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Case No: **CR-2023-MAN-000143**

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

IN THE MATTER OF AARTEE BRIGHT BAR LIMITED (IN ADMINISTRATION) AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Manchester Civil Justice Centre,
Bridge Street West, M3 3ER
Date of judgment: 16 March 2023

Before His Honour Judge Stephen Davies sitting as a High Court Judge

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SPECIALITY STEEL UK LIMITED **Applicant**

and

(1) FGI WORLDWIDE LLC
(2) RICHARD DIXON FLEMING
(3) MICHAEL JOHN MAGNAY
(4) GEMMA QUINN **Respondents**

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Christopher Boardman KC (instructed by **Clyde & Co LLP, London**) for the **Applicant**
Matthew Weaver KC (instructed by **Addleshaw Goddard LLP, Manchester**) for the **First Respondent**
Daniel Bayfield KC (instructed by **DLA Piper LLP, Manchester**) for the **Second – Fourth Respondents**

Hearing date: **15th March 2023**

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APPROVED JUDGMENT

Judge Stephen Davies **Thursday, 16 March 2023**
(14:02pm)

Introduction

1. This is my judgment following the hearing yesterday of an application made in the administration of Aartee Bright Bar Limited ("the Company"). The parties to the application are Speciality Steel UK Ltd ("the applicant") represented by Christopher Boardman KC, the first respondent, FGI Worldwide LLC, represented by Matthew Weaver KC, and the second, third and fourth respondents, Mr Richard Fleming, Mr Michael Magnay and Ms Gemma Quinn, the administrators of the company, who were represented at the hearing by Mr Daniel Bayfield KC. I am very grateful to all of them.
2. By its application made on 16 February 2023 the applicant is seeking an order under paragraph 81 of Schedule B1 to the Insolvency Act 1986 that the appointment of the administrators should cease to have effect.
3. The application is opposed by the first respondent; the administrators are neutral, although Mr Magnay has produced evidence and Mr Bayfield has made submissions as to whether or not the administrators can achieve the statutory purpose of administration.
4. I am giving this judgment today as a matter of some urgency because the parties need to know as soon as possible whether the administrators are to remain in office or not. First, the administrators are seeking to conclude a contract for the disposal of certain of the business and assets of the company to a preferred purchaser. They consider that the preferred purchase agreement is in the best interests of the company and their evidence is that it may not be achievable on the agreed terms if there is a completion in delay after 24 March 2023. Secondly, the administration exit strategy, also referred to as the rescue plan, which is proposed by the company's holding company, Aartee Steel Group Limited ("Aartee Steel"), and supported by its major creditors, including the applicant, is dependent on finance from a number of parties, where one offer is expressed to be dependent on the court making an administration cessation order at or shortly following the hearing yesterday, whereas the other is subject to the court having making such an order yesterday. Because it was not realistically possible for me to have given a properly considered decision after a full day of submissions yesterday I have had to assume that the second offer will remain open today, assuming I were to make an order today. Any delay is not in the interests of the company stakeholders, including the 250 employees whose employment the administrators have kept open on the basis that their wages are being paid by Aartee Steel in the meantime.
5. I am keeping this judgment as brief as possible, whilst confirming that I have been able to use the time since the hearing yesterday to further consider the relevant evidence and submissions. In order not to require everyone present to wait until the very end to know the outcome I will announce my decision at the outset, which is that the application fails and must be dismissed.
6. I will now give my reasons.

General matters

7. Under paragraph 81 of Schedule B1, a creditor may apply for an order for the administrators' appointment to cease to have effect. In order to make a paragraph 81 application in, as in the present case, an out-of-court appointment of administrators, the creditor must allege an improper

motive on the part of the appointing person. In this case the appointing person is the first respondent.

8. On an application under paragraph 81 the court is empowered to adjourn the application, to dismiss the application, to make an interim order, or to make any other order it thinks appropriate. It has not been suggested to me that I should either adjourn the application or make an interim order, given the obvious reasons of urgency to which I have already referred. Indeed, the application has already been adjourned once from the initial hearing date of 24 February 2023 when insufficient time was available and because further evidence needed to be filed.
9. Although there is a dispute as to the applicable principles which I shall have to determine, it is common ground that at the hearing of a paragraph 81 application the court will, to put it in neutral terms, consider two matters. The first is the issue as to whether or not the appointor appointed the administrator with an improper motive. The second comprises all other circumstances relevant to the exercise of the discretion as to whether or not it is appropriate to bring the administration to an end, including whether or not and, if so, the extent to which, the administration will, or is likely to, achieve the statutory purpose of administration.
10. The issue of improper motive is strenuously contested as between the applicant and the first respondent.
11. As to the second issue, the administrators contend, supported by the first respondent, that the statutory purpose of the administration which they are seeking to achieve in this case is the second objective specified in paragraph 3(1)(a) of Schedule B1 of achieving a better result for the company's creditors as a whole than would be likely if the company were wound up without first being in administration. That is by seeking to conclude the preferred purchase agreement to which I have already referred.
12. The applicant does not contend that the administrators cannot achieve this second objective. That is a realistic approach, since it is common ground that achieving the second objective is in many cases, of which this is one, a relatively low hurdle, given that the comparator is moving straight to liquidation. The applicant does, however, submit that there are a number of problems and difficulties with the administrators' proposal and contends that the rescue plan would provide a far better outcome for all of the company's stakeholders than is likely to be achieved under the preferred purchase agreement.
13. The applicant also, however, make it clear that the rescue plan cannot or will not be pursued within the administration. As matters stand that is clearly the case, given the conditions of support from the two proposed funders to which I have already referred.
14. The administrators accept that without third-party funding they could not achieve the first objective, namely rescuing the company as a going concern.
15. Towards the end of the hearing yesterday there was some debate as to whether it would be practicable for the rescue plan to be undertaken within the administration. That was not the subject of detailed analysis or submission at the hearing, not least because the rescue plan in its final form had only recently been produced, being attached to Mr Dalton's third witness statement dated 13 March 2023, with one funding offer only being signed off on the following day, 14 March 2023.

16. It also emerged that the person ultimately behind the rescue plan, Mr Gupta, who is now also the person ultimately behind the Company, had been in discussions with the administrators but in the end had not submitted a bid.
17. Whilst I can quite understand why he would far prefer not to have to buy the business from the administrators if the option of obtaining an administration cessation order was available I have not, as I will explain, been persuaded that there are fundamental or insuperable legal or financial obstacles to such a course.
18. It is clear that it would be possible for Mr Gupta to make an offer to acquire the whole of the company's undertaking from the administrators and to put the rescue plan or its equivalent into effect in that way, although again I accept that this might be less attractive to him than obtaining an administration cessation order.
19. Finally, the administrators have made it clear that they are willing to consider all sensible proposals accepting, as they do, that under paragraph 3(3) they must perform their functions to achieve the first objective, unless they think this is not reasonably practicable, or that the second objective would achieve a better result for the creditors as a whole.
20. I have spent some time identifying these points at the outset for two reasons. Firstly, because of course they are of considerable significance to the exercise of the discretion whether or not to make an order; and secondly, because, as Mr Weaver has emphasised, a creditor who is dissatisfied with the administrators' conduct of the administration has a remedy by way of application under paragraph 74 of Schedule B1, where it is well established that the court will not review decisions of administrators which are within a reasonable range of decisions which an administrator could take.
21. I now turn to the questions of law which have been argued.

Improper motive

22. Firstly, there is an issue as to whether it is sufficient for the applicant to have alleged honestly and on reasonable grounds that there was an improper motive, as the applicant contends, or whether, as the first respondent contends, it is a threshold condition to making a paragraph 81 order that the applicant satisfies the court at the substantive hearing that on the evidence, applying the ordinary civil balance of probabilities, the appointor did act with an improper motive.
23. I have been referred to three principal authorities on this point, the most recent being that of His Honour Judge Halliwell sitting as a High Court judge in the case of Koon v Bowes and others [2019] EWHC 3455 (Ch), upon which Mr Boardman relied. The second is that of Mr Philip Marshall QC sitting as a deputy High Court judge in Thomas v Frogmore Real Estate GP1 Ltd [2017] EWHC 25, upon which Mr Weaver relied. The third is that of Mr Justice McCloskey sitting in the Chancery Division in Northern Ireland in the case of Cursitan v Keenan [2011] NICh 23. In his judgment, Mr Marshall referred with approval to the earlier judgment of McCloskey J, and His Honour Judge Halliwell referred to both in his judgment without suggesting that he identified any conflict between his approach and theirs.
24. I am not going to refer to the detail of what was said in those authorities or to the able submissions of Mr Boardman or Mr Weaver on those points. It is sufficient for present purposes for me to say this.
25. First, on well-established principles, I should follow the most recent decision of a judge exercising a co-ordinate jurisdiction unless I am satisfied that the decision is wrong.

26. Second, there is no clear indication from the judgments themselves that the particular points which have been argued before me were argued in any of those three cases. Indeed, despite Mr Weaver's submissions, I am not persuaded that Mr Marshall or Mr Justice McCloskey were even expressly addressing their minds to the difference which is identified in this case. It appears to me that they almost certainly simply assumed that the judge should make the decision on improper motive by reference to what had been established on the evidence at trial, because the contrary was not contended in the cases before them.
27. In contrast, Judge Halliwell clearly did apply his mind to this particular point. Although he reached the conclusion in paragraph 51 that the need to establish an improper motive was merely a gateway, and at paragraph 55 that the court was only required to be satisfied that the allegation was advanced honestly and on reasonable grounds, he did not suggest that the court should not look at all of the evidence available at the substantive hearing or should refrain from making a decision as to whether or not, having regard to all of that evidence, the allegation had been made out.
28. In short, it seems to me that Judge Halliwell was, with respect to him, entirely right to conclude on a proper interpretation of paragraph 81 that there is no threshold pre-condition to making a paragraph 81 order to the effect that the applicant must satisfy the court at the substantive hearing on the balance of probabilities that he has established his allegation that the appointor was motivated by an improper motive when he appointed the administrator. It is sufficient to found the jurisdiction that the allegation is made, and that it is made honestly and on reasonable grounds.
29. However, it also seems to me to be evident that in most if not all cases, the judge dealing with the substantive hearing can and should go on to make a positive finding one way or another on the issue of improper motive, insofar as he or she is able to do so, by reference to the evidence and the submissions before him or her. That is because whether the allegation is made out is clearly a matter of great weight to be placed into the balance when the judge is considering whether or not to make an order. If the judge concluded that the allegation was simply not made out at the hearing then that would, I am prepared to accept, in most if not all cases militate very strongly against the making of an order.
30. Nonetheless, I do not accept the argument advanced by Mr Weaver that it is requisite upon the applicant to set out in precise detail what he alleges the improper motive was and then to support it by positive evidence and to make it out at the hearing on the balance of probabilities or that a failure to do so meant that the application simply could not proceed further or should lead to an order not being made, either at all or only save in exceptional circumstances.
31. The second issue of law, which I have found more difficult to found, is what is meant by an improper motive.
32. In paragraph 52 of his judgment, Judge Halliwell identified the types of conduct which might constitute an improper motive as comprehending: "... fraud, dishonesty, bad faith or an intention to achieve a collateral purpose to the disadvantage of other creditors."
33. In paragraph 55, he suggested that circumstances where the court would be likely to grant relief would include those where: "... the appointment amounts to a serious abuse of the administration procedure or there is something in the circumstances of the appointment which is likely to undermine the administration or interfere with the administrator in the proper performance of his duties ..."

34. To similar effect, in the Frogmore case, Mr Marshall said, at paragraph 47(1), that the motivation must be: "... not in harmony with the statutory purpose of administration and causative of the decision to appoint."
35. He also said at paragraph 47(3) and again at paragraph 50 that if the statutory purpose of administration was likely to be achieved, irrespective of the appointor's motivations, then it was unlikely that an order would be made under paragraph 81, thus endorsing the observation in Lightman & Moss, The Law of Administrators and Receivers of Companies, 5th ed (2014), para 27-028 (note 193), cited at paragraph 49 of his judgment, that the remedy should not be available to frustrate appointments, "where the purpose of administration is reasonably likely to be achieved".
36. It seems to me that these authorities are both emphasising that what is required is conduct which amounts to an improper use or abuse of the administration procedure for some purpose which is inconsistent with, or not in harmony with, the statutory purpose of administration. This broad approach seems to me to be broadly consistent with the approach in relation to liquidation, both corporate and individual, which is exemplified, for example, in the decision of the Privy Council in the case of Ebbvale Limited v Hosking [2013] UKPC 1, paragraphs 25 through to 33.
37. However, Mr Boardman referred me to and relied upon the decision of the Privy Council in Downsview Nominees v First City Corporation [1993] AC 295, where Lord Templeman said this (p.312 F-G):

    "Several centuries ago, equity evolved principles for the enforcement of mortgages and the protection of borrowers. The most basic principles were, firstly, that a mortgage is security for the repayment of a debt, and secondly, that a security for repayment is only a mortgage. From these principles flowed two rules, first, that powers conferred on a mortgagee must be exercised in good faith for the purpose of obtaining repayment, and second, that, subject to the first rule, powers conferred on a mortgagee may be exercised, although the consequences may be disadvantageous to the borrower."

38. In that case, the mortgagee had appointed a receiver for a collateral purpose.
39. Building on this statement of principle, Mr Boardman submitted that the only proper purpose for which a qualified floating charge holder (QFCH) in the position of the first respondent could appoint an administrator was for the purpose in good faith of obtaining repayment of what was due to it. Any other purpose, he submitted, was an improper purpose.
40. I accept that this is clearly the position in relation to the appointment of receivers. However, Mr Weaver submitted that this narrow approach could not be applied to the case of the QFCH appointing an administrator under a debenture, as in the current case. He submitted that it is an important distinction that administration, unlike the appointment of a receiver, is a class remedy where the administrator owes duties to the general body of creditors and not just to the appointor and, indeed, where the objective of making a distribution to one or more secured or preferential creditors is only the third objective falling within the statutory purpose of administration at paragraph 3.
41. I agree with Mr Weaver's submissions on this point. It seems to me that it could not be improper for the appointor to be motivated, in whole or in part, by the belief that the appointment of an administrator was likely to achieve the statutory purpose, even if it could not be said that the appointor would necessarily receive payment in full, or possibly even any payment, at the

conclusion of the administration and even if it could not be said that on an objective analysis his own economic interests would better be suited by not appointing an administrator. There is no reason, in my view, why the appointor should not be motivated, in whole or in part, by what he considered in good faith was a desire to improve the position of the general body of creditors or to enable an independent office holder to take control of the assets or to investigate alleged misconduct on the part of those in control of the company. I do not accept Mr Boardman's submission that the only proper purpose for the appointor to appoint an administrator is to obtain repayment.

42. Finally, there was a dispute about whether or not a court would ever make an order under paragraph 81 if the evidence was that the statutory purpose of the administration was likely to be achieved. Mr Weaver submitted that the answer was no, or at least not save in exceptional circumstances.
43. Again, however, it seems to me that this is an inappropriate gloss to put on the width of the jurisdiction. I entirely accept that it is unlikely that such an order would be made in such circumstances. However, there may be cases where it would still be justified. Some cases may involve a balancing exercise between factors pointing in different directions, where some are based on disputed facts and opinions upon which the court cannot confidently reach a final conclusion at the hearing of a paragraph 81 application in the same way as it could after a trial.

Improper motive – relevant facts

44. That deals with all of the legal issues which were debated before me, and I now turn to the facts, reminding myself that in the absence of disclosure and cross-examination, it may not be possible for me to make determinations with the same confidence as a judge would expect to be able to do after a full pre-trial and trial process.

The evidence before me

45. I should begin by identifying the witness statements which were put before me in evidence.
46. In support of the application as issued, there were fourt witness statements. The first was that of Mr Bart Peczkowski. He is a director of the company and of its immediate holding company, Aartee Steel, to which I have already referred.
47. The second is that of Mr Sanjay Tohani. He is a director of Marble Power, a creditor of the company, who supports the application and the rescue bid.
48. The third is that of Mr Sanjeev Gupta. He is a director of the applicant company and is the executive chairman of a group of companies known as the GFG Alliance, which is a collection of global businesses and investments, predominantly operating in the steel mining, energy and aluminium sectors, with revenue of approximately $20 billion and employing over 30,000 people across 30 countries.
49. He is also the executive chairman and the ultimate beneficial owner of Liberty Steel Group, which is a substantial steel producer, and since 16 February 2023, thus post-administration, he has been the ultimate owner of the Aartee group of companies, thus including the company and Aartee Steel as its parent company.
50. Finally, there is a witness statement from Mr Andrew Dalton. He is a partner in Begbies Traynor Group plc and a qualified insolvency professional who has been assisting Aartee Steel with the rescue plan.

51. In response to the application, there were two witness statements. The first is a witness statement from Ms Siobhan Boyes. She is a senior associate of the first respondent, based in London, and the Company relationship manager.
52. The second is that of Mr Magnay, who is the third respondent. He is a managing director of Alvarez & Marsal Europe LLP and a licensed insolvency practitioner. His firm advised the first respondent in its dealings with the company from late January until the appointment of the second, third and fourth respondents as administrators, although the precise basis under which it did this is a little unclear since apparently there was no formal engagement.
53. In reply, the applicant served three witness statements from Mr Peczkowski, from Mr Gupta and from Mr Dalton. Mr Dalton included an update of progress with the rescue plan and an explanation as to why, by that stage, he had not yet been able to provide detailed rescue proposals.
54. In response Mr Magnay produced his second witness statement, which included an update as to the administrators' conduct of the administration.
55. Finally, there was the third witness statement from Mr Dalton which I have already referred to and which attached the finalised rescue report to which I have already referred.

The parties

56. The Company is a manufacturer and supplier of steel products, employing around 250 employees, and said to be probably the largest distributor of engineering bar products in the UK, offering a range of niche steel products. It carries on business from various premises owned by its sister property company, Aartee Bright Bar Property Limited, which was also placed into administration at the same time but in respect of which no equivalent paragraph 81 application has been made.
57. There are, it appears, leases in place between the property company and the Company which allow the Company to carry on business from those premises.
58. The applicant is a substantial creditor of the company. It says it is owed approximately £1.3 million, although Mr Magnay says that the precise figure has not yet been confirmed. It a steel supplier to the company.
59. The first respondent, FGI, is a finance company headquartered in New York. On 30 April 2021 the Company entered into two agreements with the first respondent: firstly a receivables purchase facility agreement limited to £10 million; and secondly a cross-company composite guarantee and debenture agreement to secure that facility. Under these agreements FGI was entitled to receive payment of all receivables (i.e. amounts due to the Company from its debtors), from which it was entitled to be repaid monies due to it under the facility and also from which it would advance monies to the Company.

The appointment

60. The appointment of the administrators was made on 6 February 2023. It is accepted by the applicant that the first respondent was entitled as a matter of law to make the appointment, notwithstanding the complaint that it was made without prior notice, without any further demand for repayment and at a time when, on the applicant's case, FGI was about to be fully repaid anyway within days.

The respective cases

61. Turning then to the first issue of improper motive, it is helpful to summarise the respective cases.
62. The case for the applicant, as summarised in Mr Boardman's skeleton at paragraph 25.2, is that: “FGI did not make the appointment for the proper purpose of securing repayment of the sums due to

it. On the evidence, it made the appointment for the irrational, collateral and unjustified purpose of trying to avoid adverse publicity about the way in which it was being repaid from receivables which it already owned. The first respondent expressed concern about being paid at the expense of other creditors and was concerned about the inference. That was not a proper purpose because it was not to secure payment. It was also not in accordance with the statutory purpose of administration as it prevented the company from refinancing and being rescued".

63. The case for the first respondent, as summarised in the skeleton argument of Mr Weaver, is that the applicant does not evidence an improper motive on the part of the first respondent when appointing the administrators. Indeed, Mr Dalton is clear in his evidence in his first witness statement that he has no idea why the first respondent appointed the administrators. The application is based on a comment apparently made by the third and fourth respondents regarding reputational damage, together with the alleged absence of an explanation on the part of the first respondent as to why it appointed the administrators.
64. However, as to the first point, it is said that the comment was not made by the first respondent itself, it was never said to be the basis for the appointment and does not make any sense anyway, as it could not have been regarded as unreasonable for it to pay itself first from realisables (i.e. payments made to it by the Company's debtors) under its facility and security. It is also said that in any event this allegation is expressly denied by Ms Boyes in her evidence, which Mr Weaver submits must be conclusive on the point.
65. As to the second point, the absence of an explanation, it is submitted that there is no obligation on the part of the first respondent to satisfy the court that it has a proper motive. In any event, however, it is said that Ms Boyes did provide evidence of its motive in paragraphs 22.10 and 22.11 of her witness statement, where she said - in summary – that: (i) FGI was owed monies in excess of £500,000 by the Company and it had an enforceable qualifying floating charge; (ii) it was clear that the Company was insolvent; (iii) no credible plan had been put to FGI which would allow the Company to continue to trade whilst discharging sums due to creditors and, therefore, there was no obvious light at the end of the tunnel; (iv) there was a history of significant breaches of the facility agreement over the past four months, including a failure to ensure that all realisables were paid to the first respondent as the Company was contractually required to do, and which the first respondent understandably considered was entirely possible again going forward, given the company's significant financial problems; and finally (v) that the appointment of administrators over the company ensured that receivables would be treated in accordance with the terms of the facility agreement and that the company's affairs would be properly managed by independent office holders.
66. Having summarised the respective cases, I will now summarise the background and the key events, whilst aiming to do no more than provide a summary and not deal with every single point.
67. As I have already indicated, in her witness statement, Ms Boyes refers to a history of problems with the facility agreement from September 2022 onwards, leading to a first reservation of rights letter in October 2022, following allegations that the company had breached the agreement in failing to remit receivables to the first respondent. Over the same period, there were continued concerns in relation to the company's financial position and a repeated failure to discharge liabilities to HMRC as well as other matters of concern.

68. There was then a second reservation of rights letter on 13 January of 2023, following allegations of further breaches, including some form of refinancing operation which according to FGI was not disclosed and which, strictly speaking, ought to have involved payment of the proceeds to the first respondent as realisables.
69. Importantly, that second letter also made clear that the first respondent was not prepared to allow the company to draw down further against realisables from the facility and required repayment in full by 27 January 2023.
70. In effect, therefore, in the absence of any further agreement there was to be a parting of ways and the Company must have known that it was at risk of enforcement of the security, including potentially the appointment of administrators, if it did not pay in full what it was liable to pay by 27 January 2023. In the meantime, the finance tap was turned off because the first respondent was still receiving payments under invoices but was not allowing the company to access them, instead using them, as it was entitled to do, to reduce the indebtedness under the facilities agreement.
71. Ms Boyes in her witness statement at paragraph 21.3 identified that as at 13 January 2023, the date of the letter, the principal amount due was approximately £4.2 million. That had reduced to £2.6 million by 31 January 2023 and to £1.6 million a day later by 1 February 2023.
72. The Company was able to survive over this period as a result of taking various measures including, it appears, entering into ad hoc agreements with suppliers and obtaining some short term financial support. However, this was clearly unsustainable beyond the short term, which explains why, on or around 23 January 2023, the company instructed Begbies Traynor to advise on its financial position and to seek to find a sustainable solution.
73. In turn, as I have said, the first respondent involved Alvarez & Marsal to monitor the position.
74. There was an initial meeting on 25 January 2023 at which there was a discussion of the need for the company to refinance and to pay the first respondent in full.
75. On 27 January 2023 Mr Dalton produced his preliminary proposals, which made it clear that financial support from the first respondents was required until the end of February 2023 with some limited drawdowns being permitted over this period. Ms Boyes says that she was unhappy with these proposals, in particular their lack of detail, and was also unhappy with the strategy of not paying suppliers in order to repay the first respondent. Hence a further meeting was arranged for 31 January 2023.
76. This is the key meeting for the purposes of the improper motive case. It was attended by Mr Peczkowski and Mr Dalton together with two other representatives of the Company and by Ms Boyes, by Mr Magnay and Ms Quinn.
77. Mr Dalton produced a typed written note of that meeting. There was some investigation at the hearing as to whether or not it was a contemporaneous record. He accepts that it was made subsequently from various notes, including handwritten notes made at the meeting itself. However, it is not clear from his evidence whether that note was produced before or after the appointment on 6 February. It appears to me most likely, judging from the comment at the end of the note, that it was probably produced after 6 February 2023. It therefore seems to me to be likely that there would have been some propensity, not deliberate I emphasise, to emphasise or to unconsciously exaggerate the points which particularly concerned him at that stage. The contemporaneous handwritten notes have not been produced from which a comparison could be made.

78. There are also written notes produced by Ms Boyes and Mr Magnay which are said to be contemporaneous. There is some difference between them and those of Mr Dalton but, save as detailed below, nothing of key significance.
79. Mr Dalton's notes record, in summary, that the first respondent would not support the company until the end of February but Mr Peczkowski said that the group could provide critical payment support until the first respondent was repaid from receivables. It records that it was acknowledged that the group needed to inject funds speedily and that it was generally understood that the first respondent was "a very short time period" from being repaid.
80. It also records reference to reputational concern. It records Mr Magnay voicing a concern that the directors may be in a difficult position if they carried on trading without group funding and that this would cause the first respondent reputational concern. It records Mr Dalton apparently saying that this was a matter for the directors and not the first respondent. It records that both Mr Magnay and Ms Boyes "pushed back" on this, again citing the reputational risk to FGI.
81. The note records that it was left on the basis that there was an understanding that the group would need to confirm its position and ultimately provide funding in short order. The final sentence says: "There was certainly no mention of any impending enforcement action", which is what leads me to conclude that this at least must have been made after the appointment of the administrators on 6 February 2023.
82. Ms Boyes' note records Mr Peczkowski saying that the repayment of the facility from realisables would take between two and three weeks and Ms Boyes saying that if that was so FGI needed a survival plan over this period. It also records Mr Dalton saying that this was not the first respondent's business and Ms Boyes saying: "Both Michael and I explained it is absolutely FGI's business when we are the number one secured lender and have a duty of care for this business". Her note also records that: "Mike explained that FGI would not be a responsible lender if we were seen to be securing our funds to be paid off while we leave the creditors to be unpaid, therefore it is in our interest to understand the business approach being taken and ensure it is fair for all involved."
83. Mr Magnay's note is shorter but in similar terms to Ms Boyes' note, in particular recording that they both pushed back, with Mr Dalton replying that the worsening of unsecured creditors' position was not of any concern to FGI or A&M and Ms Boyes and him explaining that it was.
84. I am satisfied that these last two notes are the most reliable contemporaneous records which I should accept as reliable. In particular I am satisfied that I should not attempt the task of seeking to reconstruct the precise events of the meetings from what is now said in the witness statements with the benefit of hindsight.
85. I am unable to accept Ms Boyes' evidence that she did not associate herself at the meeting with what Mr Magnay said about reputational concern to FGI, when it is clear from her own note, and from that of Mr Magnay, that she plainly did.
86. Equally, however, whilst there was no express statement by the first respondent to the effect that unless it was paid off in full within a specified period, say a week, it would appoint administrators, but it is also clear that the first respondent did not say words to the effect that it was prepared to wait until it was paid in full from receivables even though that would, on what it was told, could have been as long as another two or three weeks.

87. Instead, what is clear is that the first respondent wanted a plan, including confirmation of group support, and they wanted it as soon as possible. In the meantime, although it was not stated expressly, it must have been clear to the Company that it could not safely have proceeded on the basis that the first respondent would not act, as it was clearly entitled to do under the debenture, to appoint administrators, given that there had been no full payment by 27 January 2023 as had been expressly required.
88. It is also right to say, in my judgment, that the statement about reputational concern does not come across as being the key concern for the first respondent. It seems to me to have been made in the context of the first respondent saying that they needed to have confirmation of group support as soon as possible and were not happy with just letting matters slide, and that one reason for that, but not the only reason, being that of reputational concern.
89. As Ms Boyes says, on any objective analysis reputational concern could not have been the overriding issue for the first respondent, given that it had first right over the realisables anyway and had a secured position. Whilst I accept that reputational concern may be based on a perceived fear of criticism even if unjust, it seems to me on the evidence that it was simply one point that was a concern in the context of the overall concerns about the problems with this account.
90. On the following day, 1 February 2023, the first respondent's authorised representative signed the statutory declaration in support of a notice of appointment and the administrators signed their respective consents to act but nothing further was done to act on those documents by appointing administrators at that stage and nor was this step communicated to the Company. Mr Boardman submits that no explanation has been advanced for why that was done at that time. That I accept is true. A reasonable inference, I think, is that FGI's intention was to put everything in place so that the step to appoint administrators could be taken with no delay if, as and when a final decision was taken to do so.
91. On the same day a note produced by Ms Boyes records a conversation with Mr Dalton in which he asked if the first respondent would agree to the group having a second legal charge to secure advances. She records that she said that he needed to send the proposal by email and she would review it but observed that if the first respondent was repaid in full it would not be necessary anyway. The implication appears to be that she was not particularly impressed by a second charge being an urgent necessity.
92. Nonetheless, on the following day, 2 February 2023, Clyde & Co LLP who were, by then, the solicitors acting for the Company in relation to the proposed second charge, wrote a letter to the first respondent saying that what appears to have been a new proposed lender, a company known as GT Steel Recycling DMCC, which it appears was associated with the Aartee group, was willing to provide short-term bridging finance up to around £2 million in stages, beginning as soon as possible this week, but subject to the consent of the first respondent to those charges, given that they were also covered by the first respondent's security.
93. It sought a response immediately but there was no response at all. Ms Boyes says in her witness statement that she was concerned as to the lack of clarity and certainty and timescale, and also as to the lack of detailed back-up proposals from Begbies Traynor. That perhaps does not explain why there was no response at all but it certainly seems to me that the first respondent was entitled to take the view that this letter was far from what had been made clear was urgently required at the meeting

on 31 January. There is no evidence that this was chased or that any firm proposals or offer of finance was provided, or that anything alse of any note happened until Monday 6 February 2023 when the appointment was filed at court.

94. Mr Boardman notes that there is no evidence from the first respondent as to who took the decision, and when and why at this point. He invites me to draw the inference that it was a decision to appoint for the reason of reputational concern. He also invites me to note that, as Ms Boyes said in her statement, by this date the debt had reduced to around £565,000, down from over £4 million as at 13 January 2023. She did however also state that in addition to that principal sum of around £565,000 further amounts totalling around £315,000 would fall due for interest and charges, including a £200,000 termination fee on the appointment of administrators, thus a total of around £879,000.
95. The question arises as to at what point did the first respondent receive sufficient by way of realisables to pay off that total amount?
96. In his first witness statement at paragraph 5.4 Mr Magnay confirms his understanding that as at 1 March 2023, some £2,129,000 had been received into the receivables account since 6 February 2023 and that some £304,000 had been transferred into the administration account. Thus, he anticipated that the principal indebtedness of the company to the first respondent would be discharged in full.
97. Mr Boardman emphasised that the first respondent has not, despite requests, produced any information as to precisely how long after 6 February 2023 sufficient had been received into the receivables account to repay the £879,000 odd due at that point.
98. On the basis of the information before me it seems likely that that was plainly within the two or three week period from 31 January recorded as suggested at the meeting on 31 January 2023, but it is impossible to be more precise in the absence of hard information from FGI.
99. The letter sent immediately after the appointment of the administrators, complaining about the appointment, was written by Clyde & Co on 10 February 2023. The letter asserted that the decision to appoint was made "even though you knew or ought to have known that the first respondent was soon to have no economic interest in the outcome of the administration".
100. It was said that this made the appointment unconscionable and an abuse of the process because it was an improper motive.
101. It is perhaps worth observing that the letter did not also assert that reputational concern was a positive and improper motive for the appointment. What was being alleged was the absence of any proper economic motive as amounting to an improper motive.

Improper motive - conclusions

102. Having gone in some detail through the evidence I can now summarise, I hope succinctly, my discussions and findings on the question of improper motive.
103. I have to say that the first respondent has not helped itself by being so defensive. It clearly knew what the case was against it and it has, as I have said, refused to provide details of who made the decision to appoint or precisely when or provided documentary evidence as to the reasons why.
104. That being said Ms Boyes has, as I have already recorded, given in her witness statement detailed reasons as to why the decision was taken.
105. Given the evidence which I have referred to above, I am not prepared to accept that the real reason was, as the applicant contends, the risk of reputational damage. It seems clear to me that this did

feature as a reason, but only as one consideration and probably a minor consideration amongst a number of others, which in my judgment were as follows.

106. Firstly, as at 1 February 2023 and again as at 6 February 2023, the first respondent was still owed substantial amounts of money by the Company, albeit that they were steadily reducing, when everything should have been repaid by 27 January 2023.

107. Secondly, the absence from the Company of a clear plan, backed up by hard proposals and proof of funding, to show how the Company proposed to clear its liability, not just to the first respondent, but also the pressing liabilities to HMRC and to other creditors, even in the short term of two to three weeks from 31 January 2023, let alone in the medium to long term.

108. Thirdly, a justified concern that the first respondent and other creditors were simply being strung along by a cash-flow insolvent company which was going to fail before very long.

109. Fourthly, a not wholly unjustified fear of a possible risk that the realisables might either dry up or be strung out, either naturally or deliberately, so that when all ongoing costs were added there would be insufficient to discharge liability in full.

110. Fifthly, a not wholly unjustified concern that the company could not be trusted to deal properly with its finances to the prejudice of the creditors as a whole.

111. Sixthly, a not wholly unjustified concern that if the first respondent let things slide and the company duly failed, there would be the possibility of adverse reputational damage on the basis of complaints, albeit without foundation, that the first respondent had been happy to allow small suppliers to continue to supply the company at their risk whilst the Company was allowed to trade on because FGI was getting paid first out of realisables regardless.

112. Seventhly, and finally, a decision to ensure that the process of ensuring that FGI and other creditors were properly paid what was due was safeguarded and controlled by an independent administrator.

113. In the end, it seems to me, as Mr Weaver submitted, that the key point is that it does not establish an improper motive that other finance companies might have allowed more time and might, for example, have given a final warning that unless the Company paid in full in 48 hours they would appoint administrators, or might have decided that it was better to do nothing, in the reasonably confident expectation of payment in due course from realisables, rather than potentially being held to blame for forcing a company into administration. It cannot be said that the first respondent, in playing what in one of the earlier cases was described as "hard ball", was acting with an improper motive.

114. Nor in my judgment can it be said that to appoint administrators in such circumstances and for such reasons was inconsistent with the statutory purpose of administration. On its face, the company was unable to carry on in business without a detailed and credible rescue plan and further substantial funding, either from the first respondent, which was not forthcoming, or from a group company or otherwise, which despite the letter of 13 January 2023 and despite Begbies Traynor being involved from 23 January 2023, simply had not been forthcoming.

115. On the face of it, therefore, appointing administrators was likely to achieve the statutory purpose under paragraph 3(3) and there was no other credible alternative.

116. It cannot be said, in my judgment, that the statutory purpose required FGI to give the Company more time just to see if it could pay off the first respondent from realisables and if it could in the meantime obtain alternative funding or reach some further accommodation with creditors.

117. In short, it seems to me that the first respondent, in appointing administrators on the basis that it was owed a substantial sum and could not be 100 per cent certain that it would receive what it was owed in days or, possibly, even weeks from realisables alone, was entitled to say that enough was enough and that this cannot amount to an improper motive.

118. I therefore reject the case on improper motive. That conclusion is, of course, a powerful reason for refusing the application, but it is not on my legal analysis a complete answer in itself. It is therefore necessary for me also to consider the wider picture, on this basis but also in case I am wrong on the question of improper motive or on the basis that the first respondent could not properly have appointed because the only proper motive was its own interest in being repaid and it knew than this would happen through receipt of realisables.

119. It is for those reasons that I now deal with the question of the rival strategies.

The rival strategies

120. As I have already explained at the beginning of this judgment, it is not for me to undertake a detailed critique of the rival strategies of the administrators' plans on the one hand and the Dalton rescue plan on the other.

121. I could not, even if I should -- and as I have already said I do not consider that I should -- seek to second-guess or manage the exercise by the administrators of their professional duties. Even if this was a paragraph 74 application that would not, as I have said, be the proper approach to take.

122. The end result, in my judgment, is that the applicant cannot even begin to persuade me that the administrators' strategy is not consistent with the proper performance of their obligation to achieve the statutory purpose of administration. They cannot be criticised at all, on the material before me, for concluding, as at 6 February 2023 and subsequently, that in the absence of a credible proposal to rescue the company as a going concern -- which was and still is impossible without substantial third-party funding -- the only sensible solution is to proceed to achieve objective (b).

123. As to this, they have clearly undertaken a strategy of seeking to achieve this objective in a careful and considered way. They have solicited bids and they have taken the preferred bids forwards. They have identified the difficulties associated with the fact that the premises are owned by the associated property company but occupied by the Company, and they have have identified two options for overcoming that difficulty which is, of course, not an uncommon problem in cases of this kind and does not normally present an insuperable difficulty.

124. It is also right to say that until the Dalton rescue plan emerged in full detail on 13 March 2023 no one had previously presented any alternative detailed credible proposal. Even now, it seems to me, it is not an alternative detailed credible proposal which achieves the first objective of a rescue within the administration.

125. Thus it cannot credibly be said, and the case has not been argued, on the basis that the administrators would be acting in breach of their duty if they did not immediately accept that this rescue plan does achieve the first objective within the statutory purpose of administration of rescuing the company as a going concern. Thus it has not been argued, and nor could it have been that the administrators are obliged to take steps, under paragraph 79 of Schedule B1 or otherwise, to

end the administration and to allow the directors to take back control and implement the Dalton rescue plan.

126. Instead, what is said is that the rescue plan is so plainly preferable to anything which the administrators can achieve that the court should terminate the administration now to allow the rescue plan to be put into effect.

127. However, as I have said, there is a primary fundamental difficulty with that argument, which is the fact that there is no insuperable objection, from a legal or financial or commercial viewpoint, to this proposal being put forwards within the administration. The fact that those behind it prefer not to do so seems to me, with respect to them, to be irrelevant.

128. On Mr Gupta's evidence, he now effectively owns the company anyway. If through his companies he had to pay the administrators to secure control of the company as a going concern and put in place the rescue strategy he identifies, then that would benefit not only the creditors who wish to be paid out and those creditors who are willing to stick with the company but, if there was a surplus, then it appears he would receive it anyway as the ultimate owner of the company.

129. It is of note that in his third witness statement Mr Dalton addressed this point at paragraph 20, where he said that the rescue plan cannot be implemented whilst the company remains in administration.

130. He gave two reasons for that. Firstly, in paragraph 20.1, that the rescue plan had been prepared on the basis that the entirety of the company's business resumes trading as soon as possible whereas, by contrast, the administrators are only trading the distribution arm at reduced capacity. That, of course, is true, but it is only true in the absence of their having confirmed funding to allow full trading to continue and this continued constraint would not apply if a sale of the business was made to Mr Gupta through his companies as a going concern.

131. Secondly, in paragraph 20.2, that the funding referred to in the report will only be provided in the event of an immediate cessation of the administration. Again, that is true, and I have already referred to the conditions in two of the funding proposals which say precisely that. However, again there is no explanation as to why that must be so, and no explanation as to why the funders would justifiably be unwilling to provide that funding if the business was sold as a going concern.

132. In conclusion, these reasons do not seem to me to provide sufficient objective justification for saying that the rescue plan cannot be implemented whilst the company remains in administration.

133. The proposal in the rescue plan is effectively commended to the court by Mr Boardman on the basis that it is a detailed and well-researched plan, produced by reputable insolvency professionals and supported by detailed documentary evidence, so that the court could and should accept it at face value and allow the company to be returned to its directors and shareholders to put that plan into place.

134. The difficulty with that approach, it seems to me, is that even if the company is balance-sheet solvent, as the rescue plan and supporting documentation appear to indicate, it is also plain that without confirmed third-party funding support it is not cash-flow solvent. It does not have confirmed support under the existing rescue plan as it stands, for the reasons I have indicated. Thus, the court would have to accept that the support would nevertheless be provided if it made an order under paragraph 81, which requires four separate companies making good on their promise of third-party funding support, and also that the company would stand by its strategy in the rescue plan.

135. All this, therefore, requires the court to assume that the rescue plan remains supported and unchanged post termination of administration and that the Company would not decide to revert back to its previous strategy of seeking to negotiate with or delay paying creditors such as HMRC or smaller suppliers. If it all goes wrong, and even on the face of the report itself the Company will not return to profit until the end of 2024, there seems to me to be the potential of real prejudice to creditors, both current and future.

136. What is clear is that there is a group, consisting of the owners of the Company and the major creditors, the majority of creditors by value, who have put together this strategy to allow the Company to carry on in business for their mutual benefit. That is, of course, not a bad thing in itself, but it does not guarantee by itself that all creditors will be treated fairly if the administration is terminated.

137. In his submissions Mr Bayfield observed the risks inherent in returning what appears to be a cash-flow insolvent company to the hands of its directors without proper safeguards being in place. Although Mr Boardman made reference at the end of the hearing to the possibility of undertakings being offered to guard against such risks, nothing has been offered at any stage in this case. Even if it was for the court to identify for itself what it would require in terms of undertakings, it is far from clear to me at least what undertakings or combination of undertakings could sensibly be stipulated for in order to guard against the risks which I have identified and which could follow.

138. Nor does it seem to me to be right for me to direct an adjournment for this question to be discussed further, given the urgency and given the undesirability of continued drift and uncertainty.

139. It must be remembered that those behind the rescue plan have had since 13 January 2023 to put a detailed proposal together on the basis that by that stage they knew that by 27 January 2023 the first respondent required repayment in full. It has taken them until 13 March 2023 to produce this detailed rescue plan, thus effectively two whole calendar months, only two days before the adjourned hearing and almost a full month after the application was issued . In the meantime, this administration has been on foot for what will be six weeks this coming Monday and substantial time and resource has been expended in getting the administration to the current position.

140. In those circumstances it seems to me there is no proper basis for the court taking what would be the unusual step of returning the company to its directors on the basis of this late-emerging proposal.

141. The court is obviously alive and sympathetic to the potential adverse consequences to employees and other stakeholders which may follow from this decision, assuming that those behind the rescue plan do not seek to take it further within the administration, but sympathy for those wider consequences cannot, I am afraid, justify making an order of the kind sought on this application, and it is for those reasons that, as I said at the outset, the application fails and must be dismissed.