Case No: CR-2021-002181

Neutral Citation No: [2022] EWHC 3105 (Ch)

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

IN THE MATTER OF BULB ENERGY LIMITED (IN ENERGY SUPPLY COMPANY ADMINISTRATION)
AND IN THE MATTER OF THE INSOLVENCY ACT 1986
AND IN THE MATTER OF THE ENERGY ACT 2011

Rolls Building
Fetter Lane
London, EC4A 1NL

Date: 30/11/2022

Before:

MR JUSTICE ZACAROLI

- -

Between:

(1) MATTHEW JAMES COWLISHAW **(2) MATTHEW DAVID SMITH** **(3) DANIEL FRANCIS BUTTERS** **(THE ENERGY ADMINISTRATORS OF BULB ENERGY LTD)**	**Applicants**
- and -	
OCTOPUS ENERGY RETAIL 2022 LIMITED	**Respondent**
- and -	
(1) SCOTTISHPOWER ENERGY RETAIL LIMITED **(2) SP SMART METER ASSETS LIMITED** **(3) BRITISH GAS TRADING LIMITED** **(4) E.ON UK PLC**	**Interveners**

- -
- -

Mr Richard Fisher KC, Mr Tom Hickman KC, Mr Henry Phillips and Mr Edoardo Lupi (instructed by **Linklaters LLP**) for the **Applicants**
Mr Andrew Thornton KC and Mr Ben Shaw (instructed by **CMS Cameron McKenna Nabarro Olswang LLP**) for the **Respondent**
Mr Stephen Robins KC and Mr Ryan Perkins (instructed by **Allen & Overy LLP**) for the **First and Second Interveners**
Mr Jonathan Adkin KC, Mr Matthew Morrison and Mr Azeem Suterwalla (instructed by **Towerhouse LLP**) for the **Third Intervener**
Mr William Buck and Mr Harry Gillow (instructed by Pinsent Masons LLP) for the **Fourth Intervener**

Hearing dates: 29 and 30 November 2022

- -

JUDGMENT

Mr Justice Zacaroli:

Introduction

1. By application notice dated 8 November 2022, energy supply company administrators (the "Administrators") of Bulb Energy Ltd (the "Company"), apply pursuant to paragraph 3(4) of Schedule 21 to the Energy Act 2004 ("EA 2004"), to appoint an effective time for the purposes of an energy transfer scheme (the "scheme") within section 95(3) of the Energy Act 2011 ("EA 2011").

2. Following the adjourned hearing of that application on 29 November 2022, I announced my decision to the parties on 30 November 2022, with reasons to follow. This judgment contains my reasons. For convenience I also repeat at the end of this judgment the reasons delivered in Court on 30 November 2022 for declining to adjourn the hearing to appoint an effective time, until after the resolution of pending judicial review proceedings to which I refer below.

3. The Administrators were appointed on 24 November 2021 on the application of the Gas and Electricity Markets Authority ("GEMA"), pursuant to section 94 EA 2011, by order of Mr Justice Adam Johnson.

4. The application is supported by Octopus Energy Retail 2022 Limited ("Octopus"), the proposed transferee under the scheme.

5. It is opposed by: (1) ScottishPower Energy Retail Limited ("SPERL") and SP Smart Meter Assets Limited ("SP Smart Meter") – together "SPR"; (2) British Gas Trading Limited ("BGT"); and (3) E.ON UK plc ("E.ON").

6. At an earlier hearing of this application, on 11 November 2022, I acceded to the request of SPR, BGT and E.ON to adjourn the hearing. The purpose of the adjournment was, in part, to allow those companies time to seek further information and to consider, and launch if they wished to do so, judicial review proceedings against the Secretary of State (in circumstances I describe more fully below).

7. Another purpose was to enable the parties to prepare fuller argument on a preliminary issue as to the nature of the court's role on an application to appoint an effective time. Is it, as the Administrators and Octopus contend, limited to being satisfied as to certain jurisdictional matters, and exercising a discretion as to timing? Or is it, as SPR, BGT and E.ON contend, to be satisfied that the scheme will achieve the statutory objective of securing the continuation of energy supplies at the lowest cost which it is reasonably practicable to incur?

8. On this adjourned hearing, I have heard fuller argument from all the parties on that preliminary issue.

Background

9. The Company is an energy supply company within the meaning of s.94 Energy Act 2011, holding an electricity supply licence; a gas supply licence and a gas shipper licence. At present, it has approximately 1.5 million UK domestic customers. It is the operating subsidiary of Simple Energy Limited ("Simple").

10. Simple provides important services to the Company, including: it is the employer of the majority of the Company's employees; and it provides access for the Company to its technology and software platform.

11. The Company encountered financial difficulties in 2021 as a result of significant increases in wholesale gas and electricity prices. The Company was only partially hedged against increases in the price of wholesale gas and electricity until December 2021. It is restricted in how much of those costs it can pass on to its variable rate customers due to the government's Default Tariff Price Cap.

12. Following the Company informing GEMA that it was going to run out of liquidity by 17 December 2021 and that it had a very significant deficit of assets (approx. £307m) compared with its liabilities (approx. £632m), GEMA applied for an order appointing the Administrators to the Company pursuant to the special administration regime contained in Chapter 5 EA 2011. Simple went into administration on the same date.

13. In other cases, upon the failure of an energy supply company, a supplier of last resort has been appointed by GEMA to take over the business of the failed supplier, with no court involvement except for a determination that the failed supplier is insolvent (and thus that GEMA has the right to revoke its licence).

14. That was not done in the case of the Company due to the size of its business and large number of customers.

15. After a year of trading the business since their appointment, and following a period of marketing and negotiation, on 28 October 2022 the Administrators agreed the terms of a proposed sale transaction with Octopus. It is that transaction which it is intended to effect pursuant to the scheme.

16. The scheme is intended to effect:

    (1) a transfer of certain business assets and liabilities of the Company to a newly incorporated subsidiary, "HiveCo"; and, immediately thereafter

    (2) a transfer to the Prospective Purchaser of all the issued share capital in HiveCo.

17. The scheme is designed to ensure that all existing energy supply customers of the Company will continue to receive energy supplies in accordance with their existing agreements, albeit from a new energy supplier. All customer credit balances will also be transferred as part of the scheme.

18. BGT, SPR and E.ON have serious concerns about the process followed by the Administrators and by the Secretary of State. They contend, for example, that the marketing process undertaken by the Administrators was flawed, that information as to government funding available to purchasers was not made available to other bidders other than Octopus, and that regulatory interventions in the energy market since the marketing process was undertaken mean that better terms could now be reached than those agreed with Octopus.

19. Those entities have very recently commenced judicial review proceedings, challenging the lawfulness of, among other things, the Secretary of State's decision to approve the

scheme. I do not need to describe in detail the nature of the challenges to the lawfulness of the approval, but note only that I proceed on the assumption that the proceedings are properly brought.

The statutory framework

20. An energy supply company administration order, such as that made in respect of the Company, is defined by section 94(1) of the Energy Act 2011 ("EA 2011") as an order which:

> "(a) is made by the court in relation to an energy supply company; and
>
> (b) directs that, while the order is in force, the affairs, business and property of the company are to be managed by a person appointed by the court."

21. The person appointed under section 94(1) is the energy administrator: section 94(2). The energy administrator must manage the company's business and property, and exercise and perform all the powers and duties of an energy administrator, so as to achieve the objective set out in section 95: section 94(3).

22. By section 95 EA 2011:

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

23. By section 95(2), those means are: (1) the rescue as a going concern of the company subject to an esc administration order and (2) transfers falling within section 95(3).

24. A transfer falls within section 95(3) if it is a transfer as a going concern:

> "(a) to another company, or
>
> (b) as respects different parts of the undertaking of the company, to two or more different companies,
>
> of so much of that undertaking as it is appropriate to transfer for the purpose of achieving the objective of the energy supply company administration."

25. The means by which a transfer can be effected include those which are proposed in this case: a transfer to a wholly owned subsidiary of the company and a transfer of securities of that wholly owned subsidiary: section 95(4).

26. By section 95(5), however, the objective of the esc administration order may be achieved by transfers falling within subsection (3) to the extent only that one or other of the following conditions is satisfied:

> "(a) the rescue as a going concern of the company subject to the esc administration order is not reasonably practicable or is not reasonably practicable without such transfers;
>
> (b) the rescue of that company as a going concern will not achieve that objective or will not do so without such transfers;
>
> (c) such transfers would produce a result for the company's creditors as a whole that is better than the result that would be produced without them; or
>
> (d) such transfers would, without prejudicing the interests of those creditors as a whole, produce a result for the company's members as a whole that is better than the result that would be produced without them."

27. By section 96(1) EA 2011, Schedule 21 of EA 2004 is applied in relation to an esc administration order, as it applies to an energy administration order under EA 2004.

28. The following are the relevant provisions of Schedule 21 (as amended by EA 2011) for present purposes.

29. By paragraph 1, the schedule applies where the court has made an energy administration order in relation to a company (the "old energy company") and it is proposed that a transfer falling within section 95(3) EA 2011 be made to another company (the "new energy company").

30. Paragraph 2 provides that:

> "It is for the energy administrator, while the energy administration order is in force, to act on behalf of the old energy company in the doing of anything that it is authorised or required to do by or under this Schedule."

31. The power to make a scheme derives from paragraph 3(1):

> "(1) The old energy company may—
>
> > (a) With the consent of the new energy company; and
> >
> > (b) for the purpose of giving effect to the proposed transfer,
>
> make a scheme under this Schedule for the transfer of property, rights and liabilities from the old energy company to the new energy company (an "energy transfer scheme")."

32. By paragraph 3(4):

> "An energy transfer scheme shall take effect in accordance with paragraph 8 at the time appointed by the court."

33. Paragraph 8 states that:

> "(1) In relation to each provision of an energy transfer scheme for the transfer of property, rights or liabilities, or for the creation of interests, rights or liabilities—
>
> (a) this Act shall have effect so as, without further assurance, to vest the property or interests, or those rights or liabilities, in the transferee at the time appointed by the court for the purposes of paragraph 3(4); and
>
> (b) the provisions of that scheme in relation to that property or those interests, or those rights or liabilities, shall have effect from that time."

34. Critically, the court must not appoint a time for a scheme to take effect unless that scheme has been approved by the Secretary of State: paragraph 3(5).

35. Paragraph 3(6) to 3(9) make further provision for approval by the Secretary of State, as follows:

> "(6) The Secretary of State may modify an energy transfer scheme before approving it, but only modifications to which both the old energy company and the new energy company have consented may be made.
>
> (7) In deciding whether to approve an energy transfer scheme, the Secretary of State must have regard, in particular, to—
>
> (a) the public interest; and
>
> (b) the effect the scheme is likely to have (if any) upon the interests of third parties.
>
> (8) Before approving an energy transfer scheme, the Secretary of State must consult GEMA.
>
> (9) The old energy company and the new energy company each have a duty to provide the Secretary of State with all information and other assistance that he may reasonably require for the purposes of, or in connection with, the exercise of the powers conferred on him by this paragraph."

36. Paragraphs 4 to 7 specify a wide variety of matters that may be included in an energy transfer scheme, including the creation of new rights and liabilities, the transfer of property, rights and liabilities that would not otherwise be capable of being transferred, the assignment of licences, and incidental, supplemental, consequential or transitional provisions.

37. Paragraph 9 provides for the modifications to be made to the scheme, by notice given by the Secretary of State to the old and new energy companies, but only with their consent. There is no requirement for any court involvement in relation to such subsequent modifications.

The Court's role in appointing the effective time: the parties' contentions in outline

38. It is common ground that the only function the Court is required to perform under Schedule 21 is to appoint the time from which the energy transfer scheme will take effect.

39. The Administrators (supported by Octopus) accept that the Court's role is not merely a "rubber stamp", but contend that it is principally concerned with determining that the jurisdictional requirements of Schedule 21 are satisfied. In particular, its principal concern is to be satisfied of two things: (1) the provisions of Schedule 21 are engaged and satisfied on the facts of the case before it; and (2) the proposed scheme is properly within the scope of Schedule 21. That in turn breaks down into five matters of which it must be satisfied:

(1) The old energy supply company is in administration: para 1(a);

(2) The transfer "falls within section 95(3)": para 1(b);

(3) The scheme is "for the purpose of" giving effect to the transfer: para 3(1);

(4) The terms of the scheme are within the broad jurisdictional scope of schedule 21: para 3(1); and

(5) The requisite consents and approvals have been obtained: paras 3(1) and 3(5).

40. Once satisfied of those matters, the Administrators accept that the Court has a discretion to exercise, but say that it is a limited one, confined to considering issues of timing.

41. SPR (supported by BGT and E.ON) agree that there is both a jurisdictional issue and a discretionary issue for the Court to determine, but contend that these are much broader than suggested by the Administrators:

(1) As to the jurisdictional issue, the Court must be satisfied that the proposed scheme falls within section 95(3) EA 2011 which, read together with section 95(1)(a), means that the Court must be satisfied that the scheme will achieve the statutory objective of securing the continuation of energy supplies at the lowest cost which it is reasonably practicable to incur;

(2) If the jurisdictional threshold is met, the Court then has a broad discretion to determine whether it would be appropriate to appoint an effective time, for which purpose the factors to be considered include (without limitation) whether a delay would:

(a) enable the Administrators to fulfil their duties to the Company's creditors under section 158(3) EA 2004; or

(b) be consistent with the statutory objective under section 95(1)(a) of securing that energy supplies are continued at the lowest cost which it is reasonably practicable to incur.

42. In the circumstances of this case, SPR contend that the Court should decline to appoint an effective time until such time as the Administrators have re-run a marketing process for the sale of the Company's business, because the process that has been run so far is inadequate.

43. In circumstances where SPR, BGT and E.ON have each now commenced judicial review proceedings, challenging the Secretary of State's decision to approve the transfer, they also contend that this Court should not appoint an effective time until such challenge has been resolved.

The jurisdictional issue

44. It is common ground that the relevant statutory provisions must be given a purposive construction.

45. SPR point to three preliminary matters in support of the contention that the Court has a "meaningful role" in appointing the effective time.

46. First, the effective time is significant because it is the date from which the vesting of property, interests and liabilities takes effect.

47. Second, under some other special administration regimes (for example, under the Postal Services Act 2011 and the Technical and Further Education Act 2017), the task of appointing the effective time is assigned to the Secretary of State. The fact that the Court is given that task under Schedule 21 reinforces the Court's overall supervisory role in the esc administration.

48. Third, during Parliamentary debates the promoter of the Bill which led to the Nuclear Energy (Financing) Act 2022, which applies Schedule 21 to the special administration regime for nuclear energy companies, described the effect of the Court being required to appoint the effective time as retaining "overall responsibility for the process". While that was said in relation to a different Act, SPR contend that the similarity of the provisions in that Act mean that what was said is of relevance in construing Schedule 21 in the context of EA 2011.

49. I accept that these points indicate the Court's role is more than a rubber stamp. They do not, however, provide any real assistance as to the nature and scope of the decision to be made.

50. As to this, there is a measure of common ground between SPR and the Administrators. Most importantly, it is agreed that it is not the Court's function to approve the scheme, in the sense of being satisfied as to its overall substantive merits, because that function has been assigned to the Secretary of State. It is also common ground (at least between the Administrators and SPR, BGT and E.ON) that, since Schedule 21 applies only where it is proposed that a transfer "falling within section 95(3)" is made, the Court's jurisdiction to appoint an effective time under Schedule 21 depends upon the proposed

scheme falling within that subsection. The difference between these parties is as to what is required for a scheme to fall within section 95(3).

51. Octopus contend that the Court is not even concerned with satisfying itself that the scheme is one that falls within Schedule 95(3), on the basis that this too is an issue for the Secretary of State. I do not accept this. Although the prospect of the Secretary of State approving something which does not fall within Schedule 21 (where, for example it is a scheme by a company where no esc administration order has been made, or is one that is expressly for the purpose of selling assets on a break-up basis) is remote, if that did happen then the Court would be justified in refusing to appoint an effective time.

52. As I have already noted, it is SPR's contention that for a scheme to fall under section 95(3), the Court must be satisfied that it will achieve the statutory objective of securing the continuation of supplies at the lowest cost which it is reasonably practicable to incur. This raises two preliminary questions; cost of what? And cost to whom?

53. SPR contend that the answer to the first question is the cost of *securing* that energy supplies are continued in the future, whether by rescuing the Company as a going concern or by an energy transfer scheme. That would encompass the cost of continuing trading in administration and the cost incurred in effecting a transfer of the business as a going concern to a new energy company.

54. They contend that the second question (cost to whom?) is answered by those who will ultimately bear the cost. While the company in administration initially bears the cost of securing the continuation of energy supplies, sections 165 to 167 EA 2004 envisage that state funding may be made available by way of grant, loan, indemnity or guarantee, where approved by the Secretary of State. Sections 98 and 99 of EA 2011 empower the Secretary of State to modify the terms of gas or electricity licences, imposing obligations on licence holders to make good any shortfall (including taking into account amounts due in repayment of any grant or loan made under section 165 EA 2004). It is at least possible that the increased burden on licence holders would then be passed on to consumers more generally.

55. The Administrators contend that the relevant cost is that to the company in administration, of continuing to supply energy, and that this relates to the period during which the Company is in esc administration. They point to the fact that the statutory objective is principally relevant because the Administrators are charged, by section 94(3) with managing the affairs, business and property, and exercise and perform all powers and duties, so as to achieve that objective.

56. In view of the conclusion I reach below as to the proper construction and effect of section 95(3), it does not matter what precisely is meant by "lowest cost" and I will assume for present purposes that it has the meaning for which SPR contend. I note, in any event, that as to the "cost to whom" question, there is little difference between the parties: both contend that it means cost to the company in administration in the first instance. SPR merely point out that the company in administration may well be (and in this case is) funded by the Government in circumstances where the cost burden is transferred to other licence holders and, indirectly, consumers as a whole. I note, in turn, that this brings in both the interests of third parties on whom the scheme may

impact and the public interest, matters which the Secretary of State is obliged particularly to take into account when approving the scheme.

57. More importantly, SPR's case is, as Mr Robins put it, that the Court must be satisfied, in order to appoint an effective time for a scheme, that the implementation of the scheme is "mission accomplished, or job done": the continuation of supplies has been secured at the lowest cost which it is reasonably practicable to incur.

58. There are a number of difficulties with this approach, looking at the language of section 95(3). First, section 95(3) does not refer to a scheme that *in fact achieves* the statutory objective. At most, it refers to something which is "appropriate for the purpose of achieving" the statutory objective. Second, the thing that has to be appropriate for that purpose is not in any event "the scheme", but the transfer of "so much of" the undertaking of the Company. Assuming that the court was required to be satisfied of anything, therefore, it is only that such *part* of the undertaking of the company in administration that is being transferred is appropriate for the purpose of achieving the statutory objective.

59. SPR's objections to the scheme illustrate the difficulty in this respect. One of their principal complaints is that the Administrators and the Government have not yet conducted a satisfactory process to determine the amount of Government support that should be made available to a transferee, and that the marketing process took place at a time when prospective bidders were unaware of the regulatory interventions that subsequently took place. Accordingly, it has not been established that the transfer to Octopus is one that is at the lowest cost that could have been achieved. Moreover, because critical information has been redacted in the scheme documentation, the evidence before the Court does not explain the cost to the Company, or provide a basis for concluding that it is not reasonably practicable to secure the continuation of supplies at a lower cost.

60. These objections have all to do with the overall cost of the transfer (being borne by the Government in the first instance, but to be passed on to other licence holders), and nothing to do with whether an *appropriate part* of the Company's undertaking is being transferred.

61. SPR's submissions effectively ignore these words. Mr Robins addressed them by acknowledging that the language is "opaque", but said they must be read having regard to the wider statutory context. He identified two particular aspects of that context. First, while the court must be involved at the commencement of an esc administration (there being no possibility of an out of court appointment), in contrast to administration orders under Schedule B1 of the Insolvency Act 1986 (the "1986 Act") the Act itself does not require the Court to be satisfied that the administration order would be likely to achieve the purpose of administration: compare s.96(2) EA 2011 and paragraph 11(b) of Schedule B1 to the 1986 Act. That, he said, supported the view that the Court *is* required to consider the likelihood of the purpose being achieved at the "transactional" stage, when a transfer scheme is proposed. Second, he referred to the broad freedom (referred to above) given to the secretary of state to approve grants or loans to the company in esc administration and to impose a cost on other licence holders where the obligation to repay such grants or loans gives rise to a shortfall in the company in esc administration.

62. Neither aspect of the statutory context, in my judgment, supports SPR's construction of section 95(3). On the contrary, the lack of consideration required by the Court as to the likelihood of the statutory purpose being achieved at the outset of administration, combined with the broad freedoms given to the Secretary of State in terms of funding, point to a careful balancing of responsibility in an esc administration, as between the court and the Secretary of State, which is absent in the case of administration under Schedule B1. That, in turn, and together with the fact that it is the Secretary of State who is expressly required to approve the scheme, points to a diminished role for the Court in this respect throughout the process. The context certainly does not, in my judgment, provide a reason for ignoring the words "of so much of that undertaking as is appropriate to transfer…"

63. Mr Robins also prayed in aid the contrast with administration under Schedule B1 of the 1986 Act, where at the "transactional" stage, administrators are empowered to dispose of the company's assets and undertaking, even prior to approval of their proposals by the creditors, without any direction from the Court: see, for example, *Re Transbus International Ltd* [2004] EWHC 932 (Ch), per Lawrence Collins J. I do not find this contrast helpful. The purpose of administration under Schedule B1 is different (involving none of the public interest element that underlies an esc administration), and a disposal of assets under Schedule B1 is fundamentally different to a transfer scheme under Schedule 21, involving such matters as the transfer of liabilities, and assignment of rights which would otherwise not be assignable.

64. The third difficulty with SPR's approach is that it rests on an incomplete summary of the statutory objective. Taken as a whole, that objective is to secure that energy supplies are continued, at the lowest cost it is reasonably practical to incur, *and* that via either a rescue of the company as a going concern or an energy transfer scheme, it is no longer necessary for the esc administration order to remain in force for that purpose.

65. I accept (as Mr Robins submitted) that the last part of the objective is not synonymous with the esc administration order being discharged (because the legislation envisages other matters, such as distribution to creditors, being effected within the esc administration). That does not, however, take away from the fact that the statutory objective includes that the circumstance - that energy supplies are being made by the company in esc administration - should be brought to an end.

66. On the other side, there are a number of points which militate against the Court having to make the kind of substantive evaluative decision which SPR's approach requires.

67. First, if the drafter's intention was that the Court should review any part of the substantive merits of the scheme, then it is surprising that this has nowhere been explicitly stated. As Mr Fisher submitted, the drafter would have imposed that requirement through the most oblique of provisions. In different contexts (and different legislation), where the court *is* required to consider the appropriateness or fairness of a scheme, for example a scheme transferring banking or insurance businesses under Part VII of the Financial Services and Markets Act 2000 ("FSMA"), the Court's function is clearly spelt out: see s.111(3) of FSMA: "the court must consider that, in all the circumstances of the case, it is appropriate to sanction the scheme." I accept, as Mr Robins said, that a statute may reasonably impose a requirement (such as that contended for here) by a series of internal cross-references. That does not diminish, however, the point that in seeking to determine whether such a requirement has in fact been imposed

by the legislation using, on SPR's case, opaque language, the absence of any wording to that effect within the only provision which assigns any role to the court, is a persuasive indication against that being Parliament's intention.

68. Second, the fact that the role of approving the scheme is given to the Secretary of State, and there is no language expressly giving any similar role to the Court, reinforces the conclusion that no overlapping role is assigned to the Court. While, again, I accept Mr Robins' submission that there is no *a priori* reason why an evaluative role cannot have been granted both to the Secretary of State and the Court, it would be surprising to find that, in the face of a provision conferring responsibility for approval of the scheme on the Secretary of State, the Court is assigned an overlapping responsibility via a provision relating only to timing.

69. Mr Robins downplayed the degree of overlap, suggesting that the Court is specifically directed to be concerned with cost (because that is part of the objective of the administration which is incorporated by reference into section 95(3)), whereas the Secretary of State is concerned with much broader matters, including the impact of the scheme on third parties and the public interest. As I have already noted above, however, the cost to the Company, and thus the Government, other licence holders and energy consumers generally, is a matter of central relevance to the impact of the scheme on third parties and the public interest. They are matters, therefore, that fall directly within the purview of the Secretary of State. It follows that on SPR's case the degree of overlap is substantial.

70. Third, if the Court was intended to have such a role when appointing an effective time, it would make little sense that the transfer – once approved by the Court (via setting an effective time) can then be altered, without any express limit under paragraph 9 of Schedule 21. Mr Robins made four submissions against this proposition:

(1) Subsequent modifications could only be of a non-material nature, because, by paragraph 9(4), the modifications may make (and, implicitly *only* make) either transitional provisions or any provision that could have been included in the scheme when it took effect at the time appointed under paragraph 3(4), and thus could not include matters which rendered the scheme one which did not achieve the statutory purpose of securing continuation of energy supplies at the lowest cost it is reasonably practicable to incur;

(2) Subsequent modifications can only be made during a limited period, because they require the agreement of the company in administration, and that company will at some point be dissolved;

(3) There is plenty of scope for court involvement because the Administrators, in accordance with their own duties, would not agree to a modification which might render the scheme one for which the Court would not have set an effective time under paragraph 3(4) and, in any doubtful case, they would seek the Court's directions; and

(4) Even when modified, the scheme must still be one that qualifies as an "energy transfer scheme" within section 95(3).

71. None of these points is an answer to the objection that if subsequent modifications do not require any form of Court approval, why would the Court need to approve the scheme itself in appointing the effective time? The first point is based on a misreading of paragraph 9(4). This is a permissive provision, enabling modifications to include anything that could have been included by reason of the expansive provisions in paragraphs 4 to 7 of Schedule 21. There is no warrant for reading it as permitting only non-material modifications.

72. As to the second point, if it were true that modifications can only be made during a limited period, that would in any event be irrelevant. In fact, there is no reason to think that dissolution would occur so soon that it would happen before a question of modifications to the scheme arose.

73. The third and fourth points – which show that the Court *might* become involved on the application of one or other party – serve to reinforce the point that the modifications take effect without any court involvement. There is in fact no difference, so far as concerns the potential for the Court being involved (either on the application of the Administrators for directions, or the application of a party complaining at the Administrators' conduct), between the position before the effective time is appointed and the position when subsequent modifications are proposed. The fact that such applications might be made at the later stage (where there is no other requirement for court involvement) says nothing therefore about the nature of the court's role at the earlier stage in setting an effective time.

74. Accordingly, in my judgment, the fact that the Secretary of State may agree potentially extensive modifications after the effective time without any requirement that they also be approved by the Court is a strong pointer to the Court not having an overlapping review function when appointing the effective time in the first place.

75. Fourth, for reasons I have set out above, the word "appropriate" in section 95(3) is linked only to the *extent* of the undertaking being transferred. This prompts the obvious question: what purpose would be served by the Court being required to be satisfied – so far as achieving the objective of the transfer being at the lowest cost was concerned – only that the appropriate part or parts of the Company's undertaking had been included in the transfer? If the intention was that the Court should exercise some parallel review of the merits of the proposed transfer on cost grounds, then it makes no sense that the only matter it was required to review was the proportion of the undertaking being transferred, as opposed, for example, to the terms – particularly as to price – on which the undertaking, or parts of it, were being transferred to another company or companies. This, too, points to there being no intention to require the Court to undertake any such review.

76. Taking into account all of the above points, in my judgment it is impossible to construe section 95(3) as imposing an objective requirement, before a particular scheme can be said to fall within that subsection, that the scheme is one that in fact achieves the statutory objective. It necessarily follows that it cannot be read as imposing an objective requirement that the scheme is one that secures at the lowest cost that it is reasonably practicable to incur the continuation of energy supplies. Accordingly, I reject SPR's contention that before appointing an effective time under paragraph 3(4) of Schedule 21 the Court must be satisfied that such a requirement is met.

77. That leaves the question what *is* the Court's role in considering whether a particular transfer "falls within" section 95(3) for the purposes of paragraph 1(b) of Schedule 21 and, in particular, what is meant by the phrase "of so much of that undertaking as is appropriate…" in section 95(3).

78. In considering that phrase, it is important to remember that the function of the subsection is to identify one of the two "means" by which it becomes unnecessary for the esc administration order to continue in force (for the purpose of achieving the statutory objective). In other words, it is identifying the type of transfer that constitute the "means" within section 95(1)(b).

79. There is support for this in the explanatory notes to EA 2011, at paragraph 271:

> "Subsection (2) [of section 95] stipulates the ways the continuation of energy supply company administration may be made unnecessary. These are either the rescue of the energy supply company as a going concern or transfers which satisfy subsection (3). Subsection (3) states what type of transfers are permissible under the section, and subsection (4) provides for how such transfers may take place."

80. With that in mind, I draw two conclusions. First, I consider that the focus of the relevant phrase, in agreement with the Administrators' contention, is on a sufficient part of the undertaking being transferred for the purpose of achieving that part of the statutory objective that requires energy supplies to be continued as a going concern without the need for the esc administration to continue in force. The phrase is necessary because the type of transfer that is permitted is not merely the transfer of the whole of the undertaking, but is extended to include one or more transfers of part or parts of the undertaking. There is a direct correlation between the extent to which a part or parts of the undertaking are retained or transferred to another company or companies, and the objective of continuing energy supplies as a going concern. In contrast (as already noted) there is no obvious correlation between the part or parts of the undertaking that are retained or transferred and the overall cost of securing the continuation of energy supplies.

81. Second, as I have already noted in rejecting SPR's primary argument, it does not impose an objective requirement that the transfer *does achieve* that part of the statutory objective, but only that it is appropriate for the purpose of doing so. This imposes in my view a relatively low hurdle. Provided the going concern transfer is intended to enable the energy supplies to continue (whether in a single new energy company, or two or more new energy companies and the old energy company) then it falls within the type of transfer permitted by section 95(3).

82. Mr Robins questioned the purpose of the Court's involvement in appointing the effective time, if it was not to undertake at least some substantive evaluative role in relation to the Scheme. The answer to that, in my judgment, is clear on the wording of paragraph 3(4): the Court's role relates to matters of timing. A scheme of a type falling under section 95(3) may well give rise to practical issues that impact on the precise time from which the transfer of property, rights and liabilities should take effect. Questions as to whether the effective time for a transfer will enable a smooth transition of all aspects of the transferring business typically arise in considering whether to sanction a

scheme relating to banking or insurance businesses under Part VII of FSMA. The Court is concerned to ensure that the transfer takes effect at a time which enables all requisite preparatory steps to be taken to ensure a smooth transition.

83. SPR contend, as a fall-back, that even if the Court does not itself have to be satisfied that the scheme is one that will achieve the statutory objective, then that is something that the Administrators must be satisfied of, and the Court's function is to review the reasonableness of the Administrators' decision in that regard. The reasons I have set out above, in rejecting SPR's primary case, equally explain why I do not accept this alternative case. On the proper construction of section 95(3), it does not impose an obligation on either the Court or the Administrators to be satisfied that a particular scheme will achieve the statutory objective before it is a scheme which is made under that section. The Administrators have a free-standing duty to exercise their functions to achieve the statutory objective (section 94(1)), but it is not a precondition to the exercise of the Court's power to appoint an effective time that they have complied with that duty.

Standing

84. The Administrators contend that none of SPR, BGT or E.ON have standing to appear and address the Court on the Administrators' application to appoint an effective time. My preliminary view is that, insofar as the issue is as to the Court's role when appointing an effective time, or as to the exercise of the Court's discretion to delay appointing an effective time in view of the pending judicial review proceedings, those entities have a clear and sufficient interest which justifies their attendance and participation. I do not, however, need to decide this issue, having in any event heard from them and determined the matter in the Administrators' favour.

The Discretionary Issue

85. In their written submissions, having noted that it is common ground that the Court does indeed have a discretion in appointing the effective time, SPR contend that it is first necessary to identify the principled basis on which the Court should exercise its discretion. They then assert that the factors to be considered include: (1) would a delay enable the Administrators to fulfil their duties to the Company's creditors under section 158(3) EA 2004 (to exercise and perform their powers and duties in a manner, so far as consistent with the objective of the esc administration, which best protects the interests of creditors and members)? and (2) if (contrary to SPR's main contention) there is no hard-edged jurisdictional issue, would a delay be consistent with the statutory objective under section 95(1)(a) (securing that energy supplies are continued at the lowest cost that it is reasonably practicable to incur)?

86. In other words, on SPR's case the Court is required to be satisfied that the proposed scheme is consistent both with the Administrators' duties to creditors and with that part of the statutory objective that relates to securing the continuation of energy supplies at the lowest cost that it is reasonably practicable to incur.

87. These points were not developed in oral submissions, and no principled basis was advanced for this approach to discretion, other than the arguments made in relation to the jurisdictional issue. In my judgment, the short answer to SPR's case is that it would impose a substantive evaluative role on the Court which – for the reasons I have set out

above in relation to the jurisdictional issue – I consider Parliament has vested in the Secretary of State and not the Court. I do not think the vesting of such a broad discretion in the Court can be inferred from a provision requiring the Court to appoint the time from which the scheme will take effect.

88. It is open to those with sufficient standing, who consider that the Administrators have failed in their duties, to make an application to the Court under paragraph 74 of Schedule B1 to the 1986 Act (as modified by paragraph 16 of Schedule 20 EA 2004). If such an application were made, then it might be necessary to consider granting interim relief to delay the scheme taking effect while the allegations were investigated. That, however, is not relevant here. In the absence of such an application, it is a non sequitur to say that because the Administrators owe duties, including to manage the affairs of the Company so as to achieve the statutory purpose set out in section 95(1), the Court, when appointing the time from which a scheme takes effect, must be satisfied that they have complied with those duties.

89. As I have already noted, I consider that the Court's discretion when appointing the effective time relates to matters of timing, taking into account matters such as the practicalities of achieving a smooth transition of property, rights and liabilities from the old energy company to the new energy company.

Satisfaction of the jurisdictional requirement in this case

90. On the narrower view of the jurisdictional requirements that I have adopted above, I am satisfied that they are met in this case. Subject only to two points of detail raised by SPR (see below), no party disputed that the jurisdictional requirements on the narrower basis were met. I will accordingly deal with this aspect only briefly (noting that I was presented with a substantial amount of evidence addressing certain of these points).

91. There is no doubt that the Company is in esc administration. I am satisfied on the evidence that one of the pre-requisites to a transfer scheme set out in section 95(5) EA 2011 is satisfied, namely that the rescue of the company as a going concern is not reasonably practicable. The transfer has been approved by the Secretary of State, and it is common ground that, notwithstanding the pending challenge to the lawfulness of the Secretary of State's decision, it is a valid and effective decision until such time as a court order is made quashing it. No other consents are required in this case. In particular, the consent of the transferee (HiveCo) is not required, because it is a wholly owned subsidiary of the Company: see paragraph 12 of Schedule 21. I am satisfied that the transfer scheme is of a type that falls within section 95(4), as it constitutes "means" by which a transfer under section 95(3) may be effected. I am also satisfied that the transfer is one as a going concern of so much of the undertaking (being, in essence, every part of the undertaking that is necessary for the business of energy supply to be continued by HiveCo) as it is appropriate for the purpose of achieving the objective of the energy supply company administration (as I have interpreted that provision above in this judgment). Finally, I am satisfied that the scheme contains the type of provisions which are permitted by paragraphs 4 to 7 of Schedule 21.

92. The first of the specific objections raised by SPR relates to clause 20.1 of the scheme. This provides that neither the Administrators, nor their firm, directors, agents, employees etc, shall incur personal liability in respect of the obligations undertaken by the Company, or any failure by the Company to comply with its obligations under or in

connection with the scheme. SPR contend that this does not fall within the jurisdiction conferred by Schedule 21. In my judgment, as Mr Fisher submitted, this provision does no more than spell out a state of affairs that already exists: that the Administrators (and their employees, agents and others) act without incurring personal liability for the Company's obligations. While there is nothing in Schedule 21 which expressly permits such a provision, Schedule 21 does not purport to set out exhaustively every type of term that a scheme may contain, and there is nothing which precludes it. The presence of that provision does not therefore cause the scheme to fall outside the type of scheme permitted under section 95(3).

93. The second term objected to by SPR is clause 20.4 of the scheme. This contains an agreement by various parties that certain liabilities to them will not fall within paragraph 99 of Schedule B1 to the 1986 Act and a waiver of any charge on the assets of the Company. SPR's concern was that this sought impermissibly to vary the statutory priority. In fact, it is no more than a waiver by specific third parties of *their* rights (to priority and security) and does not give rise to the difficulty that SPR thought it did.

Discretion as to timing

94. Aside from the impact of pending judicial review proceedings, no party objects to the effective time which is now suggested by the Administrators and Octopus. That time is 23:58 on 20 December 2022. It has been chosen because it provides both sufficient time before the scheme becomes effective for necessary preparatory steps to be taken, and sufficient time afterwards to enable necessary steps to be taken to ensure completion occurs before the contractual agreed end-date of 31 December 2022.

95. The Administrators had originally suggested 5 December 2022 as the effective time. They recognise, however, that if any interim relief suspending the effect of the Secretary of State's decision were granted in the Administrative Court, even if only for a short period to give that Court an opportunity to hold a hearing at which to consider a substantive claim for interim relief, then that could render 5 December 2022 ineffective. That might have created additional difficulties, because the Administrators need 13 days' advance notice of the effective time (whatever it is to be) to put in place necessary arrangements. Appointing 20 December 2022 as the effective time mitigates that difficulty.

96. BGT, supported by SPR and E.ON, nevertheless contend that it would be wrong to appoint 20 December 2022 as the effective time in circumstances where there is a pending challenge by way of judicial review to the lawfulness of the Secretary of State's decision to approve the scheme.

97. Mr Adkin, for BGT, submitted that I should either set no effective time until after the conclusion of the judicial review proceedings, or should adjourn the hearing until 21 December 2022, being the day before the last practicable effective time so as to ensure that the transfer is completed before 31 December 2022.

98. He submitted that since it is this Court, and this Court alone, that can appoint the effective time, it must fall to me to decide whether that date should be adjourned in order to await the outcome of the judicial review proceedings. In so doing, I should carry out a balancing exercise similar to that applied on an application for an injunction

or other interim relief. That is, a balance between the consequences if the effective time is set and the Secretary of State's approval is subsequently found to be unlawful, and the consequences if I delay setting the effective time and the Secretary of State's decision is subsequently upheld.

99. That balance, he submitted, comes down clearly in favour of delaying the effective time, because: (1) the consequences if the transfer becomes effective, but the Secretary of State's approval is later found to be unlawful, would be very serious, leading to at best a very messy situation and increased cost for all; whereas (2) there is no sufficient evidence of urgency or commercial difficulties, that would require the effective time to be set before the Administrative Court has resolved the judicial review challenge.

100. Powerfully as Mr Adkin presented that case, I part company with him at the first stage of the analysis.

101. I accept that the decision whether to delay setting the effective time is to be approached in the same manner as an application for interim relief, by balancing the consequences if the relief is granted and if it is not. I disagree, however, that this is a matter that must be determined, or is better determined, by this Court.

102. While it is for this Court to set the effective time, it is common ground (once I have reached the conclusion I have as to the nature and scope of the Court's role in doing so) that the only obstacle is the pending judicial review challenge.

103. So far as the factors that bear on my decision under Schedule 21 are concerned, I am capable of reaching a conclusion – and indeed have reached a conclusion. But, as Mr Fisher submitted within the context of the debate about this Court's role, Parliament has chosen to give the Secretary of State a prominent role, overall, in the special administration process for energy companies. In particular – so far as consideration of the merits of a transfer scheme under Schedule 21 are concerned – Parliament has vested responsibility wholly in the Secretary of State.

104. Accordingly, having reached a conclusion on the question for me under Schedule 21, the remaining question is whether matters should be held up due to a challenge being made: to a different Court; concerning the decision of someone who is not before this Court; and involving considerations which go some way beyond those I need to take into account in reaching my decision under Schedule 21.

105. That demonstrates, in my judgment, that what in substance is being asked for by BGT, SPR and E.ON is interim relief in the context of their application challenging the lawfulness of the Secretary of State's decision. It is common ground that interim relief can be applied for, and is commonly granted, in the Administrative Court; and that such relief could include suspending the effect of the Secretary of State's decision pending resolution of the challenge to it.

106. There are a number of reasons why it is the Administrative Court, and not this Court, which is the appropriate forum for considering that interim relief.

107. First, the Administrative Court is better equipped to assess the merits of the judicial review challenge. In particular, any such challenge must first pass through a permission hurdle in that Court.

108. Second, the Administrative Court will be able to do so with the right parties before it. Most importantly, the Secretary of State, whose decision is under challenge, is not before this Court. It would be wrong I think for this Court to join him as a party to this application, when what in substance is being sought is interim relief in the context of the judicial review proceedings seeking to challenge his decision, where such matters are deliberately assigned to the Administrative Court.

109. Third, in deciding whether to grant interim relief, it is not just a question of assessing the merits of the claim *per se*, but also the likelihood of the relief ultimately granted being to quash the decision. There are other possible outcomes which the Administrative Court might wish to take into account.

110. Fourth, the factors likely to come into play in determining whether interim relief is appropriate in the Administrative Court go some distance beyond those with which I am concerned in the limited role assigned to this Court. The Secretary of State is required – in considering whether to approve the scheme – to take into account among other things the public interest and the impact of the scheme on third parties. Those are not considerations for the Administrators, or for the Companies Court. They are matters, however, likely to be relevant within a judicial review challenge, and thus likely to be matters the Administrative Court would want to consider when asked to grant interim relief.

111. I note that the court has received a letter from the chief executive of Citizens Advice, presenting significant public interest concerns about the transfer, and urging me not to fix an effective time without their concerns being properly addressed. Again, the fact that these are matters which go directly to the validity of the decision made by the Secretary of State, who is not a party to this application – but is the respondent to an application for judicial review, indicates that these are matters that should be considered within the judicial review proceedings, not here.

112. Fifth, I do not have either visibility or control over the timing of the judicial review proceedings. It may be that the Administrative Court can act sufficiently quickly that a substantive conclusion is reached before 20 December. If not, the Administrative Court is nevertheless in charge of the timing of its own proceedings. That is a further reason why it is better placed to consider interim relief.

113. Sixth, the question of interim relief is intimately bound up with the question of cross-undertakings from those seeking the relief. That is again a question for the Administrative Court, not me. Mr Adkin objected that his clients are faced with an impossible dilemma: without sufficient information about the transfer, liability under a cross-undertaking would be unlimited, and no commercial party could sensibly expose themselves to that.

114. That is, as it seems to me, precisely the sort of issue that the Administrative Court could – whereas I could not – resolve, whether by ordering urgent disclosure of information by the Secretary of State or by limiting the quantum of any cross-undertaking in the meantime, or some other means.

115. For all these reasons, I decided to appoint an effective time of 23:58 on 20 December 2022. I stress that is not because I reject the arguments of BGT, E.ON and SPR that interim relief by way of suspending the effective time until after conclusion of the

Judicial Review proceedings is appropriate, but because I consider that is an issue which must be resolved by application for interim relief in the Administrative Court.

116. Finally, a practical point arises from the fact that the order I make in appointing an effective time will remain valid, even if the Secretary of State's decision were to be quashed, and – *a fortiori* – if its effect were to be suspended. That, however, can readily be addressed by inserting a liberty to apply to any party in my Order, on or before 19 December 2022, on the basis and expectation that it will be varied if the Administrative Court were to grant interim relief suspending the effect of the Secretary of State's decision before then.