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Case Nos: 4697, 4698, 4700, 4705, 4711, 4717-4719, 4721, 4722 of 2005

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
COMPANIES COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/06/2006

Before :

MR JUSTICE LINDSAY

In the Matters of Collins & Aikman Europe SA

Collins & Aikman Automotive Systems SL
Collins & Aikman Automotive Holding GmbH
Collins & Aikman Systems GmbH
Collins & Aikman Systems AB
Collins & Aikman Automotive Company Italia SRL
Collins & Aikman Automotive Trim Bvba
Collins & Aikman Automotive Holdings BV
Collins & Aikman Automotive Trim BV
Collins & Aikman Automotive SRO

- and -

In the Matter of The Insolvency Act 1986

Mr Gabriel Moss Q.C. and Mr Tom Smith (instructed by Denton Wilde Sapte) for the Joint Administrators

Hearing dates: 6th April 2006

Approved Judgment

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

.....
MR JUSTICE LINDSAY

Mr Justice Lindsay:

1. In this judgment I deal with some questions arising where, for the particular reasons given, the English-appointed Joint Administrators of a number of related companies incorporated and previously carrying on business in several European jurisdictions now wish to respect, albeit indirectly, some special provisions of the law of those local jurisdictions notwithstanding that those provisions differ from those of the law which is the law of the main proceedings under Articles 3 and 4 of the Council Regulation of 29th May 2000, namely English law.
2. On the 6th April 2006 I had in front of me an Ordinary Application in the above matters. It sought provisional approval by the Court of a specified course of action, firstly, as to distributions proposed to be made by the Joint Administrators (whom I shall describe below), secondly as to consultations with creditors' committees and with creditors in relation to such distributions and, thirdly, for the matters to return to Court after an interval. The plan was that on the return the Court might take into account the result of those consultations and of any objections duly raised to the proposals before then, if appropriate, issuing directions in relation to them. At that hearing in April I gave the provisional approval asked of me. I made ancillary directions to carry forward the consultation process and directed the matter to return to Court on the 6th June.
3. Today, the matter having returned to me on the 6th June, I make the order of today's date which refers to this judgment. I now give the reasons for that order.
4. The Collins & Aikman Group was a leading supplier of automotive components, typically plastic and soft-trim products used in the interiors of motor vehicles. It supplied, inter alios, Ford, General Motors and Daimler Chrysler. In Europe there were within the Group 24 companies spread over 10 countries. A broad indication of the size of the Group's European operations is given by the facts of its having employed some 4,000 persons in Europe at 27 operational sites with a turnover in all of the order of \$1bn p.a..
5. The Group carried on business also within the USA where, on the 17th May 2005, the United States wing filed voluntary petitions for re-organisation under Chapter 11 of the US Bankruptcy Code. That the US operations were placed into Chapter 11 proceedings put the European Companies under severe financial pressure and on the 15th July 2005 the 24 European Companies applied to the High Court in England for Administration Orders. Lawrence Collins J. made such orders in each of the 24 cases before him, which included a Luxemburg holding company and, of the trading companies, 6 companies in England and Wales and companies in Spain, Sweden, Germany, Belgium, Italy and the Netherlands.
6. Those Administration Orders were made within this jurisdiction on the basis that the High Court was satisfied on the evidence put before it that the EC Regulation applied and that the proceedings in England and Wales were main proceedings for the purposes of Articles 3 and 4 of the Regulation. By the Orders then made Messrs S.J. Appell, A.P. Beveridge and G.P. Squires of the firm of Kroll were appointed Joint Administrators (hereinafter called "the Joint Administrators"). A Schedule forming part of those Orders described the effect and purpose of the administration in each case. At paragraph 3 of that Schedule it said:-

“By way of summary, the Joint Administrators must perform their functions with the objective of:

3.1 Rescuing the Company as a going concern or (only if it is not reasonably practical to achieve that objective, or if the pursuit of the objective set out in 3.2 would achieve a better result for the company’s creditors as a whole) then

3.2 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)

.....”

7. The Schedule pointed out that the Joint Administrators were officers of the Court and, in summary, described their powers (a subject to which I shall later return).
8. The Joint Administrators immediately recognised that, although the European Companies were incorporated in several different European jurisdictions, they formed a closely-linked group, many of the functions of which were organised on a Europe-wide rather than national basis. The strategy developed by the Joint Administrators was thus to adopt a co-ordinated approach to the continuation of the businesses, to the funding of the Administration and to the sale of the businesses and assets of the European Companies, in the firm belief that such approach would lead to the best possible returns to creditors. The Joint Administrators were, however, very aware that, whilst the main proceedings were in England, creditors remained entitled to seek the opening of secondary proceedings in any of the other countries where a relevant company had an “establishment”. The Joint Administrators were of the view that the opening of such secondary proceedings and the appointment of local officeholders would have been likely to have impeded the achievement of the purposes of the Administration by making it difficult to continue to trade the businesses, fund the administrations and conduct sales processes on a group-wide basis. To avoid such secondary proceedings oral assurances were given by or on behalf of the Joint Administrators to creditors at creditors’ meetings and creditors’ committees’ meetings that if there were no secondary proceedings in the relevant jurisdiction then their respective financial positions as creditors under the relevant local law would as far as possible be respected in the English administration. With only minor exceptions creditors did not seek to open secondary proceedings or take other divisive steps but rather supported the broad strategy which the Joint Administrators had proposed. The Joint Administrators attribute both that degree of restraint on the creditors’ parts and the degree of support which they achieved to such assurances so given, which enabled them to conduct sales achieving very favourable realisations, in all some \$45m more than had been the estimates that they had received. The Joint Administrators are of the view that the giving of the assurances was of critical importance to that successful execution of the administration strategy.
9. By April 2006 the realisations were virtually complete and the Joint Administrators held over \$125m for distribution to the creditors of the European companies and the Joint Administrators had come to the view that it was of the utmost importance to seek to give effect to the assurances which had been given and which had led to the

cooperation which, in turn, had procured the successful outcomes of the various administrations. A particular unfairness that would arise were the assurances not to be honoured would be that, by the time assets had been sold and businesses realised, it would, at lowest, be arguable that in various jurisdictions there no longer would be any “establishment”. Where that was found to be the case, the local creditors would no longer be able to launch the secondary proceedings which the giving of assurances had seemed to have rendered unnecessary but which, had it even been hinted that those assurances would not be punctually honoured, creditors would be likely to have wished immediately to have begun.

10. By April 2006, then, the Joint Administrators had a problem before them. They had given assurances which they wished to honour, assurances given not only with a view to the benefit of creditors generally but assurances which had conduced to achievement of that benefit. Those assurances had included performance by the Joint Administrators of differing provisions, country by country, as to local law as to, for example, the preferences to be given to particular classes of creditors and the subordination or not of inter-company indebtedness, provisions which were different from the applicable provisions of English law, the law of the main proceedings. The Joint Administrators and their advisers took the view, however, that, properly examined, so wide were the powers conferred upon them by English law (at all events if their proposals received the sanction of the Court by appropriate directions being given) that full effect could be given to the assurances notwithstanding that that involved payments to creditors which, had the assurances not been given, would have been alien to or inconsistent with the law of the main proceedings.
11. Taking that view, the Administrators applied to the Court in April, as I have mentioned. The applications before me (both on 6th June and, earlier, in April) directly concern only the 10 companies that are listed at the head of this judgment. Each of them has funds available for distribution to creditors. Of the rest of the 24 group companies describable as the European companies, the 6 incorporated in England and Wales were, of course, not the subject of assurances of the kind with which I am concerned and hence play no part in the application before me. 5 of the European companies are such that there will ultimately be no funds available for distribution to their creditors so that, again, they have no reason to be made subject to the present application. There were, though, 3 companies in relation to which secondary proceedings were opened and, as to 2 of those, distributions to creditors will be made within those secondary proceedings. Of the 24, that leaves only 1 company, Collins & Aikman Automotive Trim GmbH, with respect to which a separate application will be made to cope with its particular circumstances.
12. At the conclusion of the argument in April I then provisionally acceded to the Joint Administrators’ argument. However, as I then only had the Joint Administrators before me, their plan, as I have touched upon, was that there should be a consultation with creditors and creditors’ committees and the opportunity to express dissent before a final ruling, if any, were to be made.
13. The Joint Administrators’ argument as to the propriety of the directions which they seek may be broadly split into two: as to jurisdiction on the one hand and, if there are found to be one or more relevant jurisdictions, the exercise of that or those jurisdictions as a matter of discretion on the other. I shall deal first with jurisdiction.

Jurisdictions suggested

14. As to jurisdiction, the Joint Administrators, appearing by Mr Gabriel Moss Q.C. and Mr Tom Smith, urge that the English Court and the English Joint Administrators are enabled to honour the local assurances given in the circumstances which I have described and thereby indirectly to respect local law, not that of the main proceedings, by way of one or more of 3 routes, namely:-
- (i) Under the express powers of the English legislation,
 - (ii) Under the inherent jurisdiction of the English Court over the Joint Administrators as officers of the Court, and
 - (iii) Under the rule in *Ex parte James*.

I shall look at each of those 3 but I shall go first to the Rule in *Ex parte James*.

The rule in *Ex parte James*

15. The Rule in *Ex parte James* is to be found at *Re Condon, ex parte James (1874) LR 9 Ch App 609* but it is best derived from comments upon it rather than from an examination of its source, a case in bankruptcy. At its very broadest – see *McPherson, The Law of Company Liquidation (4th Edition, 1999)* – it is described as follows:-

“This elusive and difficult principle is based on morality. At the centre of the principle is that if an officer of the Court is under an obligation of conscience, then the Court will direct the officer to fulfil that obligation.”

An attempt was made by Walton J. to set out four conditions which, in his view, had to be present were the rule to be permitted to operate – see *Re Clark, ex parte Texaco [1975] 1 WLR 559 at 563-4*. Later authorities have done nothing to encourage so prescriptive an approach. Thus in *Re T.H. Knitwear (Wholesale) Ltd [1988] Ch 275 C.A.* Slade L.J. commented as follows at *p. 288b* :-

“The authorities clearly show that the reason for the existence of the rule is that, in the administration of assets on an insolvency, the Court will expect its own officer to behave as honestly as other people (see, for example, *ex p. James (1874) LR 9 Ch App 609 at 614, [1874-80] All ER 388 at 390* per James L.J.). It will accordingly direct him to act “in an honourable and high-minded way” (see *ex p. Simmonds, re: Carnac (1885) 16 Q.B.D. 308 at 312* per Lord Esher M.R.), even if this means overriding rights which persons interested might otherwise be entitled to claim on the strict application of the rules of law and of equity, in the technical sense”.

At *p.* 289 Slade L.J., although entering a note of caution as to the element of uncertainty which so broad a rule might introduce in other than obvious cases, continued:

“The entire basis of the principle, as I discern it from the cases, is that the Court will not allow its own officer to behave in a dishonourable manner. There is no doubt much to be said in favour of the principle.”

16. Textbook authority both explains the rule further and discourages inflexibility in its application. Thus *Williams and Muir Hunter on Bankruptcy (19th Edition) 1979 at p. 249* says as to trustees-in-bankruptcy, who, like Administrators, are officers of the Court:-

“Generally, the trustee will be ordered, as an officer of the Court, to do the fullest equity, and in certain cases, an even higher standard of conduct is imposed on him. It is not easy to define the exact bounds of a principle based upon the control exercised by the Court over its officer, which, since it operates in fields not covered by the established rules of law and equity, is incapable of reduction to an exact formula and must in its application be governed in part by ethical considerations.”

17. *Re Wyvern Developments Ltd [1974] 2 All ER 543* per Templeman J. is an example of an officer of the court (there the Official Receiver as Liquidator) being permitted, against his company’s financial interest, to honour an earlier promise he had made and to do so even if (contrary to the Judge’s conclusion) that promise had not had contractual force. He was permitted to do so by reason of the high standard of conduct and the ethical considerations which required the Official Receiver to comply with his promise. He was authorised to honour his promise even against the opposition of a shareholder of the company who stood to gain if the promise was ignored. If, as the rule and that application of it suggest, the high ethical standard expected and required of an officer of the Court can thus outweigh even the prospect of a better realisation for the estate and can do so even where there is no *contractual obligation* on the officer to ignore that prospect, then, a fortiori, the Rule in *ex parte James* can surely permit an officer of the Court, in otherwise appropriate circumstances, properly to choose to honour a promise made that *has* procured a better realisation. I would not, however, expect the Rule to have any weight where statutory provisions either expressly or by necessary implication clearly preclude the course of conduct which the Rule would otherwise have supported. To that extent the Rule cannot be considered other than within the surrounding statutory structure, which I shall come on to. For the moment, though, I shall assume that nothing in that structure denies force to the Rule. On that basis, and given the view I take, as explained below, of the relevant statutory provisions, the Rule is not alone in supporting the Joint Administrators’ proposal now to implement the assurances which they earlier gave. I thus have no need to consider what force the Rule would have had had it stood alone but I do see it as making a strong contribution to the propriety of directions being given whereby the Joint Administrators should be free to make distributions in implementation of their promises. As the Rule in *Ex parte James* applies only to officers of the Court it is related to the next heading of Mr Moss’ argument, as to an inherent jurisdiction.

An inherent jurisdiction?

18. The argument here begins with an assumption that under common law the High Court has a jurisdiction to control its own officers and hence to control administrators.
19. Mr Moss and Mr Smith draw my attention to the existence of an inherent jurisdiction and its exercise in *Re Atlantic Computers Systems plc* [1992] Ch 505 CA at 543f, *Re Mirror Group (Holdings) Ltd* [1992] BCC 972 at p. 976, *Re Japan Leasing (Europe) plc* [1999] BPIR 911 at 923h, *Re Mark One (Oxford Street) plc* [1999] 1 All ER 608, *Re Wolsey Theatre Co Ltd* [2001] BCC 486 and *Re UCT (UK) Ltd* [20001] All ER 186 at 190. The jurisdiction is unbounded save that it must be judicially exercised. However, statute has intervened in the particular area of the law with which I am concerned and all those authorities precede the substantial intervention represented by the Enterprise Act taking effect in 2003. There are, now, as will be seen when the relevant legislation is referred to below, many provisions which prescribe what administrators are or are not to do in various circumstances. When any inherent jurisdiction is invoked, as it is here, questions frequently arise as to how far, in the particular area of law with which the Court is concerned, some such inherent jurisdiction as is here suggested has been ousted by statutory provision. In *Shiloh Spinners –v- Harding* [1973] A.C. 691 at 723 Lord Wilberforce said:-

“In my opinion where the Courts have established a general principle of law or equity, and the legislature steps in with particular legislation in a particular area, it must, unless showing a contrary intention, be taken to have left cases outside that area where they were under the influence of the general law. To suppose otherwise involves the conclusion that an existing jurisdiction has been cut down by implication by an enactment moreover which is positive in character rather than negative.”

That reference to a distinction between “positive” and “negative” statutory provision was repeated in *Harrison –v- Tew* [1990] 2 A.C. 523 at 536 where Lord Lowry said:-

“One must distinguish between affirmative and negative provisions: the common law can co-exist with a statutory provision with which it is not inconsistent.”

20. It is, contrary to the Latin maxim, thus not the case that the mere existence of the express (a statutory provision) here displaces the tacit (the inherent jurisdiction); to have that consequence the former must be such as to be inconsistent with the continued existence of the latter. Without that both may have parallel force.

Thus whether there exists an inherent jurisdiction in the High Court such that it might direct its administrators as its officers as to what they should or should not do, a jurisdiction alongside the many statutory provisions on the same subject, cannot be answered without a careful look at what the legislature has prescribed and the manner – be it negative or positive – in which it has done so. I shall accordingly, ahead of any further consideration of the existence or not of a relevant inherent jurisdiction in this matter, turn to what it is that the legislature has provided.

The legislation

21. Administration under English law, always intended to be a very practical and flexible process, was made even more so in its scope by Schedule B1 of the Insolvency Act 1986, introduced with effect from the 15th September 2003 by way of the Enterprise Act 2002. The provisions of that Schedule, so far as here material, begin at paragraph 3 (1), (2) and (3) as follows:-

“3 (1) The administrator of a company must perform his functions with the objective of -

- (a) rescuing the company as a going concern, or
- (b) achieving a better result for the company’s creditors as a whole than would be likely if the company were wound up (without first being in administration), or
- (c)

(2) Subject to sub-paragraph (4), the administrator of a company must perform his functions in the interest of the company’s creditors as a whole.

(3) The administrator must perform his functions with the objectives specified in sub-paragraph (1) (a) unless he thinks either that –

- (a) that it is not reasonably practicable to achieve that objective
- (b) that the objective specified in sub-paragraph (1) (b) would achieve a better result for the company’s creditors as a whole
- (4)

(5) The administrator of a company must perform his functions as quickly and efficiently as is reasonably practicable.”

Later in Schedule B1 one finds, under the heading “Functions of Administrator - General Powers” the following:-

59.(1) The administrator of a company may do anything necessary or expedient for the management of the affairs, business and property of the company.

(2) A provision of this Schedule which expressly permits the administrator to do a specified thing is without prejudice to the generality of sub-paragraph (1).

60. The administrator of a company has the powers specified in Schedule 1 to this Act.”

At that Schedule 1, under the heading “Powers of Administrator or Administrative Receiver”, one finds at sub-paragraphs 1-23 a comprehensive list of powers which include, so far as material in the case before me:-

“13. Power to make any payment which is necessary or incidental to the performance of his functions.

.....

.....

18. Power to make any arrangement or compromise on behalf of the company.

.....

.....

23. Power to do all other things incidental to the exercise of the foregoing powers.”

Going back to Schedule B1, one finds also under the heading “Distribution” the following:-

“65. (1) The administrator of a company may make a distribution to a creditor of the company.

(2) Section 175 shall apply in relation to a distribution under this paragraph as it applies in relation to a winding-up.

(3) A payment may not be made by way of distribution under this paragraph to a creditor of the company who is neither secured or preferential unless the Court gives permission.”

22. The section 175 so referred to describes what are, under English law, preferential debts and provides for their payment in priority to all other debts. Schedule B1 continues:-

“66. The administrator of a company may make a payment otherwise than in accordance with paragraph 65 or paragraph 13 of Schedule 1 if he thinks it likely to assist the achievement of the purpose of administration.”

23. Schedule B1 paragraph 68 (2) provides that:-

“If the Court gives directions to the administrator of a company in connection with any aspect of his management of the

company's affairs, business or property, the administrator shall comply with the directions."

Paragraph 68 (3) specifies conditions one or more of which have to be present before the Court can give directions under paragraph 68 (2).

24. Express provision is made in paragraph 69 of Schedule B1 that:-

"69. In exercising his functions under this Schedule the administrator of a company acts as its agent."

The same Schedule provides, under the heading "Status of Administrator" at its paragraph 5 that:-

"An administrator is an officer of the Court, whether or not he is appointed by the Court."

25. Finally, of the provisions to which reference need be made, at paragraph 63 one finds:-

"The administrator of a company may apply to the Court for directions in connection with his functions."

26. By the time the matter was before me in April no-one had said that it had been wrong of the Joint Administrators to give the assurances which they had. Nor had anyone by then doubted that the assurances were given other than with the view to achievement of the statutory objectives of Schedule B1 paragraph 3 (1) (b) and with a view to performance within paragraph 3 (2) and (3) (b). Given, further, the very wide terms of Schedule B1 paragraph 59 (1) and (2) and of Schedule 1 paragraphs 18 and 23 I thus started, in April, on the evidence before me, from the premise that the giving of the assurances had been entirely proper. Nothing has emerged at the creditors' meetings and in other consultations since the April hearing to undo that as a starting point. As for the *implementation* of those assurances, the Joint Administrators, rightly in my view, regard one or other of Schedule B1 paragraphs 65 and 66 as the clearest route to their obtaining the directions which they seek.

Paragraph 65 of Schedule B1

27. I have doubts, though, about the applicability of paragraph 65. The implied reference in paragraph 65 (2), by way of its reference to section 175, to preferential debts (within section 386 of the 1986 Act) seems to require that any distribution "under this paragraph", i.e. under paragraph 65 (and thus including a payment with the permission of the Court under paragraph 65 (3)) shall be subject to those creditors characterised under *English* law as preferential creditors being paid (or at least with such provision for them that their payment could be expected and would not be jeopardised, either in amount or at all, by the proposed distribution) before the distribution under paragraph 65 is made. But would that be the case here?

28. The different jurisdictions within which creditors of the European companies are to be found have provisions as to preference between creditors which differ from English law and differ from one to another. I am not told, and it would doubtless require very

detailed, time consuming and costly further investigations to be made to establish, whether honouring the assurances given would, incidentally, have the effect of ensuring that such of the creditors of foreign countries who, applying English law to them, would be regarded as preferential, would either be paid in full or could be reliably assured that their payment would not be jeopardised were the assurances now to be implemented.

29. However, I do not see any such further investigation as necessary for two reasons. Firstly, it may be that any doubts based on a need to see payment of, or adequate provision for, those who are under *English* law are preferential creditors are unfounded. H.H. Judge Norris Q.C. sitting in Birmingham as a judge of the Chancery Division in *Re MG Rover Belux SA/NV on 29th March 2006 (unreported)* was satisfied that, so long as those who were preferential creditors under the local law (there Belgian law) were provided for, a direction could be given under paragraph 65 (3) for payments to unsecured creditors without enquiry there being required (so far as one can tell from the report) into whether creditors preferential by English law were to be first paid or provided for. However, I need not investigate paragraph 65 (3) further because of the view I take of paragraph 66.

Paragraph 66 of Schedule B1

30. Paragraph 66 of Schedule B1, it is to be noted, contains no limit related to payment of secured or preferential creditors; in particular the importation of section 175 of the 1986 Act in paragraph 65 (2) is only as to distributions “under this paragraph”, i.e. under paragraph 65 only, and the negative provisions of paragraph 65 (3) are correspondingly limited to relate only to distributions “under this paragraph”, paragraph 65.
31. Paragraph 66 relates to “payments”, a term wide enough to include and certainly not such as would exclude the “distributions” which had been the subject matter of paragraph 65. If, contrary to my doubts, implementation of the Joint Administrators’ assurances would be in accordance with paragraph 65 then there would be no need to invoke paragraph 66 but if I am right in harbouring those doubts then the payments which are proposed would be “otherwise than in accordance with paragraph 65” and hence potentially would be within paragraph 66. Equally, if the making of the payments now proposed can be regarded as necessary or incidental to the performance of the Joint Administrators’ functions within Schedule 1 paragraph 13 *supra* then, again, one need look no further for authority to direct the Joint Administrators as they propose. But if paragraph 13 does not apply either then paragraph 66 can step into the breach so long as the payments can properly be regarded as such that the Joint Administrators think them, and reasonably think them, to be “likely to assist achievement of the purpose of administration” within paragraph 66.
32. There can, on the facts here, be no doubt but that the *giving* of the assurances was, at the time they were given, thought by the Joint Administrators to be likely to assist the objectives described in Schedule B1 paragraphs 3 (1) (a) and (b). That, of itself, does not *necessarily* answer the question as to whether joint administrators can reasonably *now* think that *performance* of the assurances is likely to assist achievement of the purpose of the administration. However, when an assurance is given in enforceable contractual form incorporating a promise of its later performance, I cannot think that the legislature would wish to distinguish between the giving of such an assurance and

its performance. It could not have been contemplated, other than in very exceptional cases, that administrators would advisedly or upon direction of the Court breach contractual provisions and thus not only lessen their office but expose themselves to proceedings for specific performance or damages or both.

33. Here, though, it is not said that the assurances were given in contractual form. Does that make any difference? In my opinion it does not. Firstly, the legislature would naturally expect its creatures, administrators, to behave honourably. Secondly, to distinguish between the giving of the promise (thought likely to assist etc.) and its performance would be to open the door to tortious liability in the administrator and to time and money being taken up in contests on that subject. Creditors would be able to claim in misrepresentation (presumably innocent misrepresentation) that assurances had been given on which they had relied and on account of which, as I have explained, they had lost their ability to launch local secondary proceedings to their advantage for want of there any longer being any local establishment. Thirdly, administration is a process which greatly depends for its success upon a good degree of confidence existing between the creditors of a company and the administrators who take over its control. Were the administrators, even against their wishes, to be required to ignore their own promises properly given to assist achievement of the purpose of the administration, the attractive form of corporate re-organisation which administration was intended to create would be brought into disrepute, an outcome which the legislature, in creating administration, cannot have intended. It may be that exceptional circumstances could arise when assurances given and thought at the time of their giving to assist achievement of the purpose of the administration in question become no longer so thought at the time for their performance but that is emphatically not the case here. There is here no reason not to carry forward from giving the assurances to performing them.
34. I should add that I respectfully agree with Judge Norris' view in *MG Rover Belux* that where, as here, the law of the main jurisdiction is sufficiently flexible, as English law is, to acknowledge that in the particular circumstances of an administration it is the provisions of a local non-English law that may have (albeit indirectly) to be respected, then there is nothing in Article 3 of the Regulation of 29th May 2000 that precludes that respect.
35. If for such reasons (to which the Rule in *Ex parte James* and any relevant inherent jurisdiction, as I shall return to, can only add) it would be wrong in a case such as this to distinguish between the performance of contractual and non-contractual promises, then the fact that, at the time the assurances were given, their giving was (reasonably) thought likely to assist achievement of the purpose of the administration should normally suffice, firstly, to enable the Joint Administrators without impropriety to propose under paragraph 66 that the assured payments should now be paid and, secondly, for them to *seek* directions in relation thereto under paragraph 63.
36. Whether that suffices also for the Court to be enabled to *give* directions in that behalf under paragraphs 63 and 66 requires a brief look at Schedule B1 paragraph 68 (2) and (3) *supra*. I do not regard the directions I am invited to give as "in connection with any aspect" of the Joint Administrators' *management* as there described and thus I see the width of paragraph 63 as not here cut down by a need to satisfy the conditions set out in the alternative to one another in paragraph 68 (3). I have thus not needed to look into whether, for example, under paragraph 68 (3) (b), the present proposals are

consistent with those put to the initial creditors' meeting (though no one has urged that they are not). On that basis it was, in April, my provisional view that I did have jurisdiction to direct as the Joint Administrators invite me to do and, now that the matter has returned to me in June, I remain of that view and so hold.

To revert to an inherent jurisdiction

37. The subjects upon which an administrator may apply to the Court for directions are not circumscribed beyond the very wide description of their being "in connection with his functions" – Schedule B1 at paragraph 63. To pick up the distinction between "positive" and "negative" legislative provisions to which I earlier referred, that at paragraph 63 can hardly be regarded as sufficiently "negative" in the sense in which Lord Wilberforce used the word in *Shiloh supra* to exclude any inherent jurisdiction. It is not as if the legislature, when it intended to limit the Court's ability to direct its officers, administrators, did not know how to do so; paragraph 68 (3), for example, begins with a "negative" provision – "The Court may give directions under subparagraph (2) *only if* –" and then it prescribes conditions. The terms of paragraph 68 (2), though, are also "positive"; they do not, for example, in terms prescribe that no directions may be given by the Court other than in relation to the company's affairs, business or property so that, there again, an inherent jurisdiction can survive.
38. However, coming closer to the particular inherent jurisdiction here being contemplated, one to make distributions to creditors, the statutory provisions are undoubtedly in part negative. Paragraph 65 (2) *supra* imports section 175's requirement that preferential debts shall be paid in priority to *all other* and is thus (as gives rise to the doubts I have mentioned as to the applicability of paragraph 65) "negative" in the sense of precluding other types of payment being made under paragraph 65, despite paragraph 65 (1) itself being entirely general and positive in its language. There is thus, as it seems to me, nothing in paragraph 65 which ousts an inherent jurisdiction of the High Court to give directions to administrators save a fetter to the limited extent indicated in paragraph 65 (2) and (3) where the distribution would be to one or more of the existing ordinary creditors yet whilst those who under English law are secure or preferential creditors were left unprovided for.
39. Schedule B1 paragraph 66 *supra* is also "negative" but only to a limited and, in practice, unnecessary extent; it could be required to import from the terms of paragraph 66 that the Court has no inherent jurisdiction to direct an administrator to make a payment that is outside paragraph 65 or paragraph 13 of Schedule B1 unless he thinks it likely to assist achievement of the purpose of administration. Otherwise there is, in my view, nothing in paragraph 66 to cut down whatever inherent jurisdiction lies in the Court to give directions to its officers.
40. But where does this discussion lead? If, as I have held, there is a plain ability in the Court conferred by statute to give the directions which are here sought, what matter is it that a corresponding ability may be arrived at by another route? If adequate braces can plainly be seen to be worn, does one have to examine whether there is also a belt available? Nothing I say here is intended to be a narrowing (or widening) of the Court's inherent jurisdiction to give directions to administrators as its officers save to the extent that I have seen it to be fettered by recent and current statutory provision; rather it is that on the particular facts of this case a more detailed examination of the interaction between statute and the inherent jurisdiction of the High Court is here

unnecessary as the statutory provisions alone suffice to enable the Court, in point of jurisdiction, to direct the Joint Administrators in the way in which they invite direction.

The conclusion as to jurisdiction

41. For the reasons I have given, firstly, the Joint Administrators are, in my judgment, here enabled to implement the assurances which they earlier gave and hence may pro tanto depart from the application of ordinary provisions of English law, the law of the main proceedings. Secondly, I hold that I have jurisdiction such that I may, in exercise of a discretion, give them directions so to do.

Discretion

42. If, then, I have jurisdiction to give the directions to the Joint Administrators that they invite, ought I, in point of discretion, to do so? Mr Moss and Mr Smith point out that the alternatives to the Joint Administrators' proposals under English law are Creditors' Voluntary Liquidations ("CVLs"), Compulsory Voluntary Arrangements ("CVAs") and a number of secondary winding up proceedings in the relevant local jurisdictions. In comparison with the Joint Administrators' proposals each has significant disadvantages.
43. CVLs, apart from involving a fresh insolvency procedure and the risk that, if someone other than one of the incumbent administrators were to be selected as liquidator, that incoming officeholder would have to get up to speed, so to speak, at the expense of the creditors, runs the further risk that in a liquidation, a much less flexible system than administration, the liquidator might find himself unable to depart from the statutory scheme for distribution. Nor, a voluntary liquidator not being an officer of the Court, would he be subjected to the strictures of the Rule in *Ex parte James*. The unfairness of a scheme under which the office-holder would *not* be able to honour the promises given would be obvious.
44. As for CVAs, time and expense would be taken up in preparing the proposals and obtaining approval for them in the meetings that would have to be called. Again, the supervisor of a CVA is not an officer of the Court.
45. As for there being a number of secondary proceedings in local jurisdictions, inescapably that would lead to complication, expense and delay in the cases where secondary proceedings could still be started on the basis that there was still some local "establishment" and would lead to considerable uncertainty and a real sense of grievance where there was not.
46. It had from the outset here been indicated that the appropriate exit route from the administrations in the European companies would be a matter of consultation between the Joint Administrators and the various creditors' committees. The adjournment from April was in part for that to take place. It has now taken place. The creditors' committees have without exception unanimously approved the Joint Administrators' proposals.
47. As for the 3 applicant companies which have no creditors' committee, the position is as follows. The only creditors of Collins & Aikman HoldingsBV are the U.S. parent

companies who had already, by April, confirmed their support for the present application and for the proposed distributions. As for Collins & Aikman Europe SA (called “Luxco” in the evidence) its only creditors are the U.S. parent companies, whose approval I have described, and J.P.Morgan who, having had the Joint Administrators’ proposals explained to them and having had the opportunity to object thereto, have agreed to them. Lastly, as for Collins & Aikman Automotive Holdings GmbH, the Joint Administrators had proposed, in the absence of any Creditors’ Committee, to consult with its 5 largest creditors but that is taking longer than expected to arrange and I will, in that company’s case, adjourn the directions application as I explain below.

48. Given the degree of approval to which I have referred and given also the disadvantages of each of the 3 alternatives to the Joint Administrators’ proposals, I feel well able, in point of discretion, subject only to consideration of the practical effects of doing so, to exercise the jurisdiction which I have held that I have by giving to the Joint Administrators directions of the kind which they have invited.
49. What, then, are the practical effects of such a direction? The practical effect that is most relevant is that North American creditors, chiefly because of the local law as to subordination of inter-company debts, will receive less than they would have done had English law been applicable to them. Most of the North American creditors are creditors of the Luxemburg holding company, Collins & Aikman Europe SA. As I have mentioned, it does not have a creditors’ committee but its creditors, chiefly the North American companies, had indicated support for the application made to me in April and, as I have said, have not since withdrawn that support. As early as March the 31st 2006 the Chief Restructuring Officer of Collins & Aikman North American Group had written:-

“We acknowledge that application of local law could reduce our recovery as compared to the result that might be achieved if English rules regarding subordination and preferential claims were applied. Nonetheless, we believe that this theoretical reduction is more than off-set by the benefit to creditors, including C & A North America, than [sic] could have been realised had creditors not been advised that local priorities would apply through the joint administration. We believe that method would be the most efficient and cost effective process possible, and will achieve a fair distribution to all creditors, including C & A North America.”

Thus the persons most likely to be put at a disadvantage if the Joint Administrators are directed to carry through their proposals are fully aware of the implication of those proposals and, if I may so put it, having achieved the benefit of the proposals, are now content to bear their burden. Thus consideration of the practical effects does nothing to diminish a recognition, as that Chief Restructuring Officer put it, that the Joint Administrators’ proposals “..... will achieve a fair distribution to all creditors”. In the circumstances as I have described them, I accordingly make the order which refers to this judgment in the case of each applicant company, save for Collins & Aikman Automotive Holdings GmbH. In that case only I adjourn further hearing to 4th July, by which date the Joint Administrators expect to have obtained the views of its 5

largest creditors. I also authorise the issue of the Certificate (as referred to in Articles 54 and 58 of Council Regulation (EC) No. 44/2001) which refers to this Judgment.