Part 18 without reference to fixed charge holders and the property subject to their charges for the simple reason that such property is not affected by its payment.

69. That the class of potential applicants under rule 18.34 is limited to those with a real and substantial economic interest in the outcome (and therefore excludes creditors secured by a fixed charge) is underlined by the provisions of rule 18.34(2)(b), and in particular (b)(ii), which requires an applicant to seek the permission of the court to apply where there is not the support of at least 10% in value of the unsecured creditors (and even then, subject to rule 18.37(1) which allows for summary dismissal by the court on receipt of the application) and also rule 18.35(4), which requires a bankrupt to show, if he is to be given permission to apply, that there is or would likely be a surplus in the bankruptcy were it not for the excessive remuneration or expenses.

Conclusions

70. Drawing together these provisions and their effects:

    70.1. in a liquidation or administration, the property owned, held or controlled by the company is treated as comprising various discrete "funds" from which, in each case, certain defined expenses and debts may be paid, in a particular prescribed order of priority;

    70.2. the expenses of an administration (and a liquidation) are specifically identified, and include the office holder's "*remuneration*";

70.3. those identified expenses are payable from the company's free assets available for the payment of general creditors, and, in certain circumstances, where those assets are insufficient, from assets subject to a floating charge, in each case, in priority to preferential and other debts; however, whether in administration or liquidation, they are not payable from assets subject to a fixed charge; that fund remains substantially inviolable, the secured creditor's rights substantially untouched, subject to his agreement, or in some cases, court order;

70.4. Part 18 of the Rules provides a detailed code for the determination of the remuneration payable to an administrator only and insofar as it is an expense of the administration; because such remuneration is not payable from fixed charge property, it is determined without reference to (wholly secured) creditors holding fixed charge securities; fixed charge (wholly) secured creditors therefore have no standing to complain under rule 18.34;

70.5. separately, "*remuneration*" may come to be payable to a liquidator or administrator in other circumstances, but *not* as a defined expense of the insolvency: for example, where an office holder incurs costs or expenses, or does useful work in the administration or preservation of property falling wholly outside the scope of an insolvency, including property held on trust, he might, by virtue of a court order made in the exercise of a jurisdiction which exists apart from that given by the Act and the Rules (as in Re Berkeley Applegate) be entitled to some payment, to be made from the property itself, which is treated as a separately administered fund, bearing its own costs; that the allowance might include payment in return for work - "*remuneration*" as a matter of ordinary English - does not mean that it is "*remuneration*" for all purposes and in every context: in particular, it is not "*remuneration*" determined under Part 18 and payable in accordance with the Act and Rules as one of the "*expenses*" of the administration properly so called;

70.6. similarly, where an application is made under paragraph 71 of Schedule B1 in respect of fixed charge property, the court has power, in the determination of the "*net proceeds*" to provide for an allowance payable to the administrator in respect of his work, and his expenses; again, there is a sense in which the administrator may, by those means, come to receive "*remuneration*" as a result

of work done in his capacity as an administrator - but again, that payment is not of "*remuneration*" determined under Part 18 and payable as an "*expense*" of the administration, properly so called;

70.7. aside from paragraph 71, if an administrator is to realise property subject to a fixed charge, he does so with the agreement of the secured creditor, whose rights are unaffected; furthermore, if he does so, his costs, including his "*remuneration*", although incurred or charged in his capacity as administrator, are only payable from or chargeable on the fixed charge property, if at all, by agreement with the charge holder, as a cost of realisation – the creditor's agreement is the *only* source of his right to payment; again therefore, his "*remuneration*" in this respect is *not* fixed under Part 18, and is *not* therefore subject to challenge under rule 18.34 (which is an integral part of the machinery provided for determination of remuneration as a statutory "*expense*", but no more – the rule has no broader operation or relevance); it is not that the word "*remuneration*" is inherently incapable of referring to a reward agreed in connection with the realisation of charged property, it is that the remuneration agreed in connection with an administrator realising property subject to a fixed charge is not within Part 18.

71. That conclusion is sufficient to dispose of these Applications (and indeed, to strike them out, on Mr Ridgley's application of 11 July 2023): Mr Ridgley's remuneration and expenses, agreed with Mr Colin as a cost of selling the Land, which was property subject to a fixed charge, was neither fixed nor determined under Part 18, and cannot be challenged under rule 18.34.

72. Mr Harty sought to challenge that conclusion.

73. First, he placed reliance on the provisions of rule 18.38, which states:

> "(*1*) ***[Calculation unless otherwise agreed]*** *A liquidator or trustee who realises assets on behalf of a secured creditor is entitled to such sum by way of remuneration as is arrived at as follows, unless the liquidator or trustee has agreed otherwise with the secured creditor–*
>
> *(a) in a winding up–*

(i) where the assets are subject to a charge which when created was a mortgage or a fixed charge, such sum as is arrived at by applying the realisation scale in Schedule 11 to the monies received in respect of the assets realised (including any sums received in respect of Value Added Tax on them but after deducting any sums spent out of money received in carrying on the business of the company),

(ii) where the assets are subject to a charge which when created was a floating charge such sum as is arrived at by–

(aa) first applying the realisation scale in Schedule 11 to monies received by the liquidator from the realisation of the assets (including any Value Added Tax on the realisation but ignoring any sums received which are spent in carrying on the business of the company),

(bb) then by adding to the sum arrived at under sub-paragraph (a)(ii)(aa) such sum as is arrived at by applying the distribution scale in Schedule 11 to the value of the assets distributed to the holder of the charge and payments made in respect of preferential debts; or

(b) in a bankruptcy such sum as is arrived at by applying the realisation scale in Schedule 11 to the monies received in respect of the assets realised (including any Value Added Tax on them)."

(2) ***[Remuneration from proceeds realised]*** *The sum to which the liquidator or trustee is entitled must be taken out of the proceeds of the realisation.*"

74. According to Mr Harty, this rule illustrates, in particular, that references in Part 18 to "*remuneration*", including in rule 18.34, should be construed broadly, or at least sufficiently broadly to include remuneration charged in respect of the realisation of fixed charge property, and thus supports the argument that an application under rule 18.34 is an appropriate means of complaining about the amount of such remuneration.

75. I do not agree with that submission, for the following reasons:

75.1. subject to any agreement between the office holder and the secured creditor, the rule fixes the office holder's remuneration payable in connection with the

realisation of charged property "*on behalf of a secured creditor*" (language which echoes that of the judge in Re Berkeley Applegate in the passage set out above at [54]) and provides that it "*must be taken*" from the proceeds of realisation;

75.2. it is not clear whether that payment would be made in priority to any payment from floating charge assets of the liquidator's other expenses, generally incurred, insofar as they are payable from those assets under section 176ZA, but that would certainly appear to be at least arguable, if not likely; in other words, that the remuneration fixed under rule 18.38 is a first charge on the proceeds, payable whether or not section 176ZA is applicable (because of an insufficiency of free assets) and payable in priority to the expenses otherwise and generally incurred by the office holder insofar as payable from that property;

75.3. the rule does not allow for expenses and remuneration incurred otherwise than in the course of realisation to be paid from fixed charge assets, nor does it apply in an administration; in an administration, if a floating charge asset is realised under paragraph 70, the administrator's remuneration would appear to be as fixed under Part 18, and if a fixed charge property is realised, it will (and can only) be fixed under either paragraph 71, by the court, or by agreement between the administrator and the fixed charge holder as in the present case;

75.4. essentially, in the context of liquidation and bankruptcy, but not administration, the purpose of the rule is to fix - albeit explicitly subject to any agreement between the parties - a particular variety of expense payable from a particular fund, probably as a first charge on that fund;

75.5. rule 18.38 comes after rule 18.34, at the very end of Part 18, and the absence from rule 18.34(1)(b) of any reference to rule 18.38, means that in any event, no complaint can be made under rule 18.34 about the basis of remuneration fixed under rule 18.38 – even if fixed by reference to an agreement made between the office holder and the charge holder;

75.6. given that no complaint can be made under rule 18.34 about the basis of remuneration under rule 18.38 - even if fixed by agreement - it would be curious

if complaint could be made that such remuneration and/or expenses incurred were nonetheless excessive "*in all the circumstances*" under rule 18.34(1)(a) or (c);

75.7. more likely is that rule 18.38 is a self-contained means of calculating remuneration in the particular cases which it governs, and that there is no scope for challenging its effect under rule 18.34; as in Re Berkeley Applegate, and under paragraph 71, the sum in question is treated as an inevitable or inescapable burden on the creditor's right to realise the charged property; in principle, if necessary, a challenge to such an agreement might be made in accordance with the principles set out below at [83]-[88];

75.8. but in any event, whether or not (which I do not need to decide) such a challenge could be made under rule 18.34 in the context of a liquidation or bankruptcy (in respect of which the legislature has seen fit to make some provision for remuneration under rule 18.38) it does not persuade me that rule 18.34 should be expanded to allow for complaints about an administrator's remuneration or expenses incurred in respect of the realisation of fixed charge assets (in respect of which no provision has been made) - and certainly not, as in the present case, that it should be read to permit a complaint about the agreed basis of an administrator's "*remuneration*" in that context, which would be to confer a right greater than that even arguably conferred in the context of a liquidation or bankruptcy.

76. Second, Mr Harty submitted that the only effect of the realisation costs agreement between Mr Colin and Mr Ridgely was as to the order of priority of payment from the proceeds of sale of the Land, allowing for Mr Ridgley's agreed "*remuneration*" (subject to the same rules and principles and challenges as all other remuneration, including under rule 18.34) to be paid in priority to the distribution of proceeds to Mr Colin as security trustee.

77. That argument is not correct: the realisation costs agreement had nothing to do with priority; without agreement (leaving aside paragraph 71 of Schedule B1) Mr Ridgely had no right at all to any payment of any sum from the proceeds of sale; the agreement did not change the order of priority of payment of a chargeable expense, it created a new

right to payment where no such right had previously existed (or could have existed without court order); the argument based on priorities was based on a misconception similar to that which was identified by Lord Millett in the House of Lords in Re Leyland Daf, and referred to at [31] above; in that case, the real issue was not about the order of priority as between expenses and preferential debts, but about whether expenses were payable at all from floating charge assets; in the present case, the agreement was not about the order of priority of payment as between remuneration and the debt due to the secured creditor, it was about the administrator's right to any payment at all from a particular class of property.

78. Associated with that argument, Mr Harty suggested that an administrator's agreement with a fixed charge creditor could not be for remuneration in a sum greater than that fixed by means of the processes provided for by Part 18. Again, that cannot be correct: first, because there is no reason to think that the realisation of fixed charge property should necessarily be remunerated on the same basis (or no more generous basis) that an administrator's services otherwise, and second, because the secured creditor would not have been involved in the Part 18 process. To impose the Part 18 determination on the administrator and creditor in this different context would create an artificial and unprincipled ceiling, as well as being unjustified on the language of the provisions.

79. Finally, Mr Harty submitted that the objection to the use of rule 18.34 was no more than an arid point of procedure, given that an interested party, as indeed Mr Weaver accepted, ought to be permitted by some means to challenge an agreement made by an administrator for remuneration in respect of fixed charge property realisation, payable from the realisation proceeds.

80. I agree that in principle some such challenge ought to be, and is, capable of being made: there is no lacuna.

81. An agreement and payment of the sort in issue in the present case might adversely affect unsecured and floating charge creditors in two different circumstances.

    81.1. First, where there is a sale of the property, and there is a surplus after taking account of the costs of realisation, and after payment of the net proceeds to the secured creditor, the unsecured creditors and floating charge creditors would

potentially be affected by the agreement because the amount of that surplus, otherwise available for the purposes of the administration or liquidation, will be affected by the amount of the agreed remuneration and other costs, and unfairly diminished by an unduly generous payment.

81.2. Second, where there is no such surplus, the (formerly) secured creditor is entitled to maintain his debt, to that extent unsecured, and to claim payment accordingly; in that case, an unduly generous payment to the administrator will prejudice other unsecured creditors whose rights are to that extent diluted, because the total sum of the unsecured debts is greater than ought to have been the case.

82. Whilst it is not for this judgment to describe precisely the possible means and features of a challenge (and in any event, neither counsel made full submissions enabling the court to do so) it is important to identify some such means in order to meet the objection made by Mr Harty to a construction of rule 18.34 that excludes that rule as a means of pursuing a relevant complaint. The following (at least) seem to me to be routes and bases available to an adversely affected person.

83. First, under paragraph 74 of Schedule B1, a creditor of a company in administration may apply to the court claiming that the administrator has acted so as "*unfairly to harm* [his] *interests*". The court has a broad discretion to make any order it thinks appropriate. In principle, it seems to me that it would open to a creditor claimant to complain under this provision about the adverse consequences of an agreement between an administrator and a fixed charge secured creditor, albeit that the application would obviously be governed by the particular principles relevant to the power.

84. Second, an application may be made under paragraph 75, including by a creditor, alleging misfeasance against an administrator, or a breach of fiduciary or other duty, or that the administrator has misapplied, or retained, or become accountable for some property of the company. Again, in principle, it seems to me that it would open to a creditor claimant to complain under this provision about an agreement between an administrator and a fixed charge secured creditor relating to costs and remuneration.

85. Third, it was held in Re Hotel Company 42 The Calls Limited [2013] EWHC 3925, by HHJ Purle QC (or at any rate, he was "*inclined to the view*") that under the court's "*inherent jurisdiction*", a member of a company in administration might, in an appropriate case, have standing to apply for an assessment by the court of an administrator's remuneration. The case involved a company, in administration, which had been rescued as a going concern. The administration was therefore to be brought to an end (and returned to its directors and shareholder - its "*controllers*") subject to various outstanding issues, including in respect of the administrators' remuneration. In that context, the judge said, at [13]-[17]:

> "*13. … [I]t is said by the controllers that the remuneration sought by the administrators is excessive, and, moreover, that the administrators are, because of their alleged misconduct in office, entitled to no remuneration.*
>
> *14. Since the present applications were brought, a further application has been brought under paras 74 and 75 of Sch.B1, under which the shareholder, JJW Ltd, and a director, Mr Al Jaber, claim that there has been unfair harm and misfeasance by, amongst other things, the charging of excessive remuneration. That is something for which relief can be given to a member or creditor under para.74, or to a creditor or contributory under para.75. I have no doubt that if it is established that excessive remuneration has been charged, relief could be given under one or other or both of those paragraphs.*
>
> *15. There is a separate application to determine remuneration brought by Mr Al Jaber, claiming to be a creditor, and JJW Ltd, as a member. Leaving aside the provisions of paras 74 and 75, there is no express power for the court to determine remuneration upon the application of a member alone, and the status of the creditor, Mr Al Jaber, may be questioned as he purports to have waived his debt. I say purports, because the waiver was expressed to retain voting rights, which seems something of a contradiction. It may well be that the waiver is not fully effective, though I am not deciding the point. Be that as it may, there is no doubt that the connected creditors are not pressing for payment of their debts, and that the waiver could be made fully effective, if need be.*

16. I am inclined to the view that there is an inherent power in the court, in an appropriate case, to order administrators' remuneration to be assessed upon the application of a shareholder. It might be appropriate to do so, for example, in the case of a company whose assets exceed its liabilities, even though it may previously have been cash-flow insolvent, That must in my judgment follow from the court's power to direct administrators generally. Otherwise there would be an unacceptable lacuna in the statutory scheme. Rule 2.109 of the Insolvency Rules 1986 (SI 1986/1925) as amended presently contains provisions enabling creditors to challenge remuneration and expenses but is silent on the rights of shareholders in that regard.

17. The reason only creditors are mentioned in terms in the Insolvency Rules is presumably because ordinarily the dismal reality is that the only people interested in an administration are the company's creditors, but that is not necessarily so in every case, including this one. There is no doubt that the shareholder also is interested. However, I need not be troubled by the omission of any express reference to shareholders in r.2.109 because there is, as I have said, the application under paras 74 and 75, and it presently seems to me the level of remuneration is going to have to be considered and determined in those proceedings …".

86. As at the date of that decision, rule 2.109(1) stated that, "*Any secured creditor, or any unsecured creditor with either the concurrence of at least 10% in value of the unsecured creditors (including that creditor) or the permission of the court, may apply to the court*" to challenge an administrator's remuneration, but (in common with the current rule 18.34) it made no provision for an application by a company member.

87. From that passage, I take the following: first, that, as I have said, the court has powers appropriate to consider allegedly excessive costs and remuneration under paragraphs 74 and 75 of Schedule B1; second, that in an "*appropriate*" case, the court might be minded to allow (in substance, relying on its power to control administrators generally) a remuneration application to be made by a person other than those mentioned at (what is now) rule 18.34, in particular a member, and assuming some real interest in the outcome.

88. Fourth, an administrator is an officer of the court, by virtue of paragraph 5 of Schedule B1, and therefore subject to an obligation to act honourably and fairly – sometimes referred to as the rule in Ex parte James (1874) LR 9 Ch App 609 (and see Lehman Brothers Australia Limited v MacNamara [2020] EWCA Civ 321, at [68], *per* Richards LJ as he then was). A breach of that duty could, albeit perhaps by means of an application under paragraph 74 or 75, provide a further means of challenge in the present context.

89. These available bases of challenge (certainly the first, second and fourth) raise, in principle, the possibility of different issues of substance from those raised on the application presently made under rule 18.34. It is, for example, one thing to allege that an office holder's remuneration is "*excessive*" according to the principles in Part 6 of the IPD, but another quite different thing to allege that the office holder has acted in breach of duty, or unfairly to harm an applicant's interests. Those issues have not been explored on the Applications before me, although in connection with the present dispute, the alternative bases would have been appropriate in substance, because they would have caused the Applicants to engage with the fact of the realisation costs agreement itself, made between Mr Ridgley and Mr Colin in respect of property effectively controlled by Mr Colin as a creditor secured by a fixed charge, and allowed for a determination of the Applicants' allegations surrounding their conduct in respect of that agreement, allegations that otherwise sit unresolved beneath the surface.

90. Although the decision in Re Hotel Company 42 The Calls Limited contemplated a limited expansion of the class of potential complainants, it did so in circumstances where, in substance, a remuneration application under (the equivalent of) rule 18.34 was otherwise potentially appropriate - which in the present case, for the reasons I have explained, it was not.

91. Accordingly, none of these submissions persuade me that in the present case, a rule 18.34 application was appropriate. The realisation costs agreement was made between Mr Colin and Mr Ridgley outside and without reference to the provisions of Part 18; it did not provide for or fix "*remuneration*" in the sense of that which is determined and payable as an "*expense*" of the administration under the Act and Rules, and is not therefore subject to challenge pursuant to those same provisions.

The Second Issue: Rule 18.34(3) and the Relevant Time Limit

92. Rule 18.34(3) provides that an application to challenge remuneration pursuant to rule 18.34 "*must be made no later than eight weeks after receipt by the applicant of the progress report under rule 18.3, or final report or account under rule 18.14 which first reports the charging of the remuneration or the incurring of the expenses in question*". The rule therefore turns on two points of fact:

    92.1. first, the actual date of receipt by the applicant of a particular variety of formal document; and,

    92.2. second, the inclusion in that document of a statement (reported in such a document for the first time) that remuneration or expenses have been charged or incurred.

    From that date, for 8 weeks, a reasonably short period, time runs.

93. In the present case, the Applicants first issued applications on 23 December 2022 seeking an extension of time (to 31 January 2023) within which to apply under rule 18.34, and then again, on 31 January 2023, issued applications to extend time to the later of either the determination of any application for specific disclosure issued by the First Applicant or the determination of the Applicants' application for disclosure of certain documents dated 24 February 2023. In the event, the Applications themselves were issued on 19 May 2023.

94. In Re Calibre Solicitors Ltd [2015] BPIR 435, Registrar Jones (as he then was) said at [8]-[10], in connection with the operation of rule 2.109(1B) of the Insolvency Rules 1986 (the predecessor of rule 18.34(3)):

> "*8. It is plain from that scheme that each progress report will deal with the remuneration charged and expenses* ***incurred for the period it covers****. It is equally plain from the wording of Rule 2.109(1B) that the 8 week period within which to challenge remuneration and expenditure applies to the specific report which details the remuneration and expenses being challenged. This is the ordinary meaning of the words used and there is no other purposive construction or other Rule to gainsay these conclusions. It is consistent with the*

fact that Rule 2.109 (1A) refers to remuneration charged and expenses incurred rather than to future remuneration and expenses.

9. Furthermore there is good purpose behind this requirement. It should not be assumed that because remuneration/expenses in one progress report are challenged, the remuneration/expenses in other progress reports will also be challengeable. This is particularly so when an "excessive" test is to be applied. It is right for each amount to be scrutinised and for a separate decision to be taken before issuing the challenge.

10. It follows there must be one application for each report. Justice Capital Limited cannot rely upon the First Report to challenge the remuneration and expenses detailed in the Second Report. …"

95. The words emphasised above - and in this respect there was no issue between the parties - show that the relevant report, in order to start time running, must not merely state that remuneration and expenses have been charged or incurred, but that they have been charged or incurred within the period covered by the report. That requirement contains two elements: first, that in fact, within the period, the remuneration and costs were charged and incurred, and second, that the report states that fact.

96. Registrar Jones also held (at [19], in consequence of rule 12A55(2) of the Insolvency Rules 1986 (now contained at paragraph 3 of Schedule 5 to the Rules)) that the court's general powers of case management under CPR 3.1(2)(a) applied to applications to challenge an office-holder's remuneration and expenses such that the court had the power, if appropriate, to extend time for an application to challenge remuneration, subject to the same considerations as under the CPR, including the principles in Denton v TH White [2014] EWCA Civ 906.

97. As stated above, by his Progress Report for the period ending 28 September 2022 (signed on 26 October 2022) Mr Ridgley stated, at paragraph 6.4, that whilst *at the end of the reporting period, there had been no remuneration drawn. Since that date however, based on the overall fixed charge realisations achieved so far of £35,000,000.00 and the fee structure above, total remuneration across the two estates has become payable of £2,750,000.00.*"

98. On that basis, Mr Weaver submitted that whilst remuneration and expenses were not drawn until after the reporting period, they were charged and incurred immediately following the sale on 9 September 2022, and, as such, within the reporting period, meaning that time began to run on receipt of the Report (filed at court on 26 October 2022) and expired on 21 December 2022, before the first extension application, which was issued on 23 December 2022.

99. Mr Harty submitted that Mr Ridgley's remuneration, and the challenged costs, were not reported in the relevant sense, as having been charged and incurred in a defined reporting period, until Mr Ridgley's Final Progress Reports filed on 5 April 2023, in respect of the period to 27 March 2023, in which he said, in respect of OEPAL, at paragraphs 5.3-5.5, under "*Fixed Charge Realisation Costs*" (in terms substantially repeated in the Report concerning OPAL):

> "*5.3 As disclosed in my previous progress report, based on the overall fixed charge realisations achieved so at that time of £35,000,000.00 and the fee structure above, total remuneration across the two estates became payable of £2,750,000.00. Based on the apportionments of the asset values in the asset sale agreement this has meant the administrator's remuneration of £1,203,400 has become payable in respect of OEPAL and £1,546,600 in respect of OPAL.*
>
> *5.4 In addition to this, as a result of the receipt of a further £100,000 in relation to the sale of the cottage during the period, a further sum of £15,000 became payable.*
>
> *5.5 Therefore, total fixed charge realisation fees were drawn in the sum of £1,218,400 were drawn during the reporting period*."

100. I accept Mr Harty's submission in this respect. I do not read the Progress Report for the period ending 28 September 2022 as containing a statement that within the reporting period Mr Ridgley's remuneration and costs in respect of the Land's sale on 9 September 2022 had been charged and incurred (whether or not in fact they were). Time did not therefore begin to run until receipt of the Final Report filed on 5 April 2023 (which I take to be the earliest date on which it might have been received by the Applicants); 8 weeks from that date was 31 May 2023; the Applications were issued on 19 May 2023, and

were therefore issued in time. In those circumstances, there is no need to decide whether or not an extension of time would have been justified.

The Third Issue: Estoppel and Standing

101. Mr Weaver submitted that Mr Colin, as security trustee, was estopped by convention from challenging the realisation costs agreement made by his predecessor. His argument was that the parties intended that Mr Ridgley and Howes Percival would rely on the terms of the agreement and that, in relying on that agreement and undertaking work to sell the Companies' fixed charge assets, as they did, they acted to their detriment.

102. Mr Weaver relied upon the statement of the principles in Chitty on Contracts, 35th Ed, at 7-016 to 7-028. At paragraph 7-017, the citation by Lord Burrows in Tinkler v Revenue and Customs Commissioners [2021] UKSC 39 at [45] of Briggs J's decision in Revenue and Customs Commissioners v Benchdollar Ltd [2009] EWHC 1310 (Ch) at [52] is set out as follows:

> "*(i) It is not enough that the common assumption upon which the estoppel is based is merely understood by the parties in the same way. It must be expressly shared between them. (ii) The expression of the common assumption by the party alleged to be estopped must be such that he may properly be said to have assumed some element of responsibility for it, in the sense of conveying to the other party an understanding that he expected the other party to rely upon it. (iii) The person alleging the estoppel must in fact have relied upon the common assumption, to a sufficient extent, rather than merely upon his own independent view of the matter. (iv) That reliance must have occurred in connection with some subsequent mutual dealing between the parties. (v) Some detriment must thereby have been suffered by the person alleging the estoppel, or benefit thereby have been conferred upon the person alleged to be estopped, sufficient to make it unjust or unconscionable for the latter to assert the true legal (or factual) position*."

103. I do not accept that an estoppel by convention has been established, or indeed, that there was any need or any room for such an estoppel. In particular, as framed, the submission was based not on an alleged representation or assumption that the agreement would not be challenged, but on the alleged assumption that remuneration and costs would be paid

on certain terms – an assumption from which it was suggested that Mr Pagden could not depart: in other words, the point of the submission was to prevent Mr Colin (and now Mr Pagden) from denying the very fact of the agreement, in order (presumably) "*to assert the true legal (or factual) position*", that no such agreement was made.

104. However, that submission was unnecessary: there was no dispute that the agreement was made. Furthermore, in my judgment that agreement must have been contractually binding: as I have said, without the agreement of the security trustee, Mr Ridgley simply had no right (without a court order) to receive payment of any sum from the proceeds of the Land's sale (or indeed to retain it as against either Mr Colin or Mr Pagden); that agreement, when it was made, must have been contractual. If A contracts with B, it is not because of an estoppel that A (or A's successor in title) is unable to challenge the effect of the agreement; it is because A is a contracting party (and his successor is similarly bound).

105. Nonetheless, in those circumstances, the point in substance raised by Mr Weaver was whether Mr Pagden is able to challenge the effect of the agreement made by his predecessor, without setting aside that agreement, or alleging some breach of duty in respect of which compensation or an award of some other sort might be made. It was not clear to me that he could do so; it was not clear to me that Mr Pagden (as against Mr Ridgley, the other party to the agreement) could complain about the agreement's consequences, any more than his immediate predecessor, Mr Colin, could have done so, had he one day come to regret its terms; the problem was not one of standing or estoppel, but simply that he is bound by the agreement. As against Mr Pagden, independently of my conclusions regarding the scope of rule 18.34, this is a further basis on which to dismiss the Applications.

106. The Second and Third Applicants are Messrs Miller and Katz, as the joint administrators of OAT. OAT was said to have standing to challenge the agreed remuneration and costs because it is an unsecured creditor of OEPAL. Two issues arose.

107. First, although OAT is an unsecured creditor of OEPAL with a potential interest in the outcome of the Applications (and had rule 18.34 been applicable, with standing as an "*unsecured creditor*" under rule 18.34(2)(b)), Messrs Miller and Katz are not; as a result, as matters stand, and albeit the problem may be soluble, I am not persuaded that they

have standing (and for the same reason, they would not for example have standing to apply under either paragraph 74 or 75 of Schedule B1).

108. Second, given that the Land was sold for £35 million, and given that the debt due to the fixed charge secured creditors was far in excess of that sum, the only interest of OAT in the success of the Applications was if and to the extent that the value of its claim to payment of a dividend in OEPAL's administration, or subsequent liquidation, was diluted by virtue of the security trustee's unsecured claim being in a sum greater than ought properly or fairly to have been the case, having not been reduced only to the extent of a fair or proper agreement concerning the costs of selling the Land. In other words, its potential interest was in reducing the scale of competition to payment from assets available to OEPAL for distribution amongst its unsecured creditors.

109. However, it was far from clear that there will be any such assets; indeed, from what I was told, their future existence would seem to depend on claims being successfully advanced on OEPAL's behalf or for its benefit, for example, against its former directors, all of which are more or less speculative. Furthermore, it was common ground that were the claims against Mr Ridgley to have succeeded, any recoveries would have been paid and held to the benefit of OEPAL's creditors secured by the fixed charges on the Land. Success would bring no immediate benefit to OAT; any financial benefit would be long deferred. In other words, in substance, the Applications were most obviously brought for the benefit of the bondholders by their representative, Mr Pagden (who unfortunately, from their perspective, as I have said, continues to be bound by Mr Colin's agreement).

110. Nonetheless, as regards OAT, despite these evident difficulties, I would not have dismissed the Applications (certainly had they been brought by OAT, or OAT were to be added as a party) on grounds that OAT has no interest in their outcome. Mr Harty submitted that the point had not been explicitly raised in the evidence, and that had it been, it would have been more substantially answered; in the circumstances, very slight though its economic interest in these Applications appears to be, there was not the evidence before me to find that it does not exist, and more than that, there was not a fully developed case that it does not exist and that as a result, the Applications ought to be dismissed.

Disposal

111. For the reasons stated, the Applications are dismissed: the court has no power under rule 18.34 of the Rules to review or determine the costs and remuneration of an administrator where they have been expressly agreed with the holder of a fixed charge security in respect of the realisation costs of that security, payable from the proceeds of its sale. In the present case, Mr Pagden is in any event bound by the agreement made by Mr Colin, his immediate predecessor as security trustee, which on these Applications, without cross-examination (or disclosure, and possibly statements of case) cannot be set aside or disregarded. Although other means of advancing a challenge exist, for example, under paragraphs 74 and/or 75 of Schedule B1 to the Act, they would raise different issues of substance to those raised by the Applications as made, which were principally by reference to the provisions of the IPD.

Dated: 28 November 2024