Neutral Citation Number: [2018] EWHC 1936 (Ch)

Case No: CR-2018-000182

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

IN THE MATTER OF: ZINC HOTELS (HOLDINGS) LIMITED; ZINC HOTELS FREEHOLDS LIMITED; ZINC HOTELS LIMITED; ZINC CROYDON 1 LIMITED; ZINC CROYDON 2 LIMITED; ZINC EAST MIDLANDS AIRPORT 1 LIMITED; ZINC EAST MIDLANDS AIRPORT 2 LIMITED; ZINC LEEDS CITY 1 LIMITED; ZINC LEEDS CITY 2 LIMITED; ZINC LONDON KENSINGTON 1 LIMITED; ZINC LONDON KENSINGTON 2 LIMITED; ZINC WATFORD 1 LIMITED; ZINC WATFORD 2 LIMITED; ZINC PUCKRUP HALL 1 LIMITED; ZINC PUCKRUP HALL 2 LIMITED; ZINC PUCKRUP HALL 3 LIMITED; ZINC PUCKRUP HALL 4 LIMITED; ZINC NORTHAMPTON 1 LIMITED; ZINC NORTHAMPTON 2 LIMITED; ZINC COBHAM 1 LIMITED; ZINC COBHAM 2 LIMITED; ZINC NOTTINGHAM 1 LIMITED; ZINC NOTTINGHAM 2 LIMITED; ZINC YORK 1 LIMITED; ZINC YORK 2 LIMITED (ALL IN ADMINISTRATION)

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 20th July 2018

Before :

Mr Justice Henry Carr

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Between :

1) ZINC HOTELS (INVESTMENT) LIMITED
2) TOP ZINC LIMITED

Applicants

-and-

1) ALASTAIR BEVERIDGE
2) RYAN GRANT
3) CATHERINE WILLIAMSON
4) DANIEL IMISON
(Joint Administrators of the above-named companies)
5) FCCO DESIGNATED ACTIVITY COMPANY
6) FCCD DESIGNATED ACTIVITY COMPANY
7) GLOBAL LOAN AGENCY SERVICES LIMITED
8) GLAS TRUST CORPORATION LIMITED
9) HAYFIN OPAL III LP
10) HAYFIN OPAL LUXCO 2 SARL

11) HAYFIN TOPAZ LUXCO 2 SCA
12) HAYFIN SPECIAL OPS LUXCO 2 SARL

Respondents

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Stephen Davies QC and Rowena Page (instructed by **Clarion Solicitors Limited**) for the **Applicants**
Tom Smith QC and Hannah Thornley (instructed by **Freshfields Bruckhaus Deringer LLP**) for the **Respondents 1-4**
David Alexander QC and Alex Barden (instructed by **Sidley Austin LLP**) for the **Respondents 5-6**
Marcia Shekerdemian QC and Joseph Curl (instructed by **Proskauer Rose (UK) LLP**) for the **Respondents 7-8**
Guy Morpuss QC and Christopher Charlton (instructed by **Macfarlanes LLP**) for the **Respondents 9-12**

Hearing dates: 10th, 11th and 12th July 2018

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APPROVED JUDGMENT

MR JUSTICE HENRY CARR:

Introduction

1. The Applicants, ("the Shareholders"), are the ultimate shareholders of 25 companies in the Zinc Group of companies ("the Zinc Companies"). On 9 January 2018, AlixPartners LLP, ("AlixPartners"), were appointed by the secured creditors of the companies as joint administrators of the Zinc Companies ("the Administrators").
2. By an application dated 12 April 2018, ("the Main Application"), the Shareholders have sought relief in relation to the administrations, including an order for the removal of the Administrators under paragraph 88 of Schedule B1 of the Insolvency Act 1986 ("the 1986 Act"), and other relief under paragraphs 74 and 75 of Schedule B1 of the 1986 Act.
3. In particular, the Shareholders claim that unfair harm has been caused, or will be caused, by the Administrators. They seek their replacement. They also allege that the Administrators lack independence due to their previous engagement by, and allegedly close relationship with, the secured creditors.
4. All allegations made against the Administrators are strongly denied. The Administrators contend that they have performed, and are continuing to perform, their duties properly. They claim that they are seeking to realise the assets of the Zinc Companies in accordance with the statutory objectives of administration. They have considered the Shareholders' allegations, which they reject. The Administrators claim that they face competing demands as to how they should proceed: on the one hand from the Shareholders, and on the other hand from the lenders, who are owed hundreds of millions of pounds of unpaid debt. It is alleged by the Administrators that the Shareholders are seeking to disrupt and delay the sales process in order to pressurise the lenders to reduce the amount of the debt, which they are not willing to do. The Administrators consider that their duties require them to proceed to realise the Zinc Companies' assets.

5. At a directions hearing for the Main Application, held on 23 May 2018, the Shareholders indicated that they intended to apply for interim orders under paragraph 74(3)(d), and paragraph 74(4)(b) of Schedule B1. In particular, by their interim application, the Shareholders seek two orders.

    (1) First, an order appointing *"additional concurrent joint administrators"*. According to the order sought, the function of the additional administrators will be *"to represent the interests of contributories/shareholders for the purpose of achieving the statutory purpose of the administrations"*; and

    (2) Secondly, an order restraining the Administrators from distributing the proceeds of any assets realised in the administrations pending the resolution of certain legal claims.

6. This judgment concerns the interim application. The interim application was expedited, and its resolution is urgent. I reserved judgment for a short period and I am now delivering an oral judgment.

The Background Facts

7. The Zinc Companies hold the freehold and long leasehold titles to 10 hotels which trade under the Hilton brand ("the Hotels"). These comprise the Kensington Hilton and nine other Hilton hotels in different parts of the country, ("the Regional Nine").

8. The beneficial interest in the long leaseholds is held by Zinc Hotels Limited, ("ZHL"), and the Hotels are leased under occupational leases to companies in the Hilton group.

9. The First Applicant is the sole shareholder of Zinc Hotels (Holdings) Limited, ("ZHHL"), which is the sole shareholder of ZHL. The Second Applicant is the sole shareholder of the First Applicant. The Applicants are controlled by Mr Vincent Tchenguiz and Mr Dror Pasher.

10. Prior to 2002, the Hotels were owned by the Hilton Group. In August 2002, they were subject to a sale and leaseback transaction. The current financing arrangements were put in place pursuant to a restructuring which took place in 2014 and which included:

(1) A £249,948,351 term loan facility dated 11 November 2014 between ZHL as borrower and the lenders, ("the 2014 Facility"), which was repayable on 10 July 2017;

(2) A debenture dated 11 November 2014 granted by ZHL and other companies in the Zinc group as guarantors in favour of GLAS Trust Corporation Limited as security trustee, ("the Security Agent"). This comprises legal mortgages and fixed and floating charges over the property of the chargors, including the Hotels; and

(3) Interest rate and inflation rate swaps which were entered into between ZHL and one of the lenders, Bayerische Landesbank, ("BLB"), ("the Swaps").

11. BLB remains a secured creditor and there are two other secured creditors who appeared before me on this application known as "Fortress" and "Hayfin" (being the Fifth and Sixth Respondents and the Ninth to Twelfth Respondents respectively). They acquired their interest in 2015 from certain of the original lenders. It is not in dispute that, during 2017, various events of default occurred under the 2014 Facility, including a failure to repay the outstanding principal and accrued interest on the repayment date of 10 July 2017. This very substantial debt has been due and has remained unpaid for over a year.

12. On 9 January 2018, certain partners of AlixPartners were appointed as administrators of ZHL and 24 other companies in the Zinc Group. The appointments were made by the Security Agent as the holder of qualifying floating charges pursuant to paragraph 14 of Schedule B1 to the 1986 Act. By the date of the appointments, the 2014 Facility had been in default for about six months. Originally, Alastair Beveridge, Ryan Grant and Catherine Williamson were appointed. Daniel Imison, who has served witness statements on this application, replaced Ryan Grant in March 2018 pursuant to a block transfer order, when Mr Grant left AlixPartners.

13. Prior to the appointment of the Administrators, AlixPartners had been engaged by the lenders to undertake a contingency planning exercise, including preparing to accept an appointment as administrators of companies in the Zinc Group, if that proved to be necessary. This forms an

important aspect to the Shareholders' complaint of a conflict of interest on the part of the Administrators.

14. Prior to the administration, in 2016 and 2017, a sales and marketing process was undertaken in respect of the Hotels. At that time, the process was under the control of the Zinc Companies. During the 2016 marketing process, a verbal offer of £267 million was made by Cola Holdings Limited ("Cola") for the Kensington Hilton, and during the 2017 process, non-binding heads of terms dated 6 December 2017 were entered into with Cola in respect of an offer of £261.5 million for the Kensington Hilton. The relatively modest difference between the two Cola offers was because the 2016 offer was on a share sale basis, whereas the 2017 offer was on an asset sale basis and as a result, stamp duty land tax would be payable by Cola.

15. The 2017 sales process was undertaken by Savills (UK) Limited ("Savills") and Jones Lang LaSalle Limited ("JLL"), who are of course well-known sales agents. The sales agents were appointed by the Zinc Companies. The heads of terms with Cola were entered into when the Zinc Companies were under the control of Mr Tchenguiz and Mr Pasher. In my view, this shows that, at the time, they considered the Cola offer was one which it was appropriate to accept.

16. During 2016 and 2017, Savills had expressed some views on the possible sales proceeds which might be achieved. Firstly, in a pitch in May 2016 and secondly, in a pricing overview document in 2017. The Shareholders rely on the estimates given at that time of the value of the Hotels as between £550 million and £600 million. If this sum was realised, this would produce a surplus to the Shareholders of between £50 million and £100 million. However, neither the pitch nor the pricing overview was a valuation, still less a formal valuation, undertaken in accordance with the RICS Valuation Professional Standards, which is known as the *"Red Book"*.

17. Following their appointment, the Administrators commissioned a formal "*Red Book*" valuation from Christie & Co, who are experienced and reputable hotel valuers ("the Christie & Co Valuation"). The Administrators' evidence is that this formal valuation was undertaken because the views which

had been expressed by Savills were not a valuation, let alone a formal *"Red Book"* valuation. Christie & Co were selected as they were independent. The Christie & Co Valuation indicated that the value of the Zinc Companies' assets would break within the secured debt and that there would be no return for the unsecured creditors or shareholders.

18. Since the sales process for the Hotels is currently ongoing, the Christie & Co Valuation is regarded by the Administrators as confidential. Understandably, the Administrators do not wish bidders to have the benefit of being aware of the confidential valuations provided to the Administrators.

19. The Christie & Co Valuation has therefore been disclosed and exhibited in redacted form by the Administrators. Mr Mark Payne served witness statements on this application on behalf of the Shareholders. He is an assistant to the directors of the applicant companies.

20. At paragraph 53 of his third statement, Mr Payne suggested that the Administrators had *"concealed"* the details of the Christie & Co Valuation from the Shareholders. In reliance upon this evidence, it was alleged by Mr Davies QC, on behalf of the Shareholders, at paragraph 100(b)(iv) of his skeleton argument, that the Administrators would not disclose the contents of the Christie & Co Valuation.

21. In fact, some four days before Mr Payne made his third witness statement, solicitors for the Administrators had offered to disclose an unredacted form of the Christie & Co Valuation to the confidentiality club, which included representatives of the Shareholders and which had been formed for the purpose of these proceedings. Therefore, the allegation of concealment, which was a serious one, was misconceived and should never have been made. It was withdrawn by Mr Davies during his reply speech.

22. The liabilities of the Zinc companies as at 9 January 2018 comprised:

    (1) About £519 million of secured liabilities, being about £275 million owing under the 2014 facility and about £244 million, being the mark-to-market valuation of the liabilities under the swaps; and

(2) About £3.5 million of unsecured liabilities.

23. Against this background, the Administrators produced their statement of proposals for the administrations dated 2 March 2018. The proposals were the subject of very strong criticism by the Shareholders. It was alleged that no reasonable, independent administrator properly advised, could have formulated the proposals. It was said that either the proposals were formulated without regard to key considerations, or they were based on a perverse conclusion, not available to the Administrators on the evidence.

The Administrators' Proposals.

24. The objectives of administration are set out in paragraph 3 of Schedule B1 of the 1986 Act.

    Paragraph 3 of Schedule B1 provides:

> "(1) The administrator of a company must perform his functions with the objective of
> "(a) rescuing the company as a going concern, or
> "(b) achieving a better result for the company's creditors as a whole than would be likely if the company were wound up (without first being in administration), or
> "(c) realising property in order to make a distribution to one or more secured or preferential creditors.
> "(2) Subject to sub-paragraph (4), the administrator of a company must perform his functions in the interests of the company's creditors as a whole.
> "(3) The administrator must perform his functions with the objective specified in sub-paragraph (1)(a) unless he thinks either
> "(a) that it is not reasonably practicable to achieve that objective, or
> "(b) that the objective specified in sub-paragraph (1)(b) would achieve a better result for the company's creditors as a whole."

25. In *Davey v Money* [2018] EWHC 766 (Ch), Snowden J explained that the first objective is concerned with achieving a result in which all creditors are paid in full and the company is restored to financial health for the benefit of its shareholders. This cannot be achieved if all of the assets of the company are sold. He said at 283:

> "The concept of rescuing a company as a going concern is not achieved by successfully realising all of its assets so that distributions of surplus

> monies can be made to shareholders after paying creditors in full. It connotes the retention of all, or a material part, of the business of the company, together with a restoration of the solvency of the company, so that the company can properly continue to trade as a going concern."

26. In the present case, the Administrators contend that there was no credible proposal for the rescue of the Zinc Companies as going concerns. Accordingly, the proposals prepared by the Administrators stated that the Administrators were of the view that it was not reasonably practicable to pursue objective 1.

27. The proposals also expressly noted that the Administrators had become aware of certain potential claims of the Zinc Companies and that, depending on a review of those claims, they might seek to revise the proposals to change the objective of the administrations. The proposals stated that the Administrators would pursue the second objective of administration, namely to seek to achieve a better result for the Zinc Companies' creditors as a whole than would be likely if the companies were wound up without first being in administration.

<u>The sales and marketing process for the Hotels</u>

28. In order to realise objective 2, the Administrators considered that it was appropriate to continue with the existing sales and marketing processes underway in respect of the Hotels, which had already been undertaken on behalf of the Zinc Companies.

29. In relation to the Kensington Hilton, after discussions with Savills and JLL, it was decided that a further marketing process was not required, given the processes which had already been undertaken and which had resulted in heads of terms being entered into. These heads of terms, as I have mentioned, were signed very shortly before the administration on 6 December 2017. Since that time, the Administrators have progressed the transaction for the sale of the Kensington Hilton to Cola and fresh heads of terms have been signed. It is anticipated that exchange of contracts will

take place very shortly and a letter giving the Applicants five days' notice of an intention to exchange has now been served by the Administrators.

30. Although the Shareholders do not seek to restrain the sale of the Kensington Hilton, the appointment of additional administrators might well have this effect. Furthermore, the Shareholders seek to restrain the disposal of any proceeds of sale. This explains why this application for interim relief is particularly urgent to resolve.

31. The process for marketing the Kensington Hilton by Savills and JLL was subject to a variety of criticisms by the Shareholders. First it was said that the Kensington Hilton was not marketed to institutional buyers. This was factually incorrect. The correct position is recorded in a recommendation letter from JLL and Savills to Zinc Hotels, in administration, care of Ryan Grant dated 16 March 2018.

32. That letter recorded that initially, the Shareholders refused their consent to the sales agents approaching institutional buyers but subsequently allowed certain named institutions to be approached, which approaches were made by the sales agents.

33. Secondly, the Shareholders complain that the Hilton Group had previously offered £110 million as a surrender premium in order to be released from liabilities under the leases, which had not been taken account of in the marketing processes. The Administrators' case is that a possible surrender premium was factored into the price, as it was with the 2017 heads of terms accepting the Cola offer, which was signed by Mr Tchenguiz prior to the administration. I shall return to this issue later in this judgment.

34. In relation to the Regional Nine, a full marketing process had been undertaken since the commencement of the administrations. Savills and JLL were engaged to undertake this process. Second-round bids were received on 14 June 2018 and a small number of bids have been retained in the process. Those bidders have now been asked to submit final bids. The Applicants and Mr Tchenguiz have been participating actively in the bidding process.

35. The Administrators' evidence is that they are satisfied that the sales and marketing processes which have been, and are being, undertaken for the Hotels are appropriate and will result in proper market value being obtained for the benefit of all stakeholders, including the Applicants.

36. The good news is that the level of bids for the Regional Nine has been such that, contrary to the initial assessment by the Administrators, there is a real possibility of there being a surplus for the Shareholders. In addition to the level of bids received, there has also been about a £7 million reduction in the secured liabilities as a result of a decline in the mark-to-market value of the liabilities under the Swaps. By about 25 May 2018, the Administrators had reached the view that there was a real possibility of a surplus for the Shareholders.

The interim application

37. The application for interim orders is made under paragraph 74(3) of Schedule B1. This provides that on an application made under paragraph 74(1), the court may:

> "a) grant relief;
> b) dismiss the application;
> c) adjourn the hearing conditionally or unconditionally;
> d) make any interim order;
> e) make any other order it thinks appropriate."

38. The first question is whether there is any power to appoint an additional interim administrator once an administration has been commenced.

39. The starting point for the Shareholders' argument that such a power exists, is that an administrator is an officer of the Court whether or not he is appointed by the Court (see in particular paragraph 5 of Schedule B1). Therefore, the Act is formulated against the backdrop of the Court's overarching power of control and management of the insolvency process. This was pointed out in *Donaldson v O'Sullivan* [2009] 1WLR 924 at 39, pages 938 A to B.

40. In the *Donaldson* case, Lloyd LJ said at 41, having reviewed the relevant case law:

> "All of those cases seem to me to support the thesis that bankruptcy is a court-controlled process in relation to which the court has wide powers exercisable for the purpose of the insolvency process as a whole, which are not limited to those conferred expressly by the relevant legislation. There are non-statutory elements in the law of bankruptcy, such as the principle in *Ex P James* LR 9 Ch App 609, even though these may result in an application of assets which is not strictly in accordance with legal rights and obligations. There is also scope for the court to direct that things be done or not done in apparent conflict with the express provisions of the legislation."

41. The Shareholders contend that the wide ambit of the Court's supervisory jurisdiction to control its officers is recognised throughout the case law. In *Re Atlantic Computer Systems plc* [1992] Ch 505 Nicholls LJ held at 543G, regarding the Court's ability to impose conditions, that:

> "It may do so directly by giving directions, or in the exercise of its control over an administrator as an officer of the court."

42. Similarly, in *Re Mirror Group Holdings Limited* [1993] BCLC 538, the Vice Chancellor said:

> "The only footnote I add is that Mr Trace contended that in any event, the court has no jurisdiction to give any directions as sought because the Insolvency Act makes no provision for an application for directions such as this. I do not accept this. As noted in *Re Atlantic Computer Systems* [1990] BCC 859 at page 881 G, the court may exercise control over the administrators as officers of the court and may give direction to that end. So the court has jurisdiction."

43. The extent of the jurisdiction has been expressly recognised in the context of paragraph 74 applications. David Richards J, as he then was, said in *Clydesdale Financial Services v Smailes* [2009] EWHC 1745 (Ch) at paragraph 15:

> "However, I have no doubt that under the general power conferred by paragraph 74(3), the court could remove an administrator and appoint a replacement."

44. It has also been recognised that there is power to appoint an additional administrator to "hold the ring" pending an application to remove the existing administrators. In *Clements v Udal* [2001] BCC 658, Neuberger J, as he then was, held that he had power under the Court's general jurisdiction to appoint an administrator on a temporary basis, pending an application for removal of the existing administrators. He said at page 661D:

> "So far as administrators and liquidators are concerned, there is no statutory power which in terms gives the court power to do that which I am invited to do. However, I think that Mr McCormack-Smith is right to say that there is an inherent jurisdiction to grant such relief."

45. He then cited Lord Millett in *Deloitte & Touche AG v. Christopher D. Johnson and Another* (Cayman Islands) [1999] UKPC 25 and said:

> "Whilst that does not precisely cover this case, it seems to me that it is consistent with those observations to hold that there is a power to add, in appropriate cases, a liquidator in a compulsory liquidation, and if that is right, then it must follow that in an appropriate case where good grounds are shown, a temporary order to that effect may be made."

46. I note, however, that *Clements v Udal* was decided before the current legislation with which I am concerned, namely Schedule B1, came into effect in 2003.

47. As against this, Mr Smith QC, on behalf of the Administrators, relied on a number of authorities and statements in textbooks which suggest that there is no jurisdiction to appoint what is described as an *"interim administrator"*. However, these authorities and the statements in the textbooks which cite the relevant authorities all concern the question of whether it is possible to appoint an interim administrator before a company has yet gone into administration; in other words, before the Court's supervisory jurisdiction has been engaged at all. It may be more accurate to say that those authorities establish that there is no power to appoint a provisional administrator.

48. In particular, in *Re A Company (No 00175 of 1987)* [1987] 3 BCC 124, the Court was concerned with the appointment of an interim administrator. The application was refused as the Court held that it had no power to appoint an administrator on an interim basis prior to the administration coming into being. It went on to hold that the Court could instead appoint an interim manager to carry out a role analogous to a receiver pending the decision whether the company should go into administration.

49. Similarly, in *Re Gallidoro Trawlers* [1991] BCC 691 the Court was concerned with a petitioner who sought the appointment of an interim administrator to cover the position between presentation of a

petition and its service on the company and the making of an order on it. The Court held that *"there is no power to appoint an interim administrator and that the only power in respect of administrators is to appoint an administrator or to refuse to do so"*.

50. Finally, in *Re Switch Services Limited* [2012] Bus LR D91 the Court was concerned with the appointment of an interim administrator in respect of a proposed application for an administration order. The Court held, again, that there is no such thing as an interim administrator without there first being an administration.

51. The Shareholders do not challenge the proposition set out in these cases and in the textbooks. They pose a different question, namely whether once a company is in administration, the Court has power to appoint a further office-holder.

52. In my judgment, there is a power for the Court to appoint an interim administrator once the company is in administration. This power does not emanate from the inherent jurisdiction of the Court but rather is expressly provided for in Schedule B1 and must be exercised in accordance with the conditions set out in the legislation. Specifically, paragraph 7 of Schedule B1 expressly provides that:

> "A person may not be appointed as administrator of a company which is in administration subject to the provisions of paragraph 90 to 97 and 100 to 103 about replacement and additional administrators."

53. That general restriction makes clear that the conditions of the specified paragraphs must be complied with for the appointment to be made. It reflects that a person may be appointed as an additional administrator subject to compliance with the conditions of paragraph 103. I see no reason why this cannot be done on an interim basis, since interim orders can be made pursuant to paragraph 74(3)(d) and the appointment of an additional administrator is not excluded from the scope of that provision.

54. Paragraphs 90 to 97 and 100 to 103 are part of the scheme contained in Schedule B1, which governs the appointment of administrators and which provide, amongst other things, for the relative rights of

the secured creditors, unsecured creditors and the company to determine who is appointed as administrator. The general approach in Schedule B1 is that where there is a qualifying floating charge, the floating charge-holder has the right to decide who the administrator should be.

55. Paragraph 103 provides, insofar as material:

> "(1) Where a company is in administration, a person may be appointed to act as administrator jointly or concurrently with the person or persons acting as the administrator of the company ...
> "(3) Where a company entered administration by virtue of an appointment under paragraph 14, an appointment under sub-paragraph (1) must be made by
> "(a) the holder of the floating charge by virtue of which the appointment was made, or
> "(b) the court on the application of the person or persons acting as the administrator of the company ...
> "(6) An appointment under sub-paragraph (1) may be made only with the consent of the person or persons acting as the administrator of the company."

56. The purpose of paragraph 103 is explained in Sealy & Milman at volume 1, page 702. The authors explain that there may be situations in which it is thought advisable or necessary to appoint one or more additional administrators to act jointly or concurrently with the administrators already in office. For example, the task may call for more manpower than was originally envisaged, or a creditor who holds a qualifying floating charge may feel happier if his own appointee joins the persons already in office who have been appointed by somebody else.

57. Sealy & Milman explain that paragraph 103 spells out the procedure to be followed. The Court has overall control but, subject to that, deference must be shown to floating charge-holders. Since the administrator currently in office may have an interest in what is proposed, he is given standing to apply to the Court and also a veto on the proposed appointment.

58. Sealy & Milman also explain the purpose of paragraph 103(6). The authors state that:

> "This provision applies in each of the cases covered by paragraphs 103(2) to 103(5). It ensures that anyone already in office is not to have wished on him a newcomer that he does not feel happy to work with, even where the new appointment is made by the court."

59. In this regard, it is relevant to refer to the judgment of Lord Neuberger in *Re Lehman Bros International (Europe) (in administration*) *(No 4)* [2017] UKSC 38, [2017] 2 WLR 1497. Lord Neuberger said at paragraph 13:

> "Further, despite its lengthy and detailed provisions, the 1986 legislation does not constitute a complete insolvency code. Certain long-established judge-made rules, albeit developed at a time when the insolvency legislation was far less detailed, indeed by modern standards positively exiguous, nonetheless survive."

He then gave various examples from the case law of such judge-made rules.

60. He then continued:

> "Provided that a judge-made rule is well established consistent with the terms and underlying principles of current legislative provisions and reasonably necessary to achieve justice, it continues to apply. And as judge-made rules are ultimately part of the common law, there is no reason in principle why they cannot be developed, or indeed why new rules cannot be formulated. However, particularly in the light of the full and detailed nature of the current insolvency legislation and the need for certainty, any judge should think long and hard before extending and adapting an existing rule, and even more before formulating a new rule."

61. In light of this, it seems clear that a judge is not entitled to formulate a new rule which allows the appointment of an additional administrator where the mandatory conditions set out in paragraph 103 have not been complied with. That would not constitute extending and adapting an existing rule, it would constitute ignoring the scheme of the legislation which has been put into place.

62. In my judgment, the relevant principles, in brief summary, are as follows:

(1) The Court does not have power to appoint a provisional administrator before a company has been placed in administration.

(2) Once a company has been placed in administration, the Court does have power to appoint an additional administrator pursuant to paragraph 103 of Schedule B1 to the 1986 Act.

(3) The Court has power to grant an interim order to appoint an additional administrator pursuant to paragraph 74(3)(d) of Schedule B1. As illustrated by the judgment of Neuberger J in *Clements v Udal*, it may be appropriate to exercise this power, albeit in unusual circumstances.

(4) However, the Court does not have power to appoint an additional administrator, whether on an interim or on a final basis, unless the conditions of paragraph 103 of Schedule B1 are complied with.

63. Accordingly, where, as in the present case, the administrators were appointed under paragraph 14 by a floating charge-holder, an additional administrator can only be appointed, both on an interim and a final basis, either by the floating charge-holder or by the Court on the application of the existing administrators. Therefore, the Applicants in the present case have no standing to seek an appointment of an additional administrator. Moreover, in either case, the consent of the existing administrators is required. In the present case, the existing Administrators actively oppose the appointment of additional administrators and the application must fail for that reason as well.

<u>Other Arguments</u>

64. Whilst that is sufficient to dispose of the first head of interim relief, in case I am wrong, I will proceed to consider the other arguments that were advanced in support of the application.

65. It was submitted on behalf of the Shareholders that the familiar three-stage approach set out in *American Cyanamid v Ethicon (No. 1)* [1975] AC 396 is not appropriate where the application is to appoint an additional administrator. It is said that no injunction is sought, no one is being mandated to do or not to do something and no obvious harm could result. The relief sought in the instant case is simply an example of the general control that the Court has over its officers. It is not an injunction between two private individuals, but rather an application brought by interested parties to restore and uphold the integrity of appointment which creditors, members and the general public are entitled to expect that an officeholder will maintain.

66. The Shareholders relied on the decision of Mr Registrar Jones in *Ve Vegas Investors IV LLC and Others v Henry Shinners and Others* [2018] EWHC 186 (Ch), in particular at paragraph 18. When considering whether to remove administrators, the learned registrar said:

> "The application, by raising a conflict of interest, required me to decide whether there is a serious issue for investigation, not whether the claims identified for investigation have merit. That is because removal may be ordered if an independent review cannot be carried out because of conflict."

See also *Clydesdale Financial Services Limited v Smailes* [2009] BCC 810 at 30 per David Richards J, as he then was, and *Sisu Capital Fund Ltd v Tucker* [2006] BCC 463 at 89 per Warren J.

67. However, the *Vegas* case and the *Clydesdale* case concerned "pre-pack" sales of the companies' business and assets which were alleged to be at an undervalue. It was alleged in those cases that the administrators themselves were involved in wrongdoing. The conflict arose because they could not investigate their own conduct.

68. The case before me does not raise any such issue. The somewhat unusual nature of such an investigation was emphasised by Norris J in *BLV Realty Organization Limited v the Joint Administrators of Zegna III Holdings Inc* [2009] EWHC 2994 (Ch) at 17. Referring to the facts of the case before him, he said:

> "The circumstances of the decision-making are, it seems to me, miles away from those considered in *Clydesdale Financial Services Limited v Smailes* to justify the removal of an administrator and thereby facilitate examination of a pre-packed sale on questionable terms which he himself had negotiated immediately before appointment."

69. In my view, the appointment of an additional administrator to represent the interests of the shareholders, against the wishes of the existing administrators, would be likely to cause a stalemate in progressing the administration and might well prevent the realisation of the assets of the companies in administration. It would impose upon the existing administrators, in the words of Sealy & Milman, *"a newcomer with a specific brief to represent the interests of one party"*. This, in my view, would be entirely inappropriate, unless the normal requirements of *American Cyanamid* are satisfied. Therefore, the Shareholders need to show, in my judgment, first that there is a serious issue to be tried. If so, the court will consider (a) whether damages would be an adequate remedy for the applicant, if successful at trial, (b) whether damages under the cross-undertaking would be an

adequate remedy for the defendant if the defendant is successful at trial, and (c) the balance of convenience.

70. It is, of course, settled law that it is generally required that an applicant for interim relief provides a cross-undertaking in damages supported by appropriate fortification if there are doubts about the applicant's ability to meet any claim under the cross-undertaking.

Serious Question to be tried

71. I turn now to the issue of whether the Shareholders have shown a serious question to be tried, which requires me to consider the allegations made in the Main Proceedings.

72. The first ground in the Main Proceedings is an allegation that the Administrators have a conflict of interest due to their engagement with the lenders prior to their appointment and, *"as a consequence of this, are not acting in the best interests of the companies"*. There are two aspects to this allegation. The first concerns the prior engagement by the lenders of AlixPartners for the contingency planning exercise prior to the commencement of the administration. The second concerns the instruction by the Administrators of Ashurst as legal advisers.

Prior engagement of AlixPartners

73. AlixPartners had two previous engagements. The first was from July to November 2014, in connection with the restructuring which took place in 2014. The second was the contingency planning exercise from June 2017 until commencement of the administrations. Given that the first engagement took place nearly three years before the administration, Mr Davies understandably focused his argument on the second of these engagements.

74. It is well established that the existence of a prior relationship between an administrator and creditors is not a bar to the administrator taking appointment. See, for example, *Re Maxwell Communications Corporation plc (No. 1)* [1992] BCC 372, in particular at page 374 A to B. The issue in that case

was that the bank creditors had sought the appointment of Price Waterhouse as administrators because the banks had appointed them to investigate their affairs, and they had already spent some weeks engaged in intensive administration. The board of directors who had brought their own petition for administration asked for Touche Ross to be appointed as their preferred candidates.

75. Hoffmann J said at 374A-B:

> "Pricewaterhouse ought to be appointed administrators on the grounds that they are already in possession of a great deal of information and that they are able to carry out the administration more cheaply, effectively and quickly on account of their existing knowledge of the company than Touche Ross."

76. To similar effect, see the judgment of Snowden J in *Davey v Money* at paragraph 340, in which he states as follows after referring to certain Australian authorities:

> "The second point to be derived from *Commonwealth Bank of Australia v Fernandez* is that the judge did not think that there was an absolute bar upon the appointment of administrators who had had a prior business relationship with the secured creditors and had been nominated by them. Instead, he plainly thought that the question of whether the insolvency practitioners could be relied upon to act impartially and in accordance with their duties required an assessment of all the circumstances."

77. In the present case, Mr Imison has explained that, in most insolvencies of any size and complexity, the proposed office-holders will have been engaged prior to the commencement of the insolvency proceedings by one or more creditors, or the directors, or a regulator. He says that it would be unusual for office-holders to take any appointment without a prior engagement of some kind, which would have enabled them to do the necessary preparatory work. Mr Imison's explanation is supported by Lightman & Moss, the authors of which state, at paragraph 6-006:

> "The proposed administrator will ordinarily undertake an investigation of the company's affairs and financial position, and consequently offer advice before being appointed, which will include advice on the timing and manner of appointment."

78. This approach is now recognised in the insolvency legislation in that specific provision is made for the disclosure in the statement of proposals of pre-appointment costs incurred by the administrators

and for the recovery of those costs from the administrators' estate (see rules 3.35(10)(a), 3.36 and 3.52 of the 2016 Rules).

79. In the present case, Mr Imison's evidence is that the contingency planning exercise undertaken by AlixPartners for the lenders was neither unusual nor out of the ordinary. He states that no advice was provided to the lenders in respect of the preferred types of insolvency process, and the lenders were made fully aware of the duties which the Administrators would be under as administrators. The Administrators are under no continuing duties to the lenders which conflict with their duties as administrators.

80. Mr Tchenguiz was also aware of the engagement of AlixPartners by the lenders, and it is likely that he would have appreciated that this would result in AlixPartners being appointed as administrators if the lenders enforced their security in this way. The prior engagements were also fully disclosed in the consents to act provided by the Administrators. In these circumstances, in my judgment, there was no reason on the evidence before me for the Administrators to decline the appointment as a result of a conflict, and no reason for the Administrators to regard themselves as being under any kind of conflict which would justify the Court granting relief against them.

81. At the time of accepting the appointment, the Administrators also considered the relevant principles contained in the Insolvency Practitioner Code of Ethics published by The Insolvency Service ("the Ethics Code"). There is a distinction between professional guidance given to practitioners and the interests of the relevant insolvency proceedings, and the court is primarily concerned with the latter rather than the former. See, for example, *Sisu v Tucker* at paragraph 130 (referring to *Re Polly Peck* as per Millett J). However, since the issue of compliance with the Ethics Code has been raised and is disputed by the Shareholders, I shall consider it for the purposes of this application.

82. The Administrators' evidence is that they were in compliance with the relevant provisions of the Ethics Code. In particular, the 2014 engagement was more than three years before the appointment. The work done on the 2017 engagement, prior to the administration, was contingency planning and

did not involve the provision of advice that administrators should be appointed. The work did not impact on the financial state or stability of the Zinc Companies. The appointment as administrators was unlikely to involve any consideration or investigation of the work done pre-administration by AlixPartners, and the fees for the engagement were not abnormal for this type of work. This final proposition concerning the fees was challenged on behalf of the Shareholders, who calculated that 400 hours was spent by the Administrators during the 2017 engagement.

83. Whilst the issue will of course be a matter for the trial, on the evidence before me I do not accept that this amount of time for contingency planning for an administration of this size and nature can be characterised as abnormal.

84. The present case is not a case where the Administrators are required to investigate, or potentially bring claims in respect of work done by AlixPartners prior to the administrations. It therefore differs very significantly from the cases involving "pre-pack" sale transactions to which I have referred.

85. The Shareholders complain that AlixPartners did not specifically disclose to the Zinc Companies that the Administrators intended to accept the appointment. It is correct that the Security Agent who appointed the Administrators did not give prior warning to the Zinc Companies of the appointment of Administrators. The demand for payment and the appointment of the Administrators took effect on the same day, on 9 January 2018. In these circumstances, the Ethics Code requires that the Administrators should consider whether the circumstances give rise to an unacceptable threat to compliance with the fundamental principles. The Administrators were satisfied that there was no unacceptable threat. In these circumstances, on the evidence before me, I do not accept that there has been any breach by the Administrators of their professional duties in accordance with the Ethics Code.

Engagement of Ashurst

86. The second aspect of the Shareholders' conflict allegation in the main proceedings relates to the role of Ashurst solicitors. Ashurst were acting both for the Administrators and for the lenders. The Shareholders claim that the Administrators formulated their proposals on the basis of advice from Ashurst, who were acting for the secured creditors. This, it is said, impaired the ability of the Administrators to act independently. The Shareholders contend that the proposals were infected by the involvement of Ashurst.

87. It is, however, well established that there is no bar to the same firm of solicitors acting for both the office-holder and for a creditor. For example, in *Avonwick v Shlosberg* [2017] Ch 210, Arnold J stated at 46:

> "There is nothing inherently objectionable about a solicitor acting for both a trustee in bankruptcy or liquidator and a major creditor of the bankrupt or insolvent company. On the contrary, it has been recognised that this may well be convenient because of the creditor's familiarity with the debtor's affairs and because of absence of any real likelihood of a conflict of interest between the trustee and liquidator and the creditor: see *In re Schuppan (A Bankrupt)* [1996] 2 All ER 664 (Robert Walker J)"

88. Furthermore, in *In Re Schuppan (No. 1)* [1997] 1 BCLC 211 Robert Walker J, as he then was, noted that in many cases it might well be desirable for the office-holder to retain solicitors who were and had been instructed by the petitioning creditor.

89. In the present case, the Administrators considered that it was appropriate to engage Ashurst to assist with the administration. Ashurst had also been involved pre-administration and therefore had the benefit of some existing knowledge. Moreover, the assessment of the Administrators at this time, supported by the Christie & Co Valuation, was that the value was likely to break well within the secured debt, so the possibility of any conflict between the interests of the lenders and the duties of the Administrators was remote.

90. In relation to aspects of administration where there might be a conflict, such as the potential legal actions identified by the Shareholders against the lenders, which I will address shortly, the Administrators engaged Burges Salmon rather than Ashurst to advise. In my judgment, on the

evidence before me, these arrangements were entirely appropriate and are not decisions with which the Court is likely to interfere.

91. I should say that, once it appeared that there was a real possibility of a surplus for Shareholders, it was recognised that there was now a potential, or possible, conflict between the interests of the lenders to have their secured debt repaid and the duties of the Administrators, which also involved taking into account the interests of unsecured creditors and shareholders. In addition, the Shareholders strongly objected, and continue to object, to the engagement of Ashurst. In those circumstances, the Administrators decided to replace both Ashurst and Burges Salmon with Freshfields. Freshfields have been required to consider the conduct of the administrations to date and to advise the Administrators. In light of that, the Administrators continue to be satisfied that the administrations have been and continue to be conducted in accordance with their duties. It is not alleged that Freshfields have any conflict, and they are engaged in this matter solely by the Administrators. Freshfields, having reviewed the matter, do not consider that any material alterations are required to the proposals. That, however, does not end allegations of conflict raised by the Shareholders. In their reply evidence, the Shareholders raised an allegation for the first time that Burges Salmon were also conflicted because they had *"ongoing connections"* to BLB and acted for it on a number of occasions. The basis of this was in fact that Burges Salmon once acted for BLB on the sale of certain property portfolios owned by the Tchenguiz family trusts.

92. In my judgment, Burges Salmon's role in this historic transaction did not give rise to any conflict of interest in relation to the present matter. This, in my view, is another instance of an allegation by the Shareholders which should not have been made.

Failure to seek to achieve objective 1

93. The third ground relied upon by the Shareholders, is that the Administrators have failed to seek to achieve objective 1. As I have explained, the pursuit of objective 1 involves the rescue of the

relevant companies as a going concern without the realisation of its assets. Such a rescue might be achieved, for example, through a refinancing or recapitalisation. However, in the present case, there was no credible proposal for any such refinancing or recapitalisation.

94. During the course of the administrations, the Administrators engaged with the Applicants, as the ultimate shareholders in the Zinc Companies, on a number of occasions. Seven meetings have been held with Mr Tchenguiz and Mr Pasher since the start of the administrations. There has therefore been considerable opportunity for the Shareholders to put forward any proposals for a funded rescue or recapitalisation.

95. In summary, firstly, at a meeting which took place on 17 January 2018, Mr Tchenguiz proposed that the Cola offer be pursued. It was said that this, together with a refinancing of the Regional Nine, would allow an immediate cash exit. However, no evidence of any funding for a refinancing of the Regional Nine from the alleged funder, Cheyne Capital, was ever forthcoming.

96. Secondly, the Shareholders claim that an offer made on 2 May 2018 by Consensus Business Group ("CBG"), which is an entity owned and controlled by Mr Tchenguiz, was a refinancing offer which would have permitted the pursuit of objective 1. However, the offer on 2 May was an offer to acquire the portfolio of hotels with the acquisition to be structured, either as a corporate deal whereby CBG would acquire the shares in the Zinc nominee companies together with an assignment of ZHL interest, or an asset deal whereby CBG would acquire the long leaseholds themselves. It was not an offer to refinance or recapitalise the Zinc Companies.

97. Next, the Shareholders relied upon an offer received on 14 June 2018 which it is said would enable objective 1 to be achieved. However, this offer related solely to the Regional Nine and did not make any proposal to deal with the Kensington Hilton, which it said would be dealt with separately. In substance, it was an offer to acquire the Regional Nine for an acquisition of the shares in the relevant Zinc Companies. Accordingly, in my judgment, it was not possible for the Administrators to pursue objective 1. The decision of the Administrators that it was appropriate to pursue objective

2 and seek to sell the Hotels for the maximum value was, in my view, the only option realistically open to them.

98. I should add that a decision of an administrator as to which objective to pursue is only capable of challenge on grounds of a lack of good faith or irrationality, see the judgment of Snowden J in *Davey v Money* at paragraph 255. In the present case, on the evidence before me, I consider that there is no serious question to be tried that the decision of the Administrators was either irrational or taken in bad faith.

<u>*Failure to assess, value and realise the claims*</u>

99. The fourth and fifth grounds relied upon by the Shareholders are that the Administrators have failed to proceed expeditiously to assess a value and realise certain legal claims, whether by pursuing them themselves, or by assigning them. In particular, the Shareholders claim that the Administrators have failed to take into account the value of these claims which, according to the Shareholders, are likely to realise hundreds of millions of pounds.

100. The Shareholders rely upon the following claims:

(1) A claim by Zinc Companies against the Hilton tenants for alleged breach of their obligations under the occupational leases to meet capital expenditure requirements in order to maintain the hotels to the Hilton brand standards. This was referred to by the parties as “the Capex Claim”.

(2) Claims by the Zinc Companies against BLB to rescind the Swaps and/or for damages in relation to the Swaps, (“the Swaps Claim”), and a claim to rescind the 2014 facility, (“the Loan Reduction Claim”).

(3) A claim by the Zinc Companies against the Hilton Group for alleged unlawful conspiracy in relation to the sales and marketing process for the hotels, (“the Assets Claim”).

The Capex Claim

101. The Capex Claim was commenced by the Zinc Companies prior to the start of the administrations. The Administrators have since taken over the conduct of the claim and have retained the same counsel team comprising two well-known silks who were previously engaged by the Zinc Companies.

102. The Capex Claim contains two elements. First, a claim for specific performance, and second, a claim for damages. Before the Administrators were appointed, the specific performance claim had been struck out by a Deputy Master. The Administrators pursued an appeal to the High Court in respect of the specific performance claim, which was dismissed by Andrew Hochhauser QC. They are now seeking to pursue a second appeal to the Court of Appeal for which permission will be required from the Court of Appeal and it will be necessary to satisfy the stringent test for second appeals.

103. As to the damages claim, the Zinc Companies' skeleton argument before Mr Hochhauser QC in support of specific performance stressed the great difficulty in quantifying any damages. The Shareholders assert that the Capex Claim could be worth £111,572,000. However, this is not supported by the advice which the Administrators have received in respect of the Capex Claim from their barristers. In his judgment dismissing the appeal against the strike out of the specific performance claim, Mr Hochhauser QC concluded that the suggestion that damages, which are based on the alleged diminution in value of the Zinc Companies' reversionary interest in the Hotels, could amount to £100 million, was unachievable (see in particular paragraph 48.3.2 of his judgment).

104. The Shareholders complain that the marketing process which I have described will not result in proper value being obtained for the Capex Claim. On the evidence before me, I do not accept that this raises a serious question to be tried. In particular:

(1) The offers made by Cola in 2016 and 2017 for the Kensington Hilton were made on the basis that the sale would be effected by a share sale and thus Cola would acquire all the assets of the lessor, which would include any benefit of the Capex Claim. Therefore, those offers necessarily took into account the Capex Claim.

(2) Although the sale is now to be completed as an asset sale rather than a share sale, Cola has not reduced its previous offer, other than to reduce the stamp duty land tax now payable on an asset sale.

(3) Cola plainly does not regard the Capex Claim as an asset, since it requires that the part of the Capex Claim attributable to the Kensington Hilton must be discontinued as a condition of the sale.

105. Given the unhappy history of the Capex Claim to date and the continued occupation of the Kensington Hilton by the Hilton tenants, against whom the claim is brought, the condition required by Cola was, in my view, entirely understandable.

106. As to the Regional Nine, bidders have been supplied with information regarding the Capex Claim, as Mr Imison explains in his second statement at paragraph 69. Accordingly, they have been fully aware of the existence of this claim. Furthermore, the final bidders have been asked to submit offers on the basis that the Capex Claim in relation to the Regional Nine will not be transferred and will remain with Zinc Companies. Therefore, if there is a value in that claim, it will be recovered by the Zinc Companies.

107. I have briefly referred to the allegation by the Shareholders that the sales and marketing process for the Hotels has failed properly to exploit the fact that the Hilton tenants might be willing to pay a surrender premium in order to exit the occupational leases. On the evidence before me, I do not consider that there is any serious question to be tried in respect of this allegation. The bidders for the Hotels are aware of the existence of the leases under which the Hotels are leased to the Hilton

tenants. They are therefore aware that, as in any case where premises are subject to a lease, there might be a possibility of agreeing a surrender premium with the tenants.

108. Prior to the appointment of the Administrators, a number of bidders were given access to the Hilton tenants, which would have allowed an opportunity to discuss the surrender premium. This is expressly recorded in the letter from Savills and JLL dated 16 March 2018, to which I have already referred. The Hilton tenants have now declined to provide such access as a result of the litigation brought against them by the Applicants.

109. In those circumstances, it appears to me that bidders who wish to pursue the surrender premium, as opposed to choosing the option to retain Hilton as blue chip tenants, must have factored it into their assessment of what they are willing to pay for the Hotels.

110. I should record that very serious allegations were made against the sales agents Savills and JLL by the Shareholders. It was said that, because of a deep relationship with the Hilton Group, they had deliberately undervalued the Hotels. That is an allegation of dishonesty. The allegation is, in my view, implausible and is strongly denied by the sales agents.

111. It is particularly curious that this allegation is raised in respect of the Kensington Hilton, when the same sales agents were chosen by the Zinc Companies and obtained the same offer from Cola immediately prior to the administration, which at the time Mr Tchenguiz plainly regarded as acceptable.

112. I note that Mr Payne has given evidence that, when the Heads of Agreement were signed in December 2017, they were subject to a condition that the loan would be reduced by the lenders by either £100 million or £70 million. There is no reference to any such condition in the 2017 heads of terms, and no documentary evidence was provided to support this assertion. It is strongly denied by the lenders.

113. In any event, this does not explain why the Zinc Companies were apparently prepared to accept the Cola bid at that stage if it is in fact an undervalue; they obviously wish to get the best price possible for the Kensington Hilton, irrespective of the amount of their outstanding loan.

The Swaps Claim and the Loan Reduction Claim

114. I shall now consider the further claims relied on by the Shareholders, in particular the Swaps and Loan Reduction Claims.

115. The Swaps Claim is a claim to rescind the Swaps. The Administrators have obtained advice from Sonia Tolaney QC in relation to the merits of the Swaps Claim. The substance of the advice is confidential, but in light of Ms Tolaney's advice, the Administrators do not believe that there is any merit in the Swaps Claim, and they do not intend to pursue it.

116. Similarly, Ms Tolaney's advice was also sought in relation to the Loan Reduction Claim. Ms Tolaney's advice is, again, confidential, but in the light of that advice, the administrators do not believe that there is any merit in the Loan Reduction Claim. For my part, it is difficult to see how, even if the Zinc Companies could rescind the 2014 facility, that this would somehow enable them to escape the obligation to pay the sums due under that facility.

117. Ms O'Sullivan QC, who also appeared on this application on behalf of the Shareholders, presented a draft pleading, which was for illustrative purposes only, in relation to the Swaps Claim. This valued the swaps claim at about £12 million, very significantly less than the value previously ascribed to it by the shareholders.

118. In the circumstances, the Administrators disagree with the views expressed by the Shareholders about the Swaps Claim and the Loan Reduction Claim as valuable assets of the Zinc Companies. On the contrary, the Administrators consider that the 2014 Facility and the Swaps give rise to valid liabilities owed by the Zinc Companies to the lenders. On the evidence before me, I consider that this view is entirely reasonable.

The Assets Claim

119. I then turn to the Assets Claim. This relates to an alleged unlawful conspiracy by the Hilton Group in relation to the sales process for the Hotels. Certain Hilton directors have been included as personal defendants in this claim. The decision to include these individuals personally will require explanation and justification should this claim proceed.

120. The particulars of claim contain a number of serious allegations directed at the Hilton Group, including allegations of breach of confidence. In essence, it is alleged that the Hilton Group unlawfully interfered with the sales and marketing processes in order to drive the prices for the Hotels down, either so that the group itself could acquire the Hotels at a reduced price pursuant to its right of first offer under the terms of the leases, or so that it could minimise the amount of any surrender premium which might be negotiated with any purchaser.

121. By a letter dated 2 February 2018 from Teacher Stern, who were then acting for the Shareholders, it was alleged on behalf of the Zinc Companies that the lenders had disclosed confidential information concerning the bidding process to potential bidders. That was a very serious allegation which was not pursued in the particulars of claim. The allegation should never have been made. Mr Davies withdrew the allegation during his reply speech. The fact that the Shareholders were prepared to make such an allegation of misuse of confidential information against the lenders, apparently without any foundation whatsoever, undermines the credibility of the allegations of misconduct which they still seek to pursue.

122. The Administrators do not consider that they have seen any evidence which supports these serious allegations. The Administrators take the view that they have seen no evidence that the Hilton Group has improperly interfered with the sales and marketing process, or that the sales and marketing process has not and will not result in proper value being obtained for the Hotels. I should record that, on this application, I have not seen any such evidence. Indeed, no evidence was presented in

support of these allegations, in spite of numerous witness statements having been served on behalf of the Shareholders.

123. Therefore, I am left to consider the allegations of conspiracy made in the particulars of claim. On their face, it is said that they are inferences: they are not supported by any direct evidence. Having considered the particulars of claim, in my view, the alleged inferences do not follow from the assertions made in the pleading.

124. Furthermore, the allegation that the Hilton Group would have been able to improperly manipulate the sales processes to its advantage is not only extremely serious but appears to me to be wholly implausible. 165 different entities were engaged in the 2017 sales process in relation to the Kensington Hilton alone. Quite how the Hilton Group would have entered into some kind of unethical and unlawful conspiracy with that amount of different entities is entirely obscure.

125. Mr Davies explained that, although not evident from the pleading, the allegation was only made in respect of a limited number of serious bidders, presumably identified as a result of improper collusion between the sales agents and the Hilton Group, as to which I have seen no credible evidence.

126. In any event, it is difficult to see how the Hilton Group could in practice have subverted this process so that market value was not obtained, and this has not been explained. The Administrators do not intend to take any steps in relation to the Assets Claim. In my view, their decision is entirely reasonable, and I would have been extremely surprised had they taken any other decision.

127. The Main Application makes no allegation against AlixPartners in relation to the alleged conspiracy. However, Mr Maxwell, who is sought to be appointed as an additional administrator by the Applicants, said in a witness statement served in reply on 3 July 2018 at paragraph 15(c):

> "Prior to the appointment of the administrators, some or all of Alix, the lenders, Ashurst and Savills/JLL have communicated information to Hilton in such a way as to jeopardise the value of the surrender premium and improve Hilton's position under the ROFO."

The ROFO refers to Hilton's Right of First Offer.

128. I am not clear what Mr Maxwell intends to mean by the expression "some or all". However, no such allegation had previously been made anywhere against AlixPartners, or, for that matter Ashurst. The allegation made against the lenders is also inconsistent with the Applicants' own pleaded position, verified by a statement of truth in their issued claim, that it is as yet unclear whether the lenders supplied confidential information to Hilton, and the lenders have expressly denied this allegation.

129. I am surprised that Mr Maxwell saw fit to give the evidence that he gave, as he does not know any of the relevant facts. This allegation was withdrawn by Mr Davies as against AlixPartners during his reply speech. It is another example of an extreme allegation which should never have been made.

Assignment Proposal

130. The Applicants have also requested that the claims be assigned to them as a special purchase vehicle. The Administrators have declined to do this, and this forms part of the Shareholders' complaint in the main application.

131. So far as the Capex Claim is concerned, in relation to the Kensington Hilton, Cola has indicated that it wishes that part of the Capex Claim attributable to that hotel be discontinued. As the Administrators wish to accept the Cola offer, they consider it appropriate to comply with this condition, rather than to assign the action to the Shareholders.

132. In relation to the Regional Nine, the Capex Claim will remain with the Zinc Companies. Accordingly, if, following the completion of the administrations, the Zinc Companies wish to pursue the Capex Claim in relation to the Regional Nine, then they will be at liberty to do so. Insofar as there is any value in the Capex Claim in relation to the Regional Nine, it will therefore remain with the Zinc Companies.

133. Finally, the Administrators do not consider that it would be appropriate to assign either the Swaps Claim or the Loan Reduction Claim given the advice received on the merits of those claims. It seems to me that the Administrators' decisions are entirely reasonable. They also do not consider it appropriate to assign the Assets Claim. If, following the sale of the Hotels, the administrations are concluded and the Zinc Companies are returned to their directors, then the Zinc Companies will be able to take a decision as to whether to pursue the Assets Claim at that point. There is no question of the claim becoming time-barred until 2023.

Alleged Breach of Duty

134. I now shall stand back and consider whether, on the evidence before me, it is seriously arguable that there has been a breach of duty by the Administrators.

135. There is a difference between the standard of review to be applied to the decision of an administrator as to which objective to pursue in an administration and the methods chosen by the administrator to pursue that objective.

136. As to the methods, Snowden J set out the duties owed by an administrator at paragraphs 391 to 394 of his judgment in *Davey v Money*. These duties comprise: (1) fiduciary duties of agents to act in good faith, loyally and for proper purposes; (2) a duty to exercise reasonable skill and care and; (3) when selling the company's property, a duty to take reasonable care to obtain the best price reasonably obtainable, including as to the choice of time to sell.

137. If the matter involves a commercial decision by administrators, then the court will not interfere with that commercial judgment, unless it was based on a wrong appreciation of the law or was conspicuously unfair to a particular creditor or counterparty. See, for example, *BLV Realty Organization Limited v Batten* [2010] BPIR 277.

138. In the present case, I do not consider that the decision of the Administrators not to pursue the claims amounts, even arguably, to be a breach of any of these duties. On the contrary, given the

advice which has been received, it was clearly a reasonable decision which it was open to the Administrators to reach.

139. So far as the question of an assignment is concerned, I conclude that, on the evidence before me, the decision not to assign the claims is a reasonable one.

140. Applying the usual *American Cyanamid* test, for the reason which I have now set out in detail, having considered each aspect of the Main Application, there is no serious issue to be tried in respect of the Shareholders' complaints on the main application. For that reason, I consider that this application falls at the first *American Cyanamid* hurdle.

141. In addition, it was made absolutely clear on behalf of the Shareholders that there is no offer of a cross-undertaking in damages which, given the financial position of the Zinc Companies, would need to be fortified. This means that any loss suffered by reason of disruption to the administrations, including the loss of the Cola offer in respect of the Kensington Hilton, would not be compensated. Of itself, this is a reason to refuse the application.

142. Furthermore, the appointment of additional administrators would, in my view, create very serious practical difficulties and any order would require, I believe, repeated supervision by the Court. It appears that the Applicants' intention is that the additional administrators should in effect take over the existing outstanding matters in the administrations. In particular, Mr Maxwell explained what he intended to do if appointed as an administrator at paragraph 136 of his first statement:

> "In this particular case, I would expect interim conflict administrators to undertake the following functions:
> "1. Investigate the background to and circumstances giving rise to the Cola bid.
> "2. Review the merits and any appropriate strategy for pursing or settling the various claims of the companies in administration.
> "3. Reconsider with the Administrators the statutory proposals, with a view to bringing into consideration the point of view of the Shareholders (especially the need to evaluate and realise the surrender premium/CAPEX claim).
> "4. Review the alleged need to sell any of the Hotels pending trial and to report thereon to the Administrators and, if necessary, the court.

> “5. To the extent necessary to achieve 1 to 4 above, instruct agents, including independent lawyers, to advise on the various claims and independent selling agents for advice.
> “6. In so far as necessary pending trial, to place the Hotels on the market in a fresh sales process conducted by independent agents.”

143. This, it seems to me, would be entirely inappropriate. It would amount, rather than to the appointment of an additional administrator, to a removal of the existing Administrators by the back door.

144. Even if it is intended that the Administrators and the interim additional administrators should share responsibility for the functions between them, I do not see how this could work. Disagreement is obvious given the strident views expressed, for example, by Mr Maxwell, and in the event of disagreement, the parties could be required to return to the court and ask the court to try to resolve it.

145. Overall, I consider that the appointment of interim additional administrators, even if there was power to do so, in the circumstances of this case would be highly disruptive and damaging to the conduct of the Administrators and the interests of all of the stakeholders. The sale of the Kensington Hilton could well be lost. If the market depreciates, the loss could be considerable.

146. By contrast, I do not consider that the Shareholders will be irreparably damaged if the administrations proceed as intended. They themselves initiated the sales process which is proceeding, in my view, in a competent and fair manner. There is, in my view, no risk of any of the counterparties being unable to pay any damages. Therefore, I reject the first head of interim relief.

<u>Injunction to restrain distribution of sale proceeds</u>

147. I now turn to the question of whether I should grant an injunction to restrain distribution of the sales proceeds. This head of relief sought by the Shareholders requires the Applicants to refrain from distributing the proceeds of any assets realised in the administrations of the companies pending resolution of the claims.

148. The Hotels are presently subject to legal mortgages and fixed-charge security in favour of the Security Agent. Accordingly, in order to proceed with the sales, it will be necessary for the Security Agent to consent to the release of the security or for the court to make an order under paragraph 71 of Schedule B1 releasing the security, as explained by Snowden J in *Davey v Money* at paragraph 593:

> "Additionally, where an administrator seeks to sell an asset which is subject to a charge, further statutory considerations intervene. An administrator is generally authorised to dispose of assets subject to a floating charge as if the assets were not subject to that charge: see paragraph 70(1) of Schedule B1 to the 1986 Act. He is not, however, generally authorised to dispose of assets subject to a fixed charge unless the charge-holder gives its consent to such a disposal. The rights of the fixed chargeholder can be overridden by the court granting an order under paragraph 71(1) enabling the administrator to dispose of the property as if it were not subject to the fixed charge, but only if the conditions set out in paragraph 71(2) of Schedule B1 are satisfied, and then only on terms providing for payment of the proceeds to the fixed chargeholder together with any additional amounts necessary to produce the amount determined by the court to be full market value: see paragraph 71(3) . As such, a sale by an administrator of a property subject to a fixed charge will necessarily require the administrator to seek the consent of the holder of the fixed charge to that disposal or to make an application to court if consent is not forthcoming."

149. I must approach the application on the basis that the sales of the Hotels will be proceeding, since no interim relief has been sought seeking to restrain such sales. If the sales of the Hotels take place, there is, in my judgment, no proper basis for not paying the sales proceeds to the Security Agent. The Security Agent holds valid security over the Hotels, which will need to be released in order to enable the sales to take place. There are no grounds for disputing the validity of the liabilities to the

lenders under the 2014 Facility, or the Swaps, or the validity of the security. In these circumstances, the Security Agent is entitled to receive the net proceeds of the sales.

150. In circumstances where the Security Agent vigorously opposes the interim order to freeze the proceeds of the sale, in my judgment, the requirements for the grant of an interim injunction are not satisfied. In particular, there is no serious issue to be tried because, as holders of the legal mortgages and fixed-charge security over the Hotels, the Security Agent is clearly entitled to receive the sale proceeds. Furthermore, there is no risk of an actionable wrong occurring, which is of course an essential requirement for the grant of an injunction. And, finally, no cross-undertaking with suitable fortification has been offered.

Conclusion

151. In conclusion, I have reached the firm view that I should refuse both heads of interim relief which are sought by the Shareholders, and therefore, this application is dismissed.