



**Neutral Citation Number: [2020] EWHC 2369 (Ch)**

**CR-2020-000448**

**IN THE HIGH COURT OF JUSTICE**

**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**

**INSOLVENCY AND COMPANIES LIST (ChD)**

**By Skype Remote hearing**

**IN THE MATTER OF FORTUNA FIX LIMITED (IN ADMINISTRATION)**

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

**Date: 03/09/2020**

**Before :**

**I.C.C. JUDGE JONES**

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**Between :**

**(1) IAN COLIN WORMLEIGHTON  
(2) DAVID PHILIP SODEN  
(THE JOINT ADMINISTRATORS OF  
FORTUNA FIX LIMITED (IN  
ADMINISTRATION))**

**Applicants**

**-and-**

**(1) SALAMANDER INVEST A/S  
(2) GENESIS TECHNOLOGIES LIMITED**

**Respondents**

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**Mr Al-Attar (instructed by Macfarlanes LLP) for the Applicants**  
**Mr Goldring Q.C. and Mr Marcus Haywood (instructed by Sullivan & Cromwell LLP) for**  
**the 1<sup>st</sup> Respondent**  
**Mr Jonathan Nash Q.C. and Mr Robert Amey (instructed by Withers LLP) for the 2<sup>nd</sup>**  
**Respondent**

**Hearing dates: 6 and 7 August 2020**

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**Approved Judgment**

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....CHJ 3/9/20.....

I.C.C. JUDGE JONES

## **I.C.C. Judge Jones:**

### **A) Setting The Scene**

1. Fortuna Fix Limited (“FFL”) is unable to pay its debts as they fall due. It was resolved by the board of directors on 17 January 2020 that Administrators should be appointed and they were formally appointed on 22 January 2020. FFL’s main shareholders are not only in deadlock but in acrimony. The largest minority shareholder, Salamander Invest A/S (“Salamander”) (24.9%), has made some of those connected or associated with the majority shareholder, the trustees of the Genesis Trust (70.5%), the subject of a derivative claim. It is at the permission to proceed stage. One of those defendants is the majority creditor, Genesis Technologies Limited (“GTL”) (82%). A conspiracy to transfer all FFL’s assets to GTL is alleged and vehemently refuted.
2. Salamander has provided non-recourse funding for the costs and expenses of the administration within the context of the Administrators conducting inquiries and investigations into the causes for the derivative claim and other potential claims against (amongst others) GTL. The Administrators have not reached the stage of being able to assess the merits of any claims but propose the continuation of the administration for that purpose to aim (in outline) to achieve a “*consensual agreement*” between the warring factions and the rescue of FFL as a going concern or a better realisation than would result from liquidation. GTL voted against the Administrators’ proposals. They have not been approved.
3. At the heart of FFL’s business and any future it may have is an exclusive licence agreement (“the Licence Agreement”) concerning the development of a variety of intellectual property rights for medical advances. These include the use of robotic manufacturing technology in the production of products to treat a spectrum of neurological and central nervous system disorders, such as spinal cord injury, traumatic brain injury, Parkinson’s Disease and Alzheimer’s Disease. GTL is the licensor and other companies and individuals connected or associated with the Genesis Trust are involved in the underlying research and development. GTL and FFL also entered into a “Transitional Services Agreement” under which FFL would pay GTL for support services concerning the medical products.
4. In practical terms, the contractual arrangements were devised on the basis that FFL would be the financier. Investment it raised, whether from its shareholders or otherwise, would enable the products to be brought to the medical market-place. It would profit, and therefore be an attractive investment proposition, from the returns resulting from its rights in the intellectual property under the Licence Agreement. Now it does not even have the money to pay the licence fee, let alone exploit the intellectual property under the terms of the licence. Salamander also contends that its rights have been significantly eroded by amendments to the two agreements.
5. The consequence of non-payment has not been termination of the Licence Agreement. Salamander contends that the terms of the Licence Agreement mean it cannot currently be terminated unless and until FFL is placed into liquidation. Whilst GTL has not accepted that and has indicated that it might be terminable on other grounds, that has not been the subject of any detailed argument or request for determination. It is currently an extant agreement and there is no dispute that a liquidation will result in

termination. GTL's position in that circumstances is that the administration by preventing a liquidation results in the intellectual property rights licensed to FFL not being exploited. This, it is said, is both detrimental to GTL and contrary to the public interest. GTL is currently stymied by FFL's insolvency and by an agreement which stops the underlying research reaching those in need of the pioneering treatments.

6. Salamander asserts that GTL is acting and rejected the Administrators' proposals out of pure self-interest. First to stop the Administrators from investigating the derivative and other claims. Second, to achieve the liquidation which will result in termination of the Licence Agreement. Salamander supported the proposals and still considers that FFL should continue in administration to achieve a rescue as a going concern. It is not a creditor but rejects GTL's contention that this is in truth a shareholders' dispute.
7. GTL asserts that the reasons for its rejection of the proposals was that they had no real prospect of achieving their objectives, whether a rescue as a going concern or a better result for creditors than a liquidation. FFL has no future because any return to being a going concern must depend upon further funding and that will not be provided in the light of the groundless litigation claims of Salamander. There is no prospect of any "consensual agreement" and third parties will not provide finance in those circumstances.
8. There is also no reason why an administration will produce a better result for creditors than a liquidation. There is no prospect of the Licence Agreement being sold and any litigation claims can be investigated and, if appropriate, pursued equally as well by a liquidator. A liquidation will result in termination of the Licence Agreement but that is a contractual right not to be defeated by proposals with no prospect of success. Most importantly not only for GTL and the Genesis Trust but as a matter of public importance, removal of the stymie will enable the medical treatments to come to the market place to treat those suffering from debilitating and potentially life ending neurological and central nervous system problems. That sets the scene of commercial and litigation turmoil for the two applications issued by the Administrators.

## **B) The Applications**

9. The first application in time is made under *paragraphs 55(1) and 63 of Schedule B1 of the Insolvency Act 1986* ("the Act") following the rejection of the Administrators' proposals to achieve the purpose of administration. The second seeks directions under *paragraph 63 of Schedule B1*: (i) as to whether to convene a creditor decision procedure pursuant to a statutory request by GTL pursuant to *paragraphs 56 and 97 of Schedule B1* to decide whether to replace the Administrators; and, if so (ii) as to the voting entitlements in respect of that procedure.
10. *Paragraphs 53(2) and 55(1) of Schedule B1* respectively require the Administrators, as they have done, to report to the court and apply for directions when their proposals for achieving the purpose of administration are rejected. It has been established by case law that the requirement of *paragraph 55(1)* is mandatory (see (*Re BTR (UK) Ltd, Lavin v Swindell* [2012] EWHC 2398 (Ch), [2012] B.C.C. 864 and *Re Pudsey Steel Services Ltd* [2015] BPIR 1459, although see also *Re Parmeko Holdings Ltd* [2014] B.C.C. 159).

11. The court has a wide discretion upon such an application. Four specific, potential orders are identified in *paragraph 55(2) of Schedule B1* (appointment to cease; adjournment; interim order; or to make a winding up order on a suspended petition). The court also has an express, unfettered discretion. It may “*make any other order (including an order making consequential provision) that the court thinks appropriate*”. It has been decided in case law binding upon me that this includes a power to authorise implementation of an administrator’s proposals notwithstanding opposition from a majority of creditors (see *Re Structures & Computers Ltd* [1998] B.C.C 348 at 353B per Neuberger J., as he then was; applied in *DKLL Solicitors v Revenue and Customs Commissioners* [2007] BCC 908 at 914G-H per Andrew Simmonds QC).
12. Before that will occur, the court will need to be satisfied that the company is or is likely to become insolvent and that it is reasonably likely that one or other of the purposes of an administration prescribed by *paragraph 3 of Schedule B1* will be achieved. If so, the court will still need to exercise its discretion. In doing so it will address the interests and views of the creditors upon the application in the context of the voted rejection and the potential alternatives. The court will consider whether the weight of those views is diminished by self-interest, including any conflict of interest.
13. The second application arises because the majority unsecured creditor (there are no secured or preferential creditors) has relied upon *paragraphs 56 and 97 of Schedule B1, section 246ZE and Rule 15.18 of the Insolvency (England and Wales) Rules 2016 (“the Insolvency Rules 2016”)* to request a decision procedure be requisitioned to resolve whether to replace the current administrators with insolvency practitioner appointees from Cork Gully LLP. The issues before the court are whether there is jurisdiction to direct that the qualifying decision procedure should not be implemented, if so, in what circumstances and whether that discretion should be exercised. The issue arises in the context of *paragraph 97 of Schedule B1* providing that an administrator appointed, as here, by the company or its directors may be replaced by a decision of the creditors made by a qualifying decision procedure. Although specifically concerned with the qualifying decision procedure nothing turns upon the difference between its procedures and those for requisitioning a creditors’ meeting. The terms meetings and qualifying decision procedures can be used interchangeably.
14. The applications were expedited and heard by me during vacation over two days. There is a significant quantity of evidence (including argument purporting to be evidence) and the court was engaged with detailed, interesting and learned submissions. It is impractical either in terms of time or paper to set out the evidence in full detail. I will concentrate, therefore, upon the facts and matters most key to this decision. They will be more than adequate in terms of quantity. It would be equally impractical to refer to all the submissions. An attempt at “cherry picking” would fail to do justice to them. Therefore, I will next outline certain of their themes but otherwise only refer to a submission insofar as the context requires. My judgment has been formed, however, with reference to all I have read and heard.

**C) Submissions – An Outline**

15. The approach of the Administrators through Mr Al-Attar has been to acknowledge the obligation of neutrality and to explain to the court the problems facing FFL, the bases for the Administrators' proposals, their realistic prospects, the contrasting consequences to be expected from an administration and a liquidation and the difficulties replacement administrators would inevitably experience to the detriment of creditors. It is submitted as a matter of law that there is jurisdiction not only to order the administration to continue but also to direct that the Administrators should not seek a decision of creditors as requested by GTL.
16. Mr Goldring Q.C., leading Mr Haywood, on behalf Salamander adopted the arguments and approach of Mr Al-Attar but within the context of stronger assertions to reflect the instructions and evidence of Salamander when addressing the derivative claim and the actions and approach of GTL. There was a greater emphasis upon GTL's asserted collateral purposes (to avoid investigation and achieve termination of the agreements) and to the detriment to FFL and its members. It is concluded that:

*“it is clear that the proper operation of the process of the administration of the Company and justice to all those interested in the Company's assets, requires not the removal of the Administrators but instead that: (i) the GTL Request should not be complied with and steps relating to it should cease; and (ii) that the Administrators should remain in office.”*
17. Mr Nash Q.C., leading Mr Amey, on behalf of GTL accepts before me that there is jurisdiction to direct the administration should continue to implement the Administrators' proposals. He submits that there is no real prospect of any of the purposes of administration being achieved, and the Company should be placed into liquidation without further delay following rejection of the proposals. He submits there is cause for GTL being concerned that Salamander, despite not being a creditor, is abusing the process of administration in order as a minority shareholder to apply commercial pressure to GTL and those associated with it. Salamander, he submits, is using this administration to carry on a shareholders' dispute by other means. GTL is not seeking to “stifle” investigations into its own conduct or that of anyone else. If there is a good claim against GTL, it can be pursued by replacement administrators or by a liquidator.
18. He submits that the court does not have jurisdiction to direct that GTL's request for a decision by creditors should not be implemented. Alternatively, that the court should only exercise its power to do so in exceptional circumstances taking into consideration the rights conferred by **paragraph 97 of Schedule B1**. It would be wrong to do so when the creditors have not yet had the opportunity to vote upon those who would be in control of implementing proposals directly affecting them and impinging upon their contractual rights.
19. As a result of those submissions, it is convenient to address the law before setting out a summary of the evidence and relevant facts.

## D) The Law

### D1) The Statutory Scheme

20. The submissions in respect of both applications need to be addressed within the context of the underlying statutory scheme which offers the opportunity within the conditions prescribed by *paragraph 11 of Schedule B1* for one or other of the purposes identified in *paragraph 3 of Schedule B1* to be fulfilled by the implementation of administrators' proposals for achieving the purpose under *paragraph 49 of Schedule B1* approved by creditors under *paragraph 53(1) of Schedule B1*.
21. The scheme primarily establishes a tripartite relationship between the company through its administrators, its creditors and the court. The court has overall supervision of a process in which the interests of the creditors are of considerable importance, whilst the administrators ensure that the statutory purpose(s) of the administration can be and is/are being fulfilled. This underlying scheme is evident from the following features of the scheme which need to be borne in mind in particular for these applications and the submissions:
- a) Whilst the ability to initiate an administration through the court or formal process is conferred upon a wide group (including the company, directors, holders of floating charges and other creditors), the procedure is aimed at the production of proposals upon which the creditors will vote (*paragraphs 49-54 of Schedule B1*). This reflects their interest in the process and the fact that the administration's moratorium will result in the creditors usually foregoing existing rights and being bound instead as a class by an insolvency remedy which will restrict or otherwise affect their rights.
  - b) It follows, subject to express provision, that the interests of creditors will be of particular import should the court need to address the conduct of the administration. That will be so whether the purpose of the administration is to rescue the company as a going concern or to achieve a better result for creditors than a liquidation (*paragraph 3(1)(a) and (b) of Schedule B1*).
  - c) Although the prescribed one-year period for an administration can be extended (*paragraph 76 of Schedule B1*), it is intended to be a relatively short-term process. Subject to the jurisdiction of the court, it is paramount for its continuation that the purposes of an administration can still be achieved. An administrator's function to manage the affairs, business and property of the company is to be exercised in accordance the approved proposals and any revisions (see *paragraph 68(1) of Schedule B1*).
  - d) The short-term nature of the process is an indication of a boundary within which proposals should be drafted and applied. The paramount requirement is apparent from the mandatory requirement for a court application under *paragraph 55 of Schedule B1* if proposals are not approved. It is also evident from the obligation upon an administrator to apply to the court should it be thought that the purpose cannot be achieved or that the company should not have entered administration. The court may provide for the appointment to cease (see *paragraph 79 of Schedule B1*).

- e) It is in the context above that Parliament has largely entrusted the process and its functions to insolvency practitioners, having required them to be licensed, adopting the recommendations of the *Cork Committee (Report, Chapters 15-17)* to avoid the problems caused by the dubious practices of certain “cowboy” liquidators (see *Part XIII of the Act*). However, the adverb “largely” recognises the role of the court and that the creditors are to be able to play a part both before and after proposals are voted upon.
  - f) For example, creditors may decide that an administrator should make an application under *paragraph 79 of Schedule B1* to obtain an order that their appointment shall cease with effect from a specified time. Creditors may obtain cessation of appointment by court application in cases where the appointee or applicant for a court order had an improper motive (*paragraph 81 of Schedule B1*). In addition there is the express power conferred upon creditors to decide to replace an administrator appointed by a company or the directors (*paragraph 97 of Schedule B1*) with equivalent powers for holders of a floating charge when there is a floating charge holder appointment (*paragraph 96 of Schedule B1*).
  - g) Those provisions also establish the statutory intention that the court should have overall supervision of the conduct of an administration. This intention is also found within the provisions making all administrators officers of the court (*paragraph 5 of Schedule B1*), enabling administrators to apply for directions and requiring administrators to comply with those directions (*paragraphs 63 and 68(2) of Schedule B1*). There is also a general power conferred upon the court to remove administrators (*paragraph 88 of Schedule B1*).
22. It is against that backdrop of the statutory importance of the role and functions of an administrator, creditors and the court, that the court’s powers under *paragraph 55(2) of Schedule B1* existing upon the creditors’ rejection of proposals and the application of *paragraphs 56, 63 and 97 of Schedule B1* to enable creditors to substitute their nominee as administrator are to be addressed.

## **D2) Paragraph 55(2) of Schedule B1**

23. The wide discretionary powers of the court under *paragraph 55(2) of Schedule B1*, including the power to authorise implementation of the rejected proposals notwithstanding opposition from the majority of creditors, have been referred to at paragraphs 11-12 above. The circumstances in which that power may be exercised, identified by Mr Justice Neuberger, as he then was, in *Re Structures & Computers Ltd*, arose within the context of an argument that the court could not make an administration order. The argument was that there could be no real prospect of fulfilment of the purposes of the administration when the majority creditor, who opposed the application, could thwart those prospects in the future by voting against an administrator’s proposals.
24. “Real purpose” equates with the opinion that the purpose is “reasonably likely to be achieved” to be provided in an administrator’s statement and consent to act (see *Rule 3.2(1)(h) of the Insolvency Rules 2016*) and the provision in *paragraph 11(b) of*

*Schedule B1* that the court may make an administration order if it is “*reasonably likely to achieve the purpose*” (see also *Re AA Mutual International Insurance Co Ltd* [2004] EWHC 2430 (Ch) at [20]-[21] per Lewison J., as he then was, and *Hammonds (a firm) v Pro-Fit USA Ltd* [2008] 2 BCLC 159 at [20] and [24] per Warren J.).

25. Four specific points can be taken from his judgment and from the decision in *DKLL Solicitors v Revenue and Customs Commissioners* (above), for the purposes of the first application:
- a) First, the jurisdiction to disregard the rejection of proposals, under what is now *paragraph 55(2) of Schedule B1*, will only arise when the court is satisfied that one or more of the purpose(s) of an administration has/have a real prospect of being fulfilled.
  - b) Second, a court will normally place “*great reliance*” upon the expertise and experience of insolvency practitioners when deciding if there is a real prospect. This is consistent with their position as qualifying insolvency practitioners, the powers conferred by the statute upon the administrators and the fact that they are officers of the court (see also *Re Stanleybet UK Investments Ltd* [2012] BCC 550 at [19] Mr Justice Sales, as he then was). It is also recognised that they will usually be in the best position to have accumulated relevant knowledge and to assess the commercial prospects in cases which are often difficult and complex.
  - c) Third, it would nevertheless be unusual to disregard the rejection of the proposals despite the existence of real prospects of fulfilment. This accords with the relevance of creditors to and their interests in the statutory process.
  - d) Fourth, the court might do so, for example, when “*it is not entirely easy to see why [the majority creditor] is opposed unless it is for the purpose of obtaining ... [a] collateral benefit*” (per Neuberger J.). In that case, the collateral benefit was the opportunity to acquire the company’s employees and goodwill either without payment or at a significantly lower cost than would have to be paid if the company remained in administration.
26. Each case will turn on its own facts, but this opens the potential, in principle at least, for the court to exercise its jurisdiction to disregard GTL’s views because of the benefits it may receive from termination of the Licence Agreement. The same applies in principle, if there is a collateral purpose to thwart investigations which may lead to litigation against GTL. It is to be emphasised, however, that the existence of a collateral motive will not necessarily be determinative. The court when considering the views of all creditors will address all the circumstances of the case when exercising its discretionary powers and give appropriate weight to all relevant matters including any other reasons for opposition.
27. Finally, it is to be noted that both decisions reflect the statutory intention that the administration process should be subject to the court’s overall supervision, control and direction. They encompass and, therefore, further evidence the above-described, underlying statutory scheme.



**D3) Paragraphs 55(2), 63 and 97 of Schedule B1 - Jurisdiction**

**i) Mr Nash Q.C.'s Principal Submissions**

28. It is submitted by Mr Nash Q.C. that no such intention exists for **paragraph 56 of Schedule B1**, at least certainly not in the context of a creditor with at least 10% of the total debts requesting that creditors decide whether to replace the administrators under **paragraph 97 of Schedule B1**.
29. In a well-constructed argument, Mr Nash Q.C. drew attention to the fact that **paragraph 97 of Schedule B1** applies when a company or directors have appointed the administrator. It offers to creditors their first opportunity to exercise a statutory right to ensure their nominee will be at the helm when producing and, if appropriate, implementing proposals that have the effect on creditors summarised at paragraph 20(a) above. The right exists because creditors have not had their “say” and Parliament intends them to be able to choose the administrator if they so wish. That, he submits, is not a right to be extinguished by the court whether in the context of **paragraphs 56(1) or 63 of Schedule B1** or otherwise.
30. Mr Nash Q.C. emphasised that the mandatory nature of the wording within **paragraph 56(1)**, that the administrator “*shall seek a decision*” from the company’s creditors, is not only sufficient to sustain his submissions but is also supported by the fact that **paragraph 56(2)** creates a criminal offence if a decision is not sought “*without reasonable excuse*”.
31. The submissions stand by the mandatory, statutory language and also count on the fact that the *Act* is to be applied as a break from the past (see **Re M C Bacon Ltd (No1)** [1990] B.C.C. 78). In addition, Mr Nash Q.C. relies upon the words of Lord Justice Lloyd in **Donaldson v O’Sullivan** [2008] EWCA Civ 879; [2009] 1 W.L.R. 924 at [38-41] and the decision of Mr Registrar Briggs, as he then was, in **Kean v Lucas** [2017] EWHC 250 (Ch), [2017] B.C.C. 311. They distinguished for the purposes of statutory interpretation court appointed processes (compulsory liquidations and bankruptcies) from others, such as voluntary liquidations which do not “*require or depend on court procedures .... [and] may proceed entirely without reference to the court*” (Lloyd LJ at [38]). He submits that **paragraph 97 of Schedule B1** requires an approach to statutory construction that recognises it only applies to administrations which result from appointments by the company or the directors. Its implementation should not be controlled by the court in the same way as those processes which result from court orders.

**ii) Mr Al-Attar and Mr Goldring Q.C.'s Principal Submissions - Jurisdiction**

32. Mr Al-Attar and Mr Goldring observe that **paragraph 56 of Schedule B1** is in “*materially the same terms as section 168(2) of the Act, which applies in relation to compulsory liquidation, and imposes a similar duty upon a liquidator to summon a meeting requisitioned by creditors*”. The significance being that it is established by case law that the court has a jurisdiction upon an application by a liquidator for directions under **section 168(3) of the Act** to direct that a meeting is not called and,

therefore, that the qualifying decision procedure is not activated. The following is submitted within Mr Al-Attar's skeleton argument:

*“The jurisdiction to override the duty traces its origins back to the decisions of the Court of Appeal in Re Mansel; Ex p. Sayer (1887) 19 Q.B.D. 679 and the Divisional Court in Bankruptcy in Re Burn; Ex p Dawson [1932] 1 Ch. 247, which concerned sections 65 and 72 of the Bankruptcy Act 1869 and section 105 of the Bankruptcy Act 1914 respectively: see Re Barings Plc (No.6) [2001] 2 BCLC 159 at [43] per Sir Andrew Morritt V-C; Carman v Cronos Group S.A. [2006] EWHC 1390 (Ch) at [23]-[25] per Patten J; and Kean v Lucas [2017] B.C.C 311 at [12] per Mr Registrar Briggs ....*

*There is no logical reason why the foregoing principles ought not apply to paragraph 56 of Schedule B1 in respect of a meeting requisitioned to remove an administrator. Accordingly, in Med-Gourmet Restaurants Ltd v Ostuni Investments Ltd [2013] B.C.C. 47, Lewison J held (at [13]): ‘I agree that there is a difference between picking over the carcass of a dead company and trying to breath life into an ailing one. Nevertheless, the same broad principles apply to the choice of an administrator as to the choice of liquidator. As Sir Andrew Morritt V-C, pointed out [in Re Barings Plc (No.6)], the choice must be conducive to the proper operation of the process of liquidation and to justice as between all those interested in the liquidation’ (Emphasis added).”*

### iii) Decision

33. The problem for Mr Nash's submissions is that they run contrary to the underlying statutory scheme explained above and there is no express or implied wording to be drawn from the specific provisions to exclude the court's role of overall supervision, control and direction. The court has jurisdiction upon an application by an administrator for directions to direct that an administrator shall not seek a decision from the creditors in accordance with **paragraph 56 of Schedule B1**, whether for the purposes of **paragraph 97 of Schedule B1** or otherwise, for the following reasons:
- a) As a matter of statutory construction, it is plainly right that under **paragraphs 56(1) and 97 of Schedule B1** creditors can request a vote to decide whether to replace the administrator in the circumstances specified. It is also correct that there is no requirement that the administrators must have acted in a manner which justifies that decision. The only express condition, apart from value of debt for the purpose of the request and the absence of any qualifying floating charge, is that the company or its directors were the appointees. It is also correct that the obligation to requisition is expressed in mandatory terms.
  - b) However, neither **paragraphs 56** nor **97 of Schedule B1** exclude or place any limitations upon the right to apply to the court for directions under **paragraph 63 of Schedule B1** or upon the court's unfettered power to make them.
  - c) Whilst there is issue between the parties over the extent to which “pre-1986” law is relevant to the *Act*, there can be no dispute that **paragraph 63 of Schedule B1** applies the formula to be found, albeit with different wording from time to time and in different contexts, in the long line of statutory provisions for bankruptcy and corporate insolvency which enable the court to decide and give directions upon any matter arising in an insolvency (see for example the judgments of the Court of Appeal in **Re Mansel; Ex p. Sayer** (above)). The court's unfettered power to do so is founded from the principle

that it has an overall role both by statutory and inherent jurisdiction of supervision, control and direction in insolvencies subject to express or implied statutory provision within the relevant statutory scheme.

- d) The absence of any wording to restrain the court's jurisdiction under **paragraph 63 of schedule B1** establishes that Parliament intended the court's role of supervision, control and direction to apply without curtailment within a jurisdiction is to be exercised in accordance with the relevant statutory framework applicable to administrations and taking into consideration the court's inherent jurisdiction. This is entirely consistent with the statutory framework for administrations identified above.
  - e) It is trite law that (subject to express or implied wording) the jurisdiction to give directions to an insolvency office holder includes a power to direct them not to perform a duty, as well as power to require performance. This was stated by Lord Justice Lloyd in *Donaldson v O'Sullivan* (above at [41F]). That case follows the long train of decisions which have applied such a jurisdiction in the context of the unfettered power to give directions including *Re Mansel* (above) and *Ex p. Sayer* (above).
  - f) As to more recent authority: Although the decision in *Re Barings plc (No 6)* (above) flowed from a concession that there was jurisdiction under **section 168(3) of the Act** to give directions which override a liquidator's duty to summon a meeting to decide whether to replace the liquidators, the concession as to jurisdiction was certainly approved by Sir Andrew Morritt, then Vice-Chancellor. He stated that "*it was plainly implicit*" from the width of the unfettered power to make directions that such jurisdiction existed. That was followed in *Carmen v Cronos Group SA* [2006] EWHC 1390 (Ch) (amongst other cases) by Patten J., as he then was, when deciding the court had power to direct in a compulsory liquidation under **section 168(3) of the Act** that a liquidator should not hold a meeting otherwise required to be held by **section 168(2) of the Act** to decide whether to replace him.
  - g) The same approach and reasoning applies to **paragraphs 56, 63 and 97 of Schedule B1**. The existence of a criminal offence provision does not alter that. A direction under **paragraph 63** will obviously provide a "*reasonable excuse*" preventing a criminal offence under **paragraph 56 of Schedule B1**.
  - h) That all being so, in an appropriate case the administrators can apply for directions and be directed not to seek a decision from the creditors as requested.
34. Further, not only does the existence of this wide discretion under **paragraph 63 of Schedule B1** give effect to the supervisory role of the court but there is a wide spectrum of examples which demonstrate that it would be extraordinary if Parliament had not intended that to be the case. An example being if a request for a creditors' decision to replace is made by a majority creditor when the administrators with CFAs and ATE insurance in place have commenced proceedings against that creditor, and perhaps even reached the stage of trial. To counter that example, it might be suggested that it would be unlikely an insolvency practitioner would consent to act as a replacement administrator in those circumstances. **Paragraph 97(3) of Schedule B1**

requires that consent in writing before a decision to replace is made. However even should that prove correct in practice, and it is not to be assumed, the example is at or towards the far end of the spectrum and there are numerous potential scenarios where a majority creditor might act prejudicially to the interests of other creditors and to the administration. The point is that the court's overall role of supervision, control and direction exists to cover all eventualities even if in fact not required.

35. Mr Nash's submission is also at odds with the fact that the court has the widest possible inherent jurisdiction to control insolvency proceedings, even "*to direct that things be done (or not done) in apparent conflict with express provisions of the legislation*" (see *Donaldson v O'Sullivan* [2008] EWCA Civ 879; [2009] 1 W.L.R. 924, Lloyd LJ at [41]). It would be wrong to construe any curtailment of that inherent jurisdiction absent express or implied wording.
36. It may be noted that Lord Justice Lloyd expressly observed that did not attribute that inherent jurisdiction to the office holder being an officer of the court. The Court of Appeal did in *Re T.H. Knitwear (Wholesale) Ltd* [1988] 1 Ch. 275 but that was when deciding that the principle in *Ex parte James*, L.R.9 Ch. App 609, 614 did not apply to a voluntary liquidation. The Court of Appeal's decision was reached because the "*entire basis of the principle*" was derived from the court's control of its officers and the "*anomalous*" principle should not be extended (page 289E-F, per Slade LJ). The decision in *Re T.H. Knitwear (Wholesale) Ltd* does not undermine the decision within paragraph 33 above or the reasons.
37. Mr Nash Q.C. is (of course) correct that Lord Justice Lloyd and, applying his approach, Mr Registrar Briggs in *Kean v Lucas* (above) drew attention to the potential relevance for statutory interpretation of the question whether the insolvency process being considered was court appointed. However, it does not follow that Parliament did not intend the court to have jurisdiction to intervene simply because a **paragraph 56 of Schedule B1** requisition under **paragraph 97 of Schedule B1** can only be made if the administrator was appointed by the company or its directors outside of a court process. That is a relevant factor for the purposes of construction but one to be considered within the context of the wording of the provisions as a whole and the statutory framework. In that context it is certainly not determinative for the following reasons:
  - a) His submission that this distinction should apply is undermined by the fact that no such differentiation between court appointed and non-court appointed processes is made within **paragraphs 56 or 63 of Schedule B1**. Parliament conferred upon the court the unfettered power to make directions under **paragraph 63** whenever **paragraph 56** was engaged including pursuant to **paragraph 97 of Schedule B1**. This is consistent with the overall role of the court within the statutory framework for administrations.
  - b) It is also consistent with the long line of authorities identified by Mr Al-Attar establishing the court's statutory power to give directions in bankruptcies and liquidations within similarly drafted statutory provisions, including the power to direct that meetings requisitioned by a majority of creditors should not be held.

- c) The principle underlying that statutory interpretation, namely that the court retains overall supervision, control and direction of the relevant insolvency process, equally applies to the statutory scheme for administrations.
38. That conclusion is also apparent from the following features of the decisions in *Donaldson v O'Sullivan* (above) and *Kean v Lucas* (above) (which I refer to for completeness and with the further deference due to counsels' submissions):
- a) The context of Lord Justice Lloyd's remarks was the problem that the only express power (*section 297(4-5) of the Act*) conferred upon the court to appoint a trustee in bankruptcy applied in specific circumstances which did not exist in that case. The question for the Court of Appeal was whether that precluded (in summary) the court from appointing a trustee in other circumstances under its general powers to control the bankruptcy through directions. Two points were emphasised by Lord Justice Lloyd when reaching the answer that it did not: (i) the relevance when reaching that decision of bankruptcy being a court-controlled process; and (ii) the court's above-mentioned inherent jurisdiction. His distinction between court controlled other insolvency remedies sustained the application of the first point to the statutory interpretation required in that case. He did not need to address, for example, the control to be exercised upon directions in voluntary liquidations when answering questions under *section 112 of the Act* or *paragraph 63 of Schedule B1*. The distinction does not lead to the conclusion that the court will not have power to intervene in non-court appointed circumstances.
- b) The same deduction applies from Lord Justice Lloyd's references in paragraphs [40-41] to cases which Mr Al-Attar and Mr Goldring Q.C. now rely upon, *In re Mansel* (above) and *In re Burn* (above). He observed that those and other cases supported "*the thesis that bankruptcy is a court-controlled process in relation to which the court has wide powers, exercisable for the purposes of the insolvency process as a whole, which are not limited to those conferred expressly by the relevant legislation ... [and provide] scope for the court to direct that things be done (or not done) in apparent conflict with express provisions of the legislation*". He was not saying this will not apply to non-court appointed processes. It will apply within the context of court control whenever it is to be exercised and whether that is so will depend upon the relevant statutory context and framework.
- c) The relevant point about the decision in *Kean v Lucas* (above) is that the provision enabling an application to the court for directions in a voluntary liquidation by a liquidator, contributory or creditor, *section 112 of the Act*, includes an express "*just and beneficial*" test. Mr Registrar Briggs decided because of the express wording that this was the threshold test and there was no need to add further tests derived from other provisions conferring a similar right within other insolvency processes (for example, in *Re Barings plc (No 6)* (above) to be referred to further below). Although he emphasised the importance of appreciating the interests of creditors within a voluntary liquidation, he accepted that *section 112's* wide jurisdiction conferred power on the court to direct that a meeting should not be held when it was just and beneficial in that context. This too sustains my decision in paragraph 33 above.

- d) Interestingly for the application of that test, the form of words used follows the test of “*injustice*” identified by Lord Esher MR when referring to the foundation for the court’s jurisdiction to decide all questions in bankruptcy cases under *section 72 of the Bankruptcy Act 1883*. It appears to be an “umbrella phrase”. No doubt, all directions whether under the 1883 statute or any of the later statutes need to be just and beneficial. The point made in *Kean v Lucas* (above) is not that the court does not have jurisdiction to direct that a meeting should not be held when *Rule 4.114 of the Insolvency Rules 1986* (now *Rule 15.7(3) of the Insolvency Rules 2016*) provides a liquidator must summon a meeting when conditions are met. It is that the test to be applied when exercising such jurisdiction must relate to the context and circumstances of the particular insolvency measure, including the interests of those involved. That includes the need to appreciate the alterations in statutory context created by the change of culture and other recommendations of the *Cork Report (Insolvency Law and Practice: Report of the Review Committee)* Cmnd 8558. The decision in paragraph 33 above applies that approach by specific reference to the statutory scheme for administrations.
39. For all those reasons I conclude the court has jurisdiction to direct that the decision requested under *paragraph 97 of Schedule B1* should not be sought from the creditors under *paragraph 56 of Schedule B1*. The next issue between the parties is how that jurisdiction is to be exercised.

#### **D4) The Court’s Discretion under Paragraph 63 of Schedule B1**

##### **i) Mr Nash Q.C.’s Alternative Submissions**

40. Mr Nash Q.C. submits that if a discretion exists, it “*will only be exercised in the most extreme cases*”. He contends that this has been the case even within the context of bankruptcy and compulsory liquidation. His examples include: *Re Burn* (above) in which Farwell J expressed the test as whether the meeting would be “*useless*”; *Re Barings plc (No 6)* (above) in which the liquidators were in the midst of very heavy litigation against the company’s auditors when they received a requisition from one particular faction of creditors, who would not state give their motives “*for reasons of confidentiality*”,
41. Mr Nash Q.C. also relied upon the decision in *Kean v Lucas* (above). First, because Mr Registrar Briggs did not consider the costs of holding a meeting and, if the resolution was passed, the cost of transferring files to a new office holder to be significant. Second, because he rejected any inference that the reason for the request was to frustrate investigations when statute did not require reasons to be given and the evidence showed the requestor had many complaints which it would be inappropriate to investigate for the purposes of the decision. Third, because he rejected the objection that the new office holder would be a “nominee” for the majority shareholder bearing in mind the requirements for a licensed insolvency practitioner. He observed it would be necessary to establish that the likely replacement “*would act on the instructions or as agent of a particular creditor*”.

**ii) Mr Al-Attar and Mr Goldring Q.C.'s Submissions - Discretion**

42. The submissions of Mr Al-Attar and Mr Goldring Q.C. rely upon a variety of cases addressing the “*basic*” test to be applied, namely whether implementation of the qualifying decision procedure will be conducive to both (i) the proper operation of the administration; and (ii) justice between all those interested in the administration. I accept their approach and will refer to the cases (to the extent necessary) below.
43. Before doing so, I should add that Mr Al-Attar, following the Administrators’ stated neutrality upon an application in which they seek directions not a specific outcome, also identifies three legal seams from “*well-established line[s] of authority*”. First, the principle that majority rule is not absolute in the context of a liquidation, in particular, in relation to the decision of creditors to petition for the winding up of a company (for example, see *Re Maud* [2020] EWHC 974 (Ch) and the principles Snowden J summarised from *In re Southard* [1979] 1 WLR 546, Brightman J and [1979] 1 WLR 1198, Court of Appeal). Second, that the Court will exercise its jurisdiction to safeguard the proper use of a requisition procedure. Third that the existence of any conflict of interest will be borne in mind.
44. Mr Goldring Q.C. does not disagree with Mr Al-Attar’s submissions but in a positive approach in opposition to the second application relies upon the decision of Mr Justice Marcus Smith in *Raithatha v Holstein* [2017] EWHC 3069 at [45] to submit: “*The fact, as in this case, that the body of creditors, or part of the body of creditors, seeking the replacement may themselves face claims against them brought by the Administrators is a ‘highly material’ factor telling against the holding of a meeting ... The court’s concern is the proper operation of the process of the administration and justice as between all those interested in the administration.*”.

**iii) Decision**

45. It is obviously correct that exercise of the court’s discretion must depend upon the context of the power and the circumstances in which it is to be exercised. This was best expressed by Sir Andrew Morritt V-C in *Re Barings Plc (No.6)* (above) when he explained that a court considering whether to direct a meeting should not be held would consider (i) whether it will be conducive to the proper operation of the insolvency process and (ii) justice as between all those interested in that process. The fact that those principles of guidance were stated within the context of a liquidation does not diminish them as general guidance to be applied within the context of the statutory scheme for administrations.
46. The court in reaching a decision must give considerable weight to the wording of *paragraph 97 of Schedule B1* and the fact that it provides the first opportunity for the creditors’ nominees to be appointed. Similarly to the mandatory wording of *paragraph 56 Schedule B1* both generally and in the specific context of *paragraph 97 of Schedule B1*. However, in the context of the court’s unfettered power within *paragraph 63 of Schedule B1* to give directions pursuant to the court’s role as supervisor with power to control and direct, the cases referred to by Mr Al-Attar and Mr Goldring Q.C. provide further guidance of potential relevance to the second application. The guidance should be considered to the extent relevant to the statutory

context of the administration process and all the evidence and circumstances peculiar to the case. Accordingly:

- a) The court should have regard to all relevant circumstances including the value of the debts of those supporting and opposing the requisition. That is because the interests of the majority normally bear more weight than those of the minority. However, that is not necessarily so. It may be relevant for consideration to be given to the nature of those debts and the reasons for support and opposition (see per Brightman J., as he then was, in *In re Southard & Co Ltd* above).
- b) As Mr Justice Snowden explained in *Re Maud* (above), depending on the facts and circumstances, this may involve the court assessing from the evidence whether the reasons are “commercially rational” and, if so their weight. Rationality and weight, which must be addressed in the specific statutory context, may be “diminished by any extraneous factors such as personal antipathy or affection on the part of the creditor for the debtor (or those connected with it in the case of a company).”
- c) An example where rationality and weight may be diminished can be found in the judgment of Mr Justice Marcus Smith in *Raithatha v Holstein* (above) when he observed but in a fact specific context at [45] that: “[T]he fact that the body of creditors or part of the body of creditors seeking the removal of the liquidator may themselves face claims against them brought at the instance of the liquidator is highly material. I do not accept that this factor is determinative in all cases, but it is clearly highly material”. It is guidance to be applied within and according to the statutory context and all relevant circumstances.

## **E) The Evidence**

### **E1) Introduction**

47. FFL’s business is concerned with research and development in the field of medicine. It includes the use of robotic manufacturing technology in the manufacture of products to be used to treat a spectrum of neurological and central nervous system disorders, for example, spinal cord injury, traumatic brain injury, Parkinson’s Disease and Alzheimer’s Disease. This work is derived from the research of Mr Ahlfors, who established the Genesis Trust and associated and connected companies including FFL and GTL.
48. Salamander became a shareholder in FFL through an investment agreement reached between Mr Ahlfors and Mr Dag Stromme, representing himself and other Norwegian investors, during 2015. There was a second round of investment and a revised shareholders’ agreement in 2017. I am not concerned with the terms of that agreement, although plainly it is inextricably entwined with the commercial relationship between the two sets of shareholders.



49. FFL's business involves a variety of contractual relationships but it is sufficient to concentrate upon the agreements between FFL and GTL. As a result, I will not dwell on the role of FFL's Canadian subsidiary, now subject to insolvency remedies, or on the other Genesis companies such as New World Laboratories Inc. The key to the framework of the agreements is that FFL would be able to benefit commercially from the work of or evolved from Mr Ahlfors by providing investment and bringing medical treatments and products to market.

## **E2) The Licence Agreement**

50. The Licence Agreement superseded an interim licence agreement which had been concluded as part of an initial fund-raising exercise involving FFL and the Genesis Trust, the then owner of the relevant intellectual property rights. A novation occurred on 2 May 2016 when the Genesis Trust transferred rights to GTL. The Licence Agreement made on 18 October 2016 replaced that temporary licence. In summary but, importantly, subject to the amendments in part referred to below, the Licence Agreement within the context of detailed, express confidentiality and intellectual property protection terms and obligations upon FFL to keep records and permit audit and inspection:
- a) Requires FFL to pay a Licence Fee (now and for the remainder of its term US\$500,000 a year), relevant costs of GTL (as defined) and any applicable royalties for a perpetual, exclusive territorially based licence for the use and exploitation of specified intellectual property owned by GTL, subject to its quality control, terminable upon notice in accordance with its terms (clause 22).
  - b) The royalties relate to a percentage (between 2.5-5%) of aggregate annual net sales prices received by FFL from licensed products resulting from the licensed know-how. In addition, FFL will pay CHF 2.05m to the Novagenesis Foundation within thirty (30) days of the Food and Drug Administration of the United States of America issuing market approval for the directly reprogrammed neural precursor stem cell therapy product ("drNPC Product") that is the subject of the licensed patents for a first medical indication.
  - c) FFL pays fees (starting at US\$750,000 for the first two years and then in a range between US\$1.5-2.5m) in return for GTL providing product development services. They are research and development activities, trials and experiments and other services in relation to the licensed intellectual property. Those services are to be the subject of two-year development plans. This requires the parties to agree a plan within 60 days of the expiry of the previous development period. If not agreed, the product development services will be suspended until agreement is reached.
  - d) Developed technology and its intellectual property rights will belong to FFL, namely the technology and rights resulting from the product development services which could be used by FFL under the Licence Agreement.

- e) FFL has an option to have Canada included in its territory and a right of first negotiation and refusal for any new licences to be granted by GTL.
- f) Although sub-licences (with no rights to assign or further sub-licence) may be granted to subsidiaries and those for whom GTL has granted prior written consent, the Licence Agreement is non-assignable/transferrable by either party except: (i) to affiliates; or (ii) with the prior written consent of the other party, which is not to be unreasonably withheld or delayed.
- g) The Licence Agreement cannot be mortgaged or charged without the prior written consent of the other party, which is not to be unreasonably withheld or delayed.
- h) The Licence Agreement can be terminated on notice by either party if the other party (i) permanently ceases to carry on the entirety of its business; (ii) has a winding-up order made in respect its business; (iii) any corporate action, legal proceedings or other procedure or step is taken by or on behalf of the other party with the intention of effecting a voluntary striking-off; (iii) has a liquidator appointed in respect of its business other than in respect of a solvent liquidation or a reorganisation with one or more other companies where the resulting entity is at least as creditworthy as the relevant party.
- i) Without prejudice to sub-paragraph (h) above, GTL may terminate with immediate effect by written notice to FFL if (i) FFL's board of directors pass a board resolution to cease manufacturing, sales or development of the licensed products; (ii) it is no longer under common control with GTL and either of the following sub-paragraphs apply; (iii) it fails to pay on the due date for payment any undisputed amount payable under the Licence Agreement and fails to pay such undisputed amount to GTL within thirty days after being notified in writing of the default and being required to make payment; or (iv) FFL commits a material breach of any of its other material obligations under this Licence Agreement and if that breach is capable of remedy, has failed to remedy it within forty-five days after receipt of written notice requiring remedy.
- j) Other than under the rights of termination summarised in sub-paragraphs (h) and (i) above, there can be no termination for breach of FFL's obligations whilst FFL and GTL are under common control.

### **E3) The Transitional Support Services Agreement**

51. On 30 March 2018 FFL and GTL entered a "Transitional Support Services Agreement" requiring GTL in consideration for the payment of service charges to supply services to enable FFL (amongst other matters) to purchase, complete the automation process for the manufacture of and have the ability to manufacture the drNPC Product. Whilst plainly important, it is not suggested that any distinction should be drawn between it and the Licence Agreement for the purposes of the applications.

#### **E4) Amendments**

52. As a matter of context because it did not feature in submissions, the minutes of an FFL strategy meeting held on 13 December 2018 attended also by Mr Ahlfors and others connected with the Genesis Trust and/or GTL indicate the extent of the work being carried out, the progress being achieved and the work to be undertaken. This is also shown in a technical research and development report dated 13 February 2019.
53. On 15 March 2019 the Licence Agreement was amended. The term of the “Transitional Support Services Agreement” was also extended with amendment. These amendments have led to the derivative claim.
54. The recitals of the amended Licence Agreement only explain that the parties wish “*to reflect the current status of the development activities with respect to Licenced Products, modify the rules of ownership and use of Developed Technology, and clarify certain provisions*”. The amendments are largely by reference to the definitions for the terms “development period”, “product development fees” and “product development services”. However, there is also a provision that rights to the automated robotic manufacturing technology patents will no longer be granted under the Licence Agreement but under the “Transitional Support Services Agreement”, as amended. The key feature is that all developed technology will be exclusively owned by GTL subject to licences granted to FFL under the Licence Agreement as amended.
55. Mr Wormleighton, one of the Administrators, in his first witness statement identifies the effects of the amendments to the Licence Agreement to include: (i) the development fees to be paid by FFL are now at cost rather than fixed; (ii) the rights FFL would obtain to developed technology will not “*survive termination of the Licence Agreement*” now GTL owns the intellectual property rights; and (iii) the loss of rights concerning the patents relating to the automated robotic manufacturing technology.
56. The effects for the “Transitional Support Services Agreement” were identified by him as: (i) changes to the amounts payable to GTL, which GTL subsequently explained as being to reduce the short term cost to FFL and as a consequence improve its cash flow; and (ii) the inclusion of a ‘balloon’ payment, equal to three times GTL’s financial contribution to the costs of the services other than the development of the automated robotic manufacturing technology, to be paid before the right to own and operate (but not the intellectual property rights of) the automated robotic manufacturing technology would be transferred to FFL.

#### **E5) The Derivative and Other Claims**

57. On 15 November 2019 Salamander issued the derivative claim. Mr Stromme in his evidence on behalf of Salamander explains that it “*believes that over a sustained period, Mr Ahlfors, the Genesis Entities, Genesis and other individuals have conspired to transfer value from the Company to the Genesis Entities by various unlawful means*”.

58. The Particulars of Claim are founded on the allegation that directors, de jure, shadow and de facto, of FFL “*have sought to transfer [FFL's] key assets to [GTL] and have taken steps preparatory to the cessation of business by [FFL]*”. Those preparatory steps are alleged to be: (i) the purported approval at a board meeting on 27 and 28 August to “*initiate, if necessary, 30-day Notices of Termination of Contracts (Contract Labour and Consultants), or earlier if reasonable, to reduce cash burn and to take any other actions reasonably determined to be necessary or desirable to reduce cash burn and preserve cash assets*”; (ii) a statement by Dr Salinas at a board meeting on 22 October 2019 that if FFL's shareholders were unable to agree a basis on which Salamander and other minority shareholders would invest additional capital into [FFL], he would vote for [FFL] to commence insolvency proceedings; and (iii) the failure of members to reach an amicable resolution at meetings during 7-9 November 2019.
59. The resulting causes of action, including accessory liability and conspiracy, relate to breaches of directors’ duties causing loss of/damage: (i) to FFL’s ownership of intellectual property rights including for automated robotic manufacturing technology; (ii) because of the requirement to make payments before it obtained rights to the automated robotic manufacturing technology under licence; (iii) due to the imposition of further liabilities on the Company resulting from the 15 March 2019 agreements; (iv) including reduction in the value of the Company's business both as a going concern and in insolvency. The prayer of relief is potentially confusing but essentially seeks compensation for the loss of rights and damage resulting.
60. The Administrators are of the opinion that, even if the derivative claim had not been issued prior to the administration, there are strong grounds to investigate whether claims exist as a result of the amendments. These grounds are described in detail by Mr Wormleighton in his first witness statement at paragraph 72.
61. Mr Wormleighton suggests the amendments may have deprived the Company of valuable rights and he also concludes from the Administrators’ investigations to date that there are unanswered questions concerning FFL’s financial position in and around the time the amendment agreements were entered into. Those matters stand to be investigated in their own right, he states, but they are also entwined with the amendments. It is the Administrators’ current understanding from GTL that the amendments resulted from FFL’s financial difficulties. The Administrators raise the question whether those difficulties were caused by misfeasance.
62. GTL in its evidence in answer from its agent, Mr McGlynn, contend the derivative claim is bogus and intended to be used by Salamander as leverage to force its co-shareholder, the Genesis Trust, to the table in order to renegotiate their respective rights. That is the reason, it is said, why Salamander funds the administration. In support of that contention GTL relies upon (amongst other matters): (i) the financial position of FFL which created the need for the amendments, basically, it had run out of money; and (ii) the fact that FFL was independently advised by a major, international law firm when agreeing the amendments. It is also asserted that FFL made “*additional strategic gains*”. All these matters are dealt with in detail by Mr McGlynn but it is unnecessary to expand further because this judgment cannot determine the merits of the derivative claim.

63. It also stated within the evidence of Mr Wormleighton that investigations have been hindered by significant difficulties incurred when seeking to obtain relatively routine books and records from GTL and others in connection with their ongoing investigations. GTL observe through Mr McGlynn that *“the Administrators already have more than enough information to form a view on the merits of the Derivative Claim, and that any further investigation will be an expensive and value-destructive waste of time”*.
64. Salamander, who is not a creditor, also raises general concern about the use of the money it has invested into FFL. Its evidence is that it provided @\$33 million of the @\$37.5 million invested by the minority members investments in FFL since September 2015. Salamander assert that the Company has paid most of the \$37.5 million to the Genesis Companies and considers that the books and records of FFL require investigation.

#### **E6) The Administration**

65. FFL was placed into administration by its board of directors on 22 January 2020. Voting in favour under **paragraph 22 of Schedule B1** were Dr Salinas, Mr Mack and Mr Stromme. The first two were nominated as directors by the Genesis Trust, Mr Stromme was nominated as a director by Salamander.
66. The Administrators’ proposals under **Rule 3.35 of the Insolvency Rules 2016** were sent to creditors on 19 March 2020. The primary purpose of the administration proposed was to rescue FFL as a going concern. If that could not be fulfilled, the Administrators would seek to achieve a better result for creditors as a whole than would be achieved in a liquidation. GTL raised objections, comments and modifications. The Administrators presented their own modified proposals. On 2 April 2020 they were rejected upon the majority votes of GTL with the support of Dr Salinas.

#### **E7) The Administrators’ Modified Proposals**

67. The modified proposals identify the key reasons for FFL’s failure and financial distress as: (i) the *“significant uncertainty”* caused by the derivative claim; (ii) shareholders no longer being willing to provide *“the funds required to meet the ongoing costs and obligations”*; and (iii) external funding being an unavailable option in the circumstances of the derivative claim.
68. FFL’s summary, unaudited balance sheet for the financial year end 31 December 2018 records net assets of @£14.6m with @£13.3m debtors and total liabilities of only @£1.2m. However, of that debtor balance, @£10.3m is an intercompany balance owed by the Canadian subsidiary which is now subject to an insolvency process. Not only has FFL “lost” that book debt but it remains *“pre-revenue”*. There are no secured or preferential creditors. To date the costs of the administration are borne by Salamander and will not be recovered as an expense of the administration.

69. The modified proposal's stated strategy is to "*stabilise and secure [TLL's] underlying assets and IP and ... establish whether the funding dispute is capable of resolution which may enable [it] to be returned to the control of its directors*". The estimated outcomes from the proposals, if approved, are: "*Any return to unsecured creditors is dependent on successful resolution of the matters discussed at page 7 and release of additional funding*". There were no funds in the estate at the time of appointment.
70. The proposal to achieve FFL's rescue as a going concern depends upon: "*consensual agreement with ... shareholders ... or third party funding or additional investment ... (the latter [being] unlikely whilst the merits of the Derivative Action are being investigated) ...*".
71. If that cannot be achieved, a better result for creditors than an immediate liquidation would be achieved by: (i) pursuing the derivative claim if the conclusion is reached that the merits justify that course; (ii) pursuing any other claims available, although none have been established on the merits as yet; (iii) a sale of assets whether owned or recovered by the afore-mentioned potential claims; and (iv) sale of proprietary intellectual property rights which would terminate on liquidation.
72. It is acknowledged by the modified proposals that far more information is required before any view on the merits of the derivative claim can be reached. There is a proposed time estimate of 6-8 weeks for a decision once specified, additional information is obtained. This includes information from shareholders and from certain individuals involved in management, formation and/or operation of FFL including interviews.
73. It is proposed that if a decision to pursue the derivative claim is made, the Administrators will remain in office provided "*administration represents the most effective way for us to pursue those claims with a view to achieving [the] objectives [of the administration]*". The "*effective way*" depends upon issues of "*funding, insurance etc*". The alternatives in the absence of an "*effective way*" are that the administrators will place FFL into liquidation or seek directions from the court.

## **E8) The Administrators' Evidence – The First Application and The Rescue Proposal**

74. At face value the evidence within Mr Wormleighton's first witness statement presents a straight-forward case for an administration. The "*value of the potential rights and assets of [FFL] arising out of [the Licence Agreement] with [GTL] are potentially very significant*". A consultant's report "*values certain rights to technologies at US\$50 million*", far in excess of the @£2 million total debts. One might have envisaged that this would have been the core of the proposals whether in the context of "*consensual agreement with ... shareholders ... or third party funding or additional investment*" or otherwise.
75. However, the Administrators' modified proposals and stated position within the witness evidence do not address how this apparent abundance of capital riches can be used to overcome the current insolvency resulting from an inability to pay debts as they fall due. For example, there is no reference to the steps FFL may take over the

next six months (or any period) to raise funds to exploit those rights. There is no reference to any medical products or developments existing or waiting in the wings which, with the advantages of an administration's moratorium, will lead to the payment of creditors. There is no reference in the alternative to steps having been taken to market any of those rights or the Licence Agreement itself.

76. Instead (and this may be because none of the matters above could be referred to), the witness evidence and the modified proposals concentrate upon resolving the derivative claim. That is the primary objective. They do so in the context of the Administrators not yet having concluded their investigations into its merits and, therefore, still to reach a "*substantive view on the merits*".
77. Mr Wormleighton attributes that context to a reluctance on the part of those with knowledge, including GTL and other defendants to the derivative claim, "*to provide information and attend interviews*". In other words, not only is GTL seeking to take a self-interested approach when rejecting the proposals as majority creditor but it is also a cause of the Administrators' lack of relevant knowledge. This suggests a recognition of antipathy which may not bode well for "*consensual agreement with ... shareholders*".
78. The reason for concentrating upon shareholder agreement/third party investment rather than using apparent, capital value is that matters are not as they first appear. The Licence Agreement is not valued at "*US\$50 million*". That, I was informed during the hearing without the consultant's report, is the potential value of the intellectual property rights for which GTL has granted a licence. The value of their exploitation under the terms of the Licence Agreement will be different.
79. Further, there is no apparent prospect of funding whilst the derivative claim is unresolved. There is no evidence of any real prospect of the current shareholders investing or agreeing terms for third party investment. There is no evidence of any potential third party investor. Absent funding, the only option is sale of the underlying asset, the Licence Agreement, but that would leave FFL without a business.
80. It is in that setting that the primary objective relies upon "*consensual agreement with ... shareholders*" and envisages that the Administrators' conclusions upon the merits of any claims belonging to FFL will lead the disputing shareholders to agreement.
81. Mr Wormleighton's first statement (although the Administrators' opinion changes by the time of his second witness statement) identifies the main thorn of division between the Administrators and GTL when addressing the primary objective as the length of time required for further inquiries to enable the Administrators to opine on the merits. The modified proposals and his evidence are based upon the understanding that GTL would otherwise be willing to compromise.
82. However, the evidence of previous willingness is not quite in the terms understood by the Administrators. The evidence they rely upon, to which I was taken during submissions, is a letter from GTL's solicitors dated 31 March 2020. It includes an acknowledgment that resolution of the derivative claim is in the interests of all and indicates a willingness to support proposals if they provide a shorter period by which the administrators will reach a view on the merits. So far, so good but two additional points were crucial to GTL's stated approach: First, there should be a liquidation if a

firm view is not reached in favour of irrevocably waiving the derivative claim and all other claims. Second, even if a compromise over the litigation is concluded, there will also need to be agreed “*a workable plan to achieve the first or second purposes of the administration*”.

83. In other words, even in the event of waiver of all claims against GTL, there would need to be proposals, as yet unidentified, to be agreed by GTL. The letter continues:

*“GTL requires that a strict timetable should be put in place, with a period of 28 days from 16 April 2020 to agree a plan which has the support of Genesis Trust, Salamander, GTL and any other key stakeholders. That 28 day period can be reviewed and extended, subject to the express consent of GTL in writing, if sufficient progress toward a resolution has been made.*

*15. If the period of 28 days, or any subsequently extended period, expires without a plan being agreed, on 14 May 2020, the administration of FFL should be converted forthwith to a liquidation on the basis that achievement of the statutory purposes will be unworkable”.*

84. In any event, and even assuming the Administrators were “on the right page” at the time they modified their proposals and served their evidence in support of the first application, Mr Wormleighton’s witness statement in reply acknowledges that the position has changed. The proposals are now to be based on the premise that whilst there is currently no indication of GTL’s willingness to settle, that is to be anticipated once the Administrators have carried out their investigations.

85. This is not a subtle change. It recognises the need for a sea change if the proposals are to lead to “*consensual agreement/third party funding*” and, as a result, to a rescue as a going concern. Further, it is now appreciated that this sea change will only occur if the Administrators’ investigations exonerate GTL and the others associated or connected with it.

86. Plainly that need for a sea change is required, although the antipathy that exists and is so plainly expressed in the witness statement of Mr McGlynn suggests the need for metamorphosis rather than mere alteration in direction. An example of its expression appears in his evidence at paragraph 68 where he says this (although I make clear for the avoidance of doubt that the facts are strongly in dispute and this passage is referred to purely to identify the antipathy, not to suggest a finding that the allegations are correct or incorrect):

*“... it appears that Mr Stromme thereafter decided to set about a deliberate campaign, marked by multiple threats of litigation against FFL, GTL, Genesis Trust and the statutory directors of FFL appointed on 21 March 2019, and subsequently against David Mack who was appointed on 11 November 2019. The effect of this campaign was to undermine any prospect FFL might have had to raise the necessary funds to continue on its development path, and destroy any remaining value in FFL. In retrospect, it now seems that it may have been Mr Stromme's intent for some time to wrest control over FFL and its technology, to a degree which far exceeded Salamander's carefully worked out rights as a shareholder.”*

87. In addition, whilst Salamander through Mr Stromme states a continuing willingness to negotiate, it is plain from his witness statement that this is from a position which asserts that there are many litigation claims or potential claims against GTL which provide the means to rescue FFL as a going concern. In other words, from a starting point at complete odds with GTL.



88. In any event, at the hearing before me Mr Nash Q.C. has made clear that his instructions are that the time for settlement has passed. “*Consensual agreement*” is not on the cards. The best the Administrators can and now propose, therefore, is that their primary objective may become a reality should they be permitted to complete their investigations and they exonerate GTL and those associated or connected with it.
89. All parties correctly agree that I cannot determine the merits of the derivative or any other claims. However, Mr Wormleighton does to the extent that in paragraph 72 of his first witness statement he identifies five grounds justifying the conclusion that there are “*strong grounds to investigate the Amendment Agreements*”. This does not suggest that exoneration can be presented as even a likely conclusion.
90. In addition, during their investigations the Administrators have identified other possible claims which are both connected with the derivative claim and self-standing. They involve (amongst other matters) the possible misuse of funds resulting in FFL’s “loss” of cash and the financial difficulties which GTL contends were the cause of the amendments to the Licence Agreement at the heart of the derivative claim. It is apparent those investigations will also require considerable time to resolve. However, Mr Wormleighton expands upon a number of underlying factors justifying their further investigation within his second witness statement at paragraphs 13-17. He does so in a manner which certainly implies the Administrators consider them to be strong grounds for further investigation.
91. It is appreciated that even an express reference to “*strong grounds*” does not opine upon outcome. It is also appreciated that his evidence is clear when he states: “*We have not, therefore, reached a substantive view on the merits of the Derivative Claim. Nevertheless, it is evident that there is merit in continuing our investigation*”. However, insofar as he is addressing the prospects resulting from the outcome of further investigations, “*strong grounds*” must indicate the need to appreciate that the outcome may be contrary to GTL’s interests.
92. In addition, the Administrators’ view must presumably result from their analysis of the Particulars of Claim and the supporting documentation, remembering that conspiracy would not be pleaded without detailed evidence lying behind it. There is no indication that they consider the derivative claim unmeritorious. The prospects of “*consensual agreement*” following exoneration are hardly good.
93. Mr Wormleighton properly concludes in his evidence that “*if it becomes apparent that the Amendment Agreements deprived [FFL] of valuable rights then we will consider all available avenues to restore that value to [FFL]*”. However, that would hardly be conducive to settlement whilst GTL strongly disputes all allegations, as it does.
94. The Administrators’ approach during the hearing strayed between the going concern rescue and better realisation boundaries when addressing the possibility that valuable claims may be pursued. That is not a criticism. It recognises that in theory, absent “*consensual agreement*”, successful litigation could result in creditors being paid in full and FFL being returned to its shareholders able to raise funds for the Licence Agreement. However, for obvious reasons it is not suggested that the prospects for this result can be measured either in terms of length of time or merit and the evidence does not and cannot do so when the Administrators are not able to opine upon the

merits of any litigation. This leads to the secondary objective, a better realisation proposal.

95. As to time and the investigations, Mr Wormleighton's first witness statement identifies many reasons why the Administrators lack information due to difficulties experienced (see paragraphs 82-98). He expands upon the obstruction faced in paragraph 35-50 of his second witness statement. Whilst the steps undertaken to date are no doubt extensive (see sub-paragraph 36.1-36.4 of Mr Wormleighton's first witness statement and paragraphs 20.1-20.4 of his second), the steps still required before a view on the merits can be taken are also extensive (see sub-paragraphs 36.5 - 36.7 and 45.1 of his first and paragraphs 22.1-22.6 of his second witness statements). His second witness statement explains that no or limited further productive investigations have been carried out and that the Administrators have concluded that limited steps should be taken until the conclusion of the second application. In particular, they do not consider it practical to conduct interviews.

### **E9) The Administrators' Evidence – The First Application and The Better Realisation Proposal**

96. Achievement of the secondary objective of better realisation is explained by Mr Wormleighton's first witness statement as being, in part, by preventing a liquidation which will result in termination of the Licence Agreement. There is, however, very little evidence of detail to establish a better result for the creditors as whole than would be likely if FFL were to be wound up. Nothing significant appears to have happened to establish whether there is a market for the Licence Agreement in its amended form together with the "Transitional Support Services Agreement", as amended, to be assigned or otherwise transferred. It is not for me to decide why that is the position. I am simply concerned with the absence of evidence not whether it could have been obtained.
97. Mr Wormleighton's first witness statement refers to a need to have a fuller understanding of FFL's potential to exploit its assets to understand the effect of the amendments. There has been an indication from a consultant that "*there may be substantial value to be realised by the Company from the intellectual property it developed prior to the Administration and that [the Genesis Trust] may have information which could assist with the realisation of that value*". That is at best vague and there is no exhibited report from the consultant, although that is consistent with the reference to an indication. Mr Wormleighton goes no further than to say (paragraph 58):

*"if the Company remains in administration and upon the completion of sufficient factual investigations and the gathering of additional information, the Administrators will consider whether it is necessary and proportionate to instruct a third party valuer to assess the effects of the Amendment Agreements"*.

98. He refers to his firm's internal, specialist team expressing a preliminary view that "*the value of the technology developed in collaboration with the Company is in a range of up to USD 200 million*". He adds: "*Those specialists are helping us to determine the type of information which a potential investor would require as part of a due diligence process in order to assess the value of that technology to the*

*Company*” but there is no report or other evidence to explain this or why they have not yet instructed a third party valuer. There is nothing to address the relevance, if any, of the demise of the Canadian subsidiary which GTL describes as FFL’s operating arm.

99. GTL through Mr McGlynn contend that the terms of the License Agreement “*comprise a perpetual license of valuable intellectual property for little consideration, with no performance obligations, and terminable in very few circumstances. GTL could not, therefore, reasonably be expected to consent to the assignment of the License Agreement to any third party in which it (or a connected party) did not have at least as favourable equity rights as Genesis Trust does in relation to FFL*”. This was not addressed during the hearing. Indeed, no doubt because of the paucity of evidence, the prospect of assignment/transfer was hardly argued. The evidence does not enable any view to be taken on the prospects of realisation whether in the context of the term requiring consent not to be unreasonably withheld or otherwise.
100. Mr McGlynn also points to the detriment being suffered by GTL as a result of the licence not being terminable whilst FFL remains “*a ‘zombie’ company*” in administration. There are significant overdue fees under both agreements which continue to accrue.
101. He also refers to the detriment of not being to exploit the intellectual property. He describes this as a “*significant opportunity cost*” and draws attention both to the intellectual property being a “*perishable asset*” and to competitors catching up. He says this: “*development of the Product requires financing. That financing will be impossible to generate while the relevant intellectual property remains perpetually license to an insolvent and inoperable company embroiled in a bitter shareholder dispute*”.
102. The other source for realisation is the possible litigation. However, it is obviously the case that any litigation could be pursued in a liquidation. The same investigatory powers exist. Mr Wormleighton’s first witness statement contends there may be a better realisation through the pursuit of litigation within an administration because it may be more difficult to fund any litigation in a liquidation. That, he says:

*“is because the termination on liquidation of the Licence Agreement and other contractual rights is likely to make it much more difficult to attract funding for any litigation intended to restore rights to the Company by undoing the effects of the Amendment Agreements. A liquidation now will not make the Derivative Claim go away, but it will likely make it harder to pursue and would therefore be to the potential disadvantage of those interested in the Company’s estate as members or creditors”.*
103. GTL through Mr McGlynn not only do not accept that but also suggest that “*consideration should be given to the overall benefit to be derived by FFL from pursuing such litigation. GTL is the majority creditor of FFL. Genesis Trust holds over 70% of the shares in FFL. Any damages recovered, even if they were significant, would accrue mostly for the benefit of GTL as creditor and then to Genesis Trust. The likely benefit to the minorities will be very small, if anything, and would almost certainly be far exceeded by the costs of the litigation*”.

## **E10) The Administrators' Evidence – The Second Application**

104. GTL explains that the requisition of a creditors' decision as to whether to replace the Administrators with insolvency practitioners from Cork Gully is sought because of its deep dissatisfaction with the course and approach adopted by them. An open letter explaining its reasons accompanied the letter of request dated 12 June 2020. The Administrators' solicitors replied by letter dated 29 June 2020 stating that a decision would be sought as soon as reasonably practical.
105. The grounds for the application revolve around the proposition that the Administrators are charting a course with proposals which do not in truth offer a real prospect of the purposes of the administration being achieved. GTL's evidence is that their request for time to conduct further detailed investigations is unacceptable. In the circumstances, it is suggested that it would be wrong for the court to prevent the creditors deciding to replace those who were appointed by the directors. There has been no decision concerning appointment by the creditors and there should be.
106. The Administrators sought information from GTL concerning (amongst other matters and in summary) how prepared the alternative proposed administrators will be to take over, their proposals, their timetable for investigations and their remuneration and fees. Mr Wormleighton's understanding of that information is as follows:

*"26.1 in terms of preparatory work, the Proposed Replacement Administrators had been provided with a bundle of documents, details of which are set out in the schedule enclosed with their letter. Those documents comprise the particulars of claim for the Derivative Claim, the Administrators' original Proposals and correspondence between us and our solicitors and Genesis Tech's solicitors. Notably, the documents do not contain the original evidence and my witness statement filed in connection with the Application, nor do they include McGlynn 1. Further, we are unsure as to the extent to which the Proposed Replacement Administrator are aware of our correspondence with Fladgate and our attempts to procure the cooperation of the Genesis Individuals;*

*26.2 the Proposed Replacement Administrators will engage the firm Lipman Karas, being (as stated on their firm's website) "a specialist investigative dispute resolution practice" whose London office was established by two former partners of Withers to act as their legal counsel;*

*26.3 the Proposed Replacement Administrators have not yet prepared formal proposals on the basis that to do so would be wasteful of cost and duplicative before they have "access to the full range of information they would expect beyond their appointment", nor have they been able to form a view on the timescales for progressing aspects of the administration (we assume that such aspects include the investigations envisaged by the 22 May Order);*

*26.4 that the Proposed Replacement Administrators remuneration will be charged on an hourly basis and will be indemnified by Genesis Tech (although we are unclear as to whether such indemnity will be given on a non-recourse basis); and*

*26.5 that the Proposed Replacement Administrators have not yet formed a definitive view that any of the purposes of the Administration can be achieved (which will, of course, be a pre-requisite to their acceptance of their appointment as administrators of the Company).*

107. The Administrators requested votes for 24 July 2020, being 28 days (as required by **Rule 15.19(3) of the Insolvency Rules 2016**) from the expiry of the 14-day period under **Rule 15.19(2)**). They sent notice to FFL's creditors of the request for the qualifying decision procedure on 7 July 2020, in accordance with **Rule 15.11 of the Insolvency Rules 2016**. They also sent a "requisition reply letter" informing creditors

of the information provided by GTL. It set out a summary of the steps taken by the Administrators during their appointment, including their attempts to interview key individuals. It informed the creditors that whilst the Administrators would comply with the outcome of the requisition, they considered the following to be benefits if they remained in office: (i) the understanding and knowledge they had gained since 22 January 2020 and the avoidance of loss of time needed for new appointees to be in the same position; (ii) Salamander's funding of the administration is non-recourse; (iii) it is unclear whether GTL will fund any claims against themselves; and (iv) they are unclear whether appointees proposed by GTL have a conflict of interest.

108. On 13 July 2020 Salamander by letter asked the Administrators to apply for directions to prevent the creditors' decision being sought. The second application was issued on 14 July 2020.
109. Salamander through Mr Stromme contend that the request is a "*transparent attempt to disrupt the administration of the Company, and that granting the GTL Request would inhibit the proper operation of the process of administration and would fail to do to justice between the Company's stakeholders. In particular, ... [it] is an attempt to prevent or delay any investigation into the conduct of the Genesis Entities and their connected individuals (including GTL and Mr Ahlfors), consistent with their actions throughout the administration.*"
110. The proposed insolvency practitioners from Cork Gully have provided a signed letter consenting to act. It is attacked for its failure to comply with the ***Insolvency Rules 2016*** in particular by failing to set out their opinion upon prospects of success for the Administrators' proposals in the absence of any alternative from themselves.

## **F) The Views of Other Creditors**

111. No other creditor appeared or was represented at the hearing. The information provided by the Administrators, as taken from Mr Al-Attar's skeleton argument is that the independent creditors represent @15.6% in value of the debt and are 6 in number. Three have provisionally expressed support for the Administrators remaining in office. Two have expressed no view and one supports the second application.

## **G) The First Application - Decision**

### **G1) Rescue As A Going Concern**

112. The idea of resolution and rescue through "*consensual agreement*" aided by the opinion of the Administrators upon the merits of existing and potential litigation is a sensible commercial proposition. Even if GTL is correct to dismiss such litigation as unmeritorious, negotiations would provide the platform for potential agreement over the future of the Licence Agreement.
113. It is not, however, a proposal for achieving the rescue of FFL as a going concern as required by ***paragraph 49 of Schedule B1***. There is no statement as to how FFL will

be rescued as a going concern. It stops at “*consensual agreement*” without identifying what the agreement might be. A proposal will only appear should: (i) GTL decide to participate; (ii) effective “*consensual negotiation*” concerning litigation occur; (iii) “*consensual agreement*” resolving the extant and potential litigation results; and (iv) to use GTL’s words: “*a workable plan to achieve the first or second purposes of the administration*”. The purported proposals contain no such plan.

114. Even if it is right to describe the concept of resolution and rescue through “*consensual agreement*” as a proposal, it never had real prospects of success and certainly does not now. Even the original correspondence identifying a willingness on the part of GTL to progress along such lines was dependent upon four conditions: an acceptable timetable for conclusion of investigations; agreement to a liquidation if the Administrators accepted there were no viable claims; if not, compromise of the litigation; and then the agreement for a “*workable plan to achieve the first or second purposes of the administration*”. Prospects of success could not even be assessed other than in terms of hope.
115. Even that position deteriorated following service of the evidence in answer, as acknowledged in the evidence in reply when Mr Wormleighton in his second witness statement (paragraph 21) stated: “*consensual agreement is highly unlikely in the current circumstances*”. It further deteriorated to the state of “no hope” when Mr Nash Q.C. made clear his instructions that the time for settlement had passed. Nor is GTL to be criticised for that. It is entitled to take the commercial position it considers most attractive within the context of deciding whether to negotiate.
116. As a result, the Administrators’ approach moved to one of conjecturing that the claims they consider have sufficient strength to merit further investigation might result in a return to the prospect of “*consensual agreement*” because GTL might be exonerated. This does not appear to accord with their assessment of merits to the extent that “*strong grounds*” for investigation have been identified. That is not yet their conclusion despite having (presumably) the evidence from Salamander supporting their pleading of conspiracy bearing in mind the particulars required before such allegations should be pleaded. In any event the conjecture is speculation.
117. That leaves the proposition that investigations resulting in claims against GTL might produce a return which enables its rescue. This also does not address what that rescue might be or involve. It is really a request for time for litigation to be identified and concluded. In any event it cannot be asserted from the current evidence that there is a real prospect of rescuing FFL as a going concern. The merits of the litigation have not been assessed, even assuming causes of action with some merit exist. There is no plan dependent upon the outcome of the investigations and litigation.

## **G2) Better Result Than A Liquidation**

118. The only proposal which justifies real consideration is the second. Whether administration will result in a better result for creditors as a whole than would be likely if the company were wound up. It is being considered in the context of the creditors having rejected that proposal. The law establishes (see paragraph 25(a) above) that the court will only consider exercising its power to authorise

implementation of the proposals notwithstanding opposition from a majority of creditors if the proposal has real prospects of success.

119. There are two areas to be addressed. First, conduct of the litigation. Subject to practical concerns, there is nothing to suggest that any return from success will be greater in an administration. The practical concern identified by the Administrators is funding (see paragraph 101 above). Their opinion and evidence upon such a matter must be treated with the respect their experience and expertise warrants (see paragraph 25(b) above). However, there is no suggestion that Salamander will not fund the derivative claim if subsequently pursued by FFL in litigation. There is also no evidence of liquidation funders having been approached and indicating that they would fund any of the claims in an administration but not in a liquidation.
120. Further, it is not easy to understand their attribution of the problem within Mr Wormleighton's second witness statement to the consequences of termination in liquidation of the Licence Agreement. The derivative claim is for compensation. It is not to set aside the amendments and for specific performance of the Licence Agreement and the "Transitional Support Services Agreement" in their pre-amended form. Indeed, one would envisage that a compensation claim would be more attractive to a funder seeking a return for obvious reasons. There is no evidence to explain why a funder would (if asked) find the litigation a less attractive proposition if FFL is in liquidation. I cannot conclude that there is a real prospect of a better return on the evidence before me notwithstanding the Administrators' evidence.
121. That leaves a sale of or other dealings with the Licence Agreement. There has been no suggestion that the Licence Agreement could be used as security to enable funds to be raised to achieve the purpose(s) of the administration. As to sale, in principle there are presumably two potential markets. First, for an assignment relying upon the right to assign/transfer with prior written consent of GTL, which is not to be unreasonably withheld or delayed. Second, the negotiation of an agreed termination with GTL.
122. However, no evidence of any steps having been taken to test the existence of either market during this administration, which began at the beginning of the year. There may be good reason for this. The point for the purposes of my decision is that a real prospect of a better result cannot be assumed in this case. There is no evidence to justify a conclusion that either or any market offers a route with real prospects to achieve a better result than a liquidation. This became clear when even Mr Al-Attar and Mr Goldring Q.C. with their formidable forensic skills were unable to point to evidence of realisation.
123. In respect of assignment/transfer, this might not matter in many cases because it may be obvious that contractual rights to be terminated in the event of liquidation can be sold for value in an administration. However, that is not so in this case. The absence of evidence illustrates this. It leaves unanswered questions which include whether there are third parties who would be able and willing to undertake the obligations of the Licence Agreement (with or without the "Transitional Support Services Agreement"). If so, what the value might be and whether the assignment or transfer can be prevented by a refusal of consent.
124. There is no evidence to identify who the interested parties might be. It is not sufficient to merely point to the names of the current minority shareholders in FFL. However,

even assuming such parties exist and valuable consideration would be paid, the parameters of the consent not to be unreasonably refused test have not been addressed even in general terms, let alone in the specific context of particular types of third-party assignee/transferee.

125. This does not mean that Mr McGlynn's evidence (see paragraph 98 above) is accepted. It raises many questions for debate but it draws the spotlight further on the point that the underlying issue of the circumstances in which consent can be refused have not been adequately addressed or considered. There may be good reason for this and for the absence of evidence referred to above, It is not to be taken that I am making any finding against the conduct of the administrators concerning matters for which there is no or insufficient evidence. There may be good reason for the lack of evidence, including the possibility that no market exists. The point for the purposes of this judgment is that I cannot conclude on the evidence before me that there is a real prospect of a better result.
126. There is reason to suggest that GTL may purchase an agreement to terminate the Licence Agreement to obtain a "quick" recovery of the rights it confers. However, that has not happened to date. There is no evidence of any discussions and it cannot be assumed that the terms would not be linked by GTL to the potential claims against it thereby significantly affecting the case for a better realisation. In any event, GTL knows that it need only refuse to purchase and any real prospects which existed for this market will end.
127. In my judgment it cannot be concluded that there are real prospects of success on the basis that there must be an effective market for this Licence Agreement. As a result, I do not reach the stage of addressing the exercise of the power to authorise implementation of the proposals in the light of GTL's opposition. I have considered whether to do so on an alternative basis. However, that could only be done by addressing GTL's position against a conclusion that the evidence establishes a real prospect of success. I would need to rely upon a hypothetical scenario.

## **H) The Second Application - Decision**

128. There is obviously no point implementing a qualifying decision procedure to vote upon the replacement of the Administrators without proposals which will result in the administration continuing.
129. I would not in any event have directed a qualifying decision procedure unless satisfied that the proposed replacement administrators are of the opinion that the purpose of the administration is reasonably likely to be achieved. *Paragraph 97(3) of Schedule B1* requires a written consent to act before the decision can be made. As previously mentioned in a different context, *Rule 3.2 of the Insolvency Rules 2016* prescribes the content of a consent to act. *Sub-paragraph 3.2(1)(h) of the Insolvency Rules 2016* requires such a statement to be included within the written consent.



130. It may be that its absence is attributable to the existence of the first application, as Mr Al-Attar has suggested. It may also be that a valid consent would have appeared should the decision been to authorise implementation of the Administrators' proposals notwithstanding opposition from the majority creditor. However, it is a requirement which would have to be fulfilled.
131. If I had authorised implementation of the Administrators' proposals, the outcome for the second application would depend upon the proposal authorised. If it involved continued investigations, I would have seen this as a case where the weight of the views of the majority creditor and the rejection of the proposals were diminished by the fact that the Administrators were in mid-investigation. It would not be conducive to the proper operation of the administration to introduce a new team.
132. It would be commercially irrational to do so and there are no reasons to justify it other than GTL's views on the relevance of that work to the proposals and their concerns over the attitude of the Administrators in the sense that they appeared to them to be working against GTL and for Salamander. Relevance will have been determined by the decision based upon the real prospect test. Their views as to attitude would have been significantly diminished by their position as potential defendants/respondents to the litigation which might flow. I would also have borne in mind that whilst this would be the first opportunity for creditors to choose the administrators, the creditor seeking that opportunity had delayed for over 6 months before deciding to grasp it. It would not have been just to the creditors as a whole or FFL to allow the qualifying decision procedure to be implemented.
133. On the other hand, if the proposal to be implemented was solely the assignment/transfer of the Licence Agreement, I would have directed the qualifying decision procedure absent evidence of a conflict of interest. This would have been a scenario where the Administrators had not progressed that proposal. There was no reason to anticipate that the proposed nominees would not act independently and it would be appropriate for a decision to be made by the creditors taking into consideration the majority creditor's loss of confidence in the Administrators. A loss justified to the extent that the proposals connected with the litigation were not considered to have a real prospect of fulfilling the purposes of the administration. A conflict of interest would not arise purely because of nomination. The nominees would be licensed insolvency practitioners and could be relied upon for their independence and professionalism.

## **D) Conclusion**

134. For the reasons set out above, I have decided not to authorise implementation of the Administrators' proposals. That leads to the question of what should be ordered under *paragraph 55(2) of Schedule B1* when the appointment of the Administrators should cease to have effect as soon as practicable.
135. A difficulty for that decision is an inherent surprise and concern that the evidence does not deal in any significant manner with the ability to assign/transfer the Licence Agreement. It presents difficulty because the otherwise, obvious remedy of compulsory liquidation of this insolvent company will result in its termination.

136. The court's express power to make a compulsory winding-up order within **paragraph 55(2) of Schedule B1** only relates to a winding-up petition suspended pursuant to **paragraph 40(1)(b) of Schedule B1** as a result of an administration resulting from an appointment by the holder of a qualifying floating charge under **paragraph 14 of Schedule B1**. That limitation is attributable (at least in part) to the fact that the court will not normally make a winding up order without a petition and that is the only type of petition which might be extant (subject to suspension).
137. However, the court has jurisdiction to make a winding-up order in exceptional circumstances without a winding-up petition provided one or other of the circumstances within **section 122 of the Act** exist (see *Lancefield v Lancefield* [2002] BPIR 1108, Neuberger J., as he then was). The power of the court to treat an application for a court appointed administrator as a winding-up petition and to make any order that could be made under **section 125 of the Act** is also to be noted (see **paragraph 13(1)(d) of Schedule B1**) when applying **paragraph 55(2)(e) of Schedule B1**. It confers power upon the court to make "any other order ... [it] thinks appropriate". This is equivalent wording to that used for **paragraph 79 of Schedule B1** for which it has been decided that a discretionary power in such broad terms will include a power to wind-up compulsorily notwithstanding the absence of a petition (see *Re West End Quay Estate Management Ltd (In Administration)* [2017] EWHC 958 (Ch), [2018] B.C.C. 1, following the decision of Mr Justice Norris in *Re Graico Property Co Ltd (in administration)* [2016] EWHC 2827 (Ch), [2017] B.C.C. 15). The same conclusion must be reached for **paragraph 55(2)(e) of Schedule B1**.
138. Therefore, there is no doubt that a winding-up order could be made today and that this would then enable the court under **section 140 of the Act** to consider whether to appoint the liquidator. However, as observed by His Honour Judge Behrens (sitting as a judge of the High Court) in *Re BTR (UK) Ltd, Lavin v Swindell* [2012] EWHC 2398 (Ch), [2012] B.C.C. 864, the power to wind-up without a winding-up petition should be exercised cautiously and in an exceptional case.
139. There are two inter-connected reasons to justify a reluctance to wind-up today. The first is the concern that this may result in the loss by termination of a valuable asset. On the other hand, the above-mentioned absence of evidence of value may be explained by an inability in law to assign/transfer the Licence Agreement or simply by the lack of any market. In addition, Mr Nash Q.C. is entitled to submit that this hearing was the time for such evidence to be produced, if it can be, and that opportunity was not taken. He is also entitled to observe that absent the rejected proposals, there is no other insolvency remedy proposed and that the suggestion of an adjournment by me during the hearing, albeit in a different context, was declined. He will also mention the evidence of the damage to GTL and to the production of medical treatments required by many people, although that can in this context be attributed to the contractual terms GTL agreed for the Licence Agreement.
140. The second is that winding-up is a class remedy and the other creditors, albeit with less than 20% in value of the debt, will not have had an opportunity to consider this judgment and to make any representations upon either the class remedy of winding-up or the appointment of a liquidator.
141. As to the first reason, I have raised with Mr Al-Attar the question whether the lack of evidence is attributable to an acknowledgment that there is no market whether

because of a lack of legal ability to assign/transfer or the simple absence of potential assignees/transferees. The Administrators' approach is that they have not reached this conclusion. Their methodology during the administration, as identified within the modified proposals, has been to resolve the litigation and achieve "*consensual agreement*" before advancing down that route. Salamander is extremely keen to assert value but they are not a creditor. GTL, on the other hand, raises two points to undermine any concept of value. First that FFL has ceased trading and, therefore, the Licence Agreement can be terminated in any event. Second, it is unrealistic to envisage a market absent GTL's consent even though consent cannot be unreasonably refused.

142. In my judgment, whilst the prospects of avoiding or delaying compulsory liquidation in reliance upon an assignment/transfer of the Licence Agreement appear today (at best) thin, it is right that the non-party creditors should have time to review the position and consider their options. They should be able to enjoy that right in any event in accordance with the second reason. A compulsory winding up order would not necessarily be automatic even on an extant petition. That judgment is founded upon general principles but in practice it will also enable the other creditors to consider issues such as the funding of any liquidator who might be appointed rather than the Official Receiver taking the reins first, as normally occurs upon a winding-up order being made.
143. Salamander has asked for a 28 day adjournment but the Administrators have proposed 14 days as a reasonable period to enable them to inform the creditors (in neutral terms) of the judgment and of the adjournment to a hearing when the court will decide whether to wind-up FFL compulsorily and, if so, whether to appoint the liquidator.
144. I consider it right that the time period should be 14 days subject to available court time in the light of the Administrators' assessment, the fact that FFL is undoubtedly insolvent for the purposes of *section 122 of the Act*, that the other creditors have apparently chosen not to attend the hearing of these applications and the fact that the other creditors are a significant minority, each with relatively small debts.
145. In conclusion, in my judgment it is right for the creditors to have time to review their positions and options. I will adjourn to the first available date during the week commencing 21 September 2020. The court will then decide whether to compulsorily wind-up FFL and, if so, whether to appoint a liquidator.

Order Accordingly