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Case No: CR-2020-002051

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

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

Date: Monday 13 April 2020

Before :

MR. JUSTICE SNOWDEN

- -

IN THE MATTER OF CARLUCCIO'S LIMITED
(in administration)

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

- -

Felicity Toube QC and Madeleine Jones (instructed by **Ashurst LLP**) for the **Joint Administrators**
Oliver Segal QC and Stuart Brittenden (instructed by **Thompsons Solicitors LLP**) for **Unite the Union**

Hearing dates: 6-9 April 2020

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Approved Judgment

COVID-19: This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII and other websites. The date and time for hand-down is deemed to be 11.15 a.m on Monday 13 April 2020.

MR JUSTICE SNOWDEN

MR JUSTICE SNOWDEN :

Introduction

1. On Thursday 9 April 2020, at the end of a remote video hearing that had taken place in parts over several days, I made declarations and gave directions to Geoff Rowley and Philip Reynolds of FRP Advisory, acting as Joint Administrators of Carluccio's Limited (the "Administrators" and the "Company") under paragraph 63 of Schedule B1 of the Insolvency Act 1986 ("Schedule B1" and the "Insolvency Act"). For convenience, those directions are set out in the Annex to this judgment. I indicated at the time that I would give my detailed reasons in writing, which I now do.

2. The directions related to the legal basis upon which the Administrators might place a large number of the employees of the Company on "furlough" pursuant to the Government's proposed Coronavirus Job Retention Scheme (the "Scheme"). The Government's stated intention is that the Scheme will enable employers, including those in administration, to furlough employees whose services cannot be used due to the current COVID-19 pandemic. Furloughed employees will not be permitted to work for their employer during the period of furlough, but the employer will be able to apply for a grant from the Government to cover the cost of continuing to pay the employees 80% of their regular salary (up to a maximum of £2,500 per month).

3. The Company entered administration as a result of the impact on its business of the restrictions imposed by the Government in an effort to reduce the spread of COVID-19. The evidence is that the Company has no money with which to pay the continuing wages of its employees, and so unless it can take advantage of the Scheme, and, importantly, limit its liability for wages to the amount that it will be able to obtain in respect of the employees under the Scheme, the Administrators would be forced to make the workforce redundant. That would manifestly have a prejudicial effect on the employees and the value of the Carluccio's business which the Administrators are hoping to sell. Accordingly, shortly after their appointment, the Administrators made an offer to place the employees on furlough pursuant to the Scheme. The overwhelming majority of employees have accepted that offer, a handful have indicated that they would prefer to be made redundant and retire, and a relatively small but significant number have not yet responded.

4. The Administrators' difficulties arise because although the Scheme has been explained by the Government in broad terms in guidance published online, there has been no precise detail given of its legal structure, and specifically how the Scheme is intended to operate consistently with the insolvency legislation.

5. The urgency arises because the Administrators need to make their decisions in relation to the employees on or before Easter Monday 13 April 2020. That is the last day of the initial "safe" period of 14 days under the Insolvency Act during which the actions of the Administrators will not amount or contribute to the adoption of any contracts of employment.

6. Accordingly, in broad terms, the Administrators' application sought my determination of a number of questions of law in order to give them the assurance that if they act on the basis of those determinations they cannot subsequently be accused of having acted

inappropriately in dealing with the employees and making applications under the Scheme.

7. Due to the urgency of the matter and the difficulties of liaising with employees in the current situation, it was not, however, possible to arrange for any representative employees or other interested parties to be joined to the application. As a consequence, I cannot see how my decisions and directions as to the law will actually bind any of the affected employees or the Government. Given that position and the lack of information about how the Scheme is to operate as a matter of law in an insolvency, I considered whether it was appropriate to give directions to the Administrators at all.

8. The alternative course would have been simply to leave the Administrators to follow the best advice of their lawyers, and to leave any judicial consideration of the issues until after publication of the detailed legislation giving effect to the Scheme when a case could be brought on with representative parties. It is clear, however, that the Administrators and employees do not have the luxury of time to follow that alternative course. It is obvious that, if at all possible, the Administrators should be able, without fear of subsequent criticism, to take advantage of the benefits of the Scheme by placing the Company's employees on furlough as soon as possible, provided that they believe that to be in the best interests of the administration.

9. Accordingly, I considered that the court should do what it could to give a view of legal issues to assist the Administrators. The COVID-19 pandemic is a critical situation which carries serious risks to the economy and jobs in addition to the obvious dangers to health. I think that it is right that, wherever possible, the courts should work constructively together with the insolvency profession to implement the Government's unprecedented response to the crisis in a similarly innovative manner.

10. The Administrators were represented by Ms. Toube QC and Ms. Jones. In the absence of any representative employees, or any response from the Government to requests to participate, they presented all of the rival arguments that occurred to them with conspicuous thoroughness and ability and adopted a neutral position on the outcome.

11. In addition, in the course of the hearing I received written submissions from Mr. Brittenden and subsequently heard oral submissions from Mr. Segal QC on behalf of Unite the Union ("Unite"). Unite became involved on the basis that some of its members are among the employees, and that although it had not had any time to consult with them, it would endeavour to protect their interests. I welcomed that intervention and am very grateful to Unite and its lawyers for their input, particularly on issues of employment law.

The Administration

12. The Company operates a chain of Italian restaurants. It has over 70 branches and around 2,000 employees. All of the Company's branches have been closed since 16 March 2020, when the Prime Minister advised that all restaurants should close as part of the Government's strategy for combatting the COVID-19 outbreak. Since that date, therefore, the employees of the Company who work in its restaurants have not been able to work. An administration order was made on 30 March 2020 by ICC Judge Mullen.

13. The Administrators' current strategy is to "mothball" the Company's business and, in parallel, to seek a sale of the business in order to achieve a better result for the Company's creditors than would be achieved in a winding-up under paragraph 3(1)(b) of Schedule B1. As part of this strategy, the Administrators wish to retain the Company's employees and claim for them under the Scheme rather than make them redundant. Critically, however, as I have said, they are only willing to do so if and in so far as the costs of doing so can be met by the Government under the Scheme and they do not incur any greater liabilities for the insolvent Company.

The Scheme

14. The Scheme was announced by the Chancellor of the Exchequer, the Rt. Hon. Rishi Sunak, on 20 March 2020. Having referred to the closure of public places such as restaurants, he said,

> "But we don't do this lightly – we know those measures will have a significant economic impact.
>
> I have a responsibility to make sure we protect, as far as possible, people's jobs and incomes.
>
> Today I can announce that, for the first time in our history, the government is going to step in and help to pay people's wages.
>
> We're setting up a new Coronavirus Job Retention Scheme.
>
> Any employer in the country – small or large, charitable or non-profit - will be eligible for the scheme.
>
> Employers will be able to contact HMRC for a grant to cover most of the wages of people who are not working but are furloughed and kept on payroll, rather than being laid off.
>
> Government grants will cover 80% of the salary of retained workers up to a total of £2,500 a month – that's above the median income.
>
> And, of course, employers can top up salaries further if they choose to.
>
> That means workers in any part of the UK can retain their job, even if their employer cannot afford to pay them, and be paid at least 80% of their salary."

15. No draft legislation or regulations have yet been published in respect of the Scheme. The details of the Scheme which are known to date are contained in on-line guidance from the Government at https://www.gov.uk/guidance/claim-for-wage-costs-through-the-coronavirus-job-retention-scheme (the "Scheme Guidance") which was first published on 26 March 2020 and updated on 4 April 2020 and then on 9 April 2020 after the conclusion of the hearing before me.

16. The Scheme Guidance is addressed to employers. It states,

> "If you cannot maintain your current workforce because your operations have been severely affected by coronavirus (COVID-19), you can furlough employees and apply for a grant that covers 80% of their usual monthly wage costs, up to £2,500 a month, plus the associated Employer National Insurance contributions and pension contributions (up to the level of the minimum automatic enrolment employer pension contribution) on that subsidised furlough pay.
>
> This is a temporary scheme in place for 3 months starting from 1 March 2020, but it may be extended if necessary and employers can use this scheme anytime during this period. It is designed to help employers whose operations have been severely affected by coronavirus (COVID-19) to retain their employees and protect the UK economy. However, all employers are eligible to claim under the scheme and the government recognises different businesses will face different impacts from coronavirus."

17. The Scheme Guidance sets out that in order to claim, an employer must have created and started a PAYE payroll scheme on or before 28 February 2020, have enrolled for PAYE online, and have a UK bank account. The employer can claim for furloughed employees who were on the PAYE payroll before 28 February 2020. It also explains that whilst on furlough, the employee cannot provide work or services to the employer,

> "To be eligible for the grant, when on furlough, an employee cannot undertake work for, or on behalf, of the organisation. This includes providing services or generating revenue. Employers are free to consider allocating any critical business tasks to staff that are not furloughed. While on furlough, the employee's wage will be subject to usual income tax and other deductions."

18. The Scheme Guidance also states, under the heading "Agreeing to furlough employees",

> "Employers should discuss with their staff and make any changes to the employment contract by agreement. When employers are making decisions in relation to the process, including deciding who to offer furlough to, equality and discrimination laws will apply in the usual way.
>
> To be eligible for the grant employers must confirm in writing to their employee confirming that they have been furloughed. A record of this communication must be kept for five years."

19. Under the heading "How much you can claim" the Scheme Guidance explains that the employer can claim for 80% of the employees' salary as of 28 February 2020, before tax, up to a maximum of £2,500, plus employer pension contributions and employer National Insurance Contributions on the subsidised furlough pay. The Scheme Guidance makes it clear that the grant is payable into the employer's UK bank account.

20. The Scheme Guidance also makes it clear that the grant paid is to be treated as income of the employer, stating,

> "Payments received by a business under the scheme are made to offset these deductible revenue costs. They must therefore be included as income in the business's calculation of its taxable profits for Income Tax and Corporation Tax purposes, in accordance with normal principles."

21. It is clearly envisaged that the amount to be paid to a furloughed employee is intended to be at least the same as the amount of the grant paid to the employer under the Scheme. The Scheme Guidance expressly states,

> "You must pay the employee all the grant you receive for their gross pay in the form of money.
>
> Furloughed staff must receive no less than 80% of their reference pay (up to the monthly cap of £2500).
>
> Employers cannot enter into any transaction with the worker which reduces the wages below this amount. This includes any administration charge, fees or other costs in connection with the employment."

22. Although the Scheme is manifestly intended to apply to companies which are not in an insolvency procedure, it also potentially applies to companies in administration. In that regard, the Scheme Guidance contains the following advice under the section headed "Who can Claim",

> "Where a company is being taken under the management of an administrator, the administrator will be able to access the Job Retention Scheme. However, we would expect an administrator would only access the scheme if there is a reasonable likelihood of rehiring the workers. For instance, this could be as a result of an administration and pursuit of a sale of the business."

23. In this respect, I have evidence from the Administrators that there have been several expressions of interest in respect of some or all of the Company's business, and that accordingly they take the view that there is a reasonable likelihood of achieving a sale of the business. In that event, the relevant employees would be transferred to the buyer and, after the restrictions on restaurants are lifted when the COVID-19 pandemic eases, they will be able to resume work in the business. The Administrators think, and I agree, that this is what is meant by the expression "rehired" in the Scheme Guidance. As such, the Administrators believe, and I accept, that in principle, the Scheme ought to be available to the Company in respect of furloughed employees.

The Variation Letter

24. As I have indicated, shortly after their appointment on 30 March 2020, the Administrators wrote to all of the Company's employees who were not immediately

required to assist the Administrators with their strategy, offering to continue to employ them on varied terms so as to take advantage of the Scheme (the "Variation Letter"). The Variation Letter explained,

> "As you will be aware, the UK government has recently brought in a scheme to assist employers in the payment of employees during this difficult and unprecedented time. In this regard, it is my intention to apply under the Government's Coronavirus Job Retention Scheme (the "Scheme") in respect of all employees not required to assist the Administrators in their current "mothballing" strategy, which means that we now need to seek your agreement to vary the terms of your contract of employment with the Company.
>
> To confirm, our intention is that, from the date of closure of your restaurant or from today's date for staff at head office, you will be placed on 'Furlough Leave'. This means that your contract of employment continues, but you are required not to undertake any work for the Company. You must not attend your usual workplace or carry out any work on behalf of the Company.
>
> Under the Scheme, the Company understands that it will be provided with a grant equivalent to 80% of your regular wages (excluding any fees, commission and bonus) up to a maximum of £2,500 per month plus the associated employer's National Insurance contributions ("NICs") and minimum automatic enrolment employer pension contributions on the reduced salary (the "Grant"), calculated in accordance with government guidelines on the Grant from time to time. It is our intention to claim for every eligible employee in full, however, I can confirm that the Company is unfortunately not in a position to meet the remaining portion of your regular wage given its financial position. By agreeing to go on Furlough Leave you also accept that your pay will be reduced for the period of Furlough Leave. Your varied contractual pay for this period will be the portion of your regular wages which the Grant will cover. Such pay shall be subject to deductions for tax, NICs and any other statutory deductions."

25. The Variation Letter also made the important point that due to its financial position, the Company would only be able to pay employees if and when it received a grant from the Government. The Administrators stated that they were unable to indicate how long that would take, but assured employees that they were committed to making payment to the employees within 7 days of receipt of grant monies.

26. After dealing with other matters such as holidays, the Variation Letter stated that, subject to its provisions, the employee's "other terms and conditions of employment will remain the same during the period of Furlough Leave", and that the employee's continuity of employment for statutory and other purposes would not be affected.

27. The Variation Letter then sought the agreement of the employee to the terms of the letter and to go on Furlough Leave. It asked for the employees to respond by email by 3 April 2020 in the following terms,

> "I agree to the variation of my terms and conditions of employment, including that I have been placed on Furlough Leave and my contractual remuneration has been reduced, as described in the letter from the Company dated 30 March 2020."

28. The Variation Letter concluded by warning the employees,

> "Please note that if the Company does not receive an e-mail from you by the above deadline, the Administrators will need to review your position within the Company and may be required to consider the possibility that your role is redundant."

29. As at 10 a.m. on 7 April 2020, of 1,788 employees who received the Variation Letter, some 1,707 employees had accepted its terms, 4 had rejected it and stated that they wished to be made redundant, and 77 had not responded. In argument, and in the Directions which I gave, those employees were referred to as "Consenting Employees", "Objecting Employees" and "Non-Responding Employees" respectively. I shall use those terms in the remainder of this judgment.

The Scheme and insolvency

30. As I have indicated, it is clearly intended that the Scheme should be available to companies in administration, subject to the proviso that there should be a reasonable likelihood of the employees resuming work either for the company itself or after a sale of the business by the administrators.

31. What is far less clear, however, is just how the Scheme is supposed to work in an insolvency process. In particular, the Scheme Guidance does not explain how administrators might be entitled to pay furloughed employees consistently with the insolvency legislation.

32. The problem arises because it is quite clear from the Scheme Guidance that the structure of the Scheme is that a claim is made by the employer and not the employee, and that the Government will pay any grant monies to the employer and not to the employee. The Scheme Guidance is also explicit that the amount of the grant is to be paid into the employer's bank account and is to be accounted for as income by the employer. As such, any grant monies paid will constitute assets of the company in administration. Under the insolvency legislation, administrators are not free to dispose of the assets of the company in administration as they see fit, but must do so in accordance with the insolvency legislation and, in particular, by making payments in the order of priorities prescribed in that legislation.

33. There are techniques readily available to ensure that monies lent or payable to a company in financial difficulties can be held on trust so as not to form part of the insolvent estate but are available for making specific payments: see e.g. Barclays Bank v Quistclose Investments Limited [1970] AC 567 and Carreras Rothmans v Freeman Mathews Treasure Limited [1985] 1 All ER 155. However, the Scheme Guidance

contains no suggestion that such techniques are to be employed in a case of administration. There is no mention of the word "trust" in the Scheme Guidance and the grant monies are simply to be paid into the employer's UK bank account without any requirement for segregation from its general funds.

34. The only conceivable statement that might even hint at such a mechanism is the one sentence cited at paragraph 21 above,

> "You must pay the employee all the grant you receive for their gross pay in the form of money."

But that requirement is just as applicable to companies that are not in administration, and the context in which it appears merely emphasises that the employer should provide its employees with the same amount of money that it receives by way of grant under the Scheme.

35. It might be that when the detail of the legislation and regulations giving effect to the Scheme are drafted and published, the Government will propose a regime that imposes a trust mechanism, or that modifies or entirely by-passes the normal insolvency legislation in some, as yet unidentified, way. But the Administrators have to take their decisions on the future of the Company's employees now, and thus can only do so on the basis of the insolvency legislation which is now in force.

36. Accordingly, as matters stand, in order that the Administrators can be confident that they will be able to make payments to furloughed employees, there must be a mechanism found under the insolvency legislation to justify payment of such wages and salary in priority to other claims against the Company. In my judgment, the only realistic candidates which could enable such payments to be made are paragraphs 99 and 66 of Schedule B1.

The Statutory Framework

Paragraph 99 of Schedule B1

37. Paragraph 99 of Schedule B1 ("Paragraph 99") deals with charges and liabilities on an administrator's vacation of office. Paragraphs 99(3) to (5) provide:

> (3) The former administrator's remuneration and expenses shall be–
>
> > (a) charged on and payable out of property of which he had custody or control immediately before cessation, and
> >
> > (b) payable in priority to any security to which paragraph 70 applies.
>
> (4) A sum payable in respect of a debt or liability arising out of a contract entered into by the former administrator or a predecessor before cessation shall be–

> (a) charged on and payable out of property of which the former administrator had custody or control immediately before cessation, and
>
> (b) payable in priority to any charge arising under sub-paragraph (3).
>
> (5) Sub-paragraph (4) shall apply to a liability arising under a contract of employment which was adopted by the former administrator or a predecessor before cessation; and for that purpose–
>
> (a) action taken within the period of 14 days after an administrator's appointment shall not be taken to amount or contribute to the adoption of a contract,
>
> (b) no account shall be taken of a liability which arises, or in so far as it arises, by reference to anything which is done or which occurs before the adoption of the contract of employment, and
>
> (c) no account shall be taken of a liability to make a payment other than wages or salary.

38. By virtue of Paragraph 99(6), the expression "wages or salary" includes holiday pay and contributions to an occupational pension scheme. It does not, however, extend to all liabilities under a contract of employment. In particular it does not extend to redundancy payments, unfair dismissal payments, payments in lieu of notice, and protective awards in relation to employees whose employment has been terminated: see Re Huddersfield Fine Worsteds and others [2005] BCC 915.

39. The effect of these paragraphs is that liabilities for wages or salary arising out of contracts of employment adopted by an administrator following the onset of administration (subject to the condition that no act taken within the first 14 days of the administrator's appointment may amount or contribute to such adoption) are payable out of the assets held by the administrator in priority to the administrator's remuneration and expenses, which in turn have priority over the claims of floating charge creditors and unsecured creditors.

40. This order of priority is confirmed at Rule 3.51(1) of the Insolvency (England and Wales) Rules 2016, which states (before setting out the priority among expenses of the administration) as follows:

> "Where there is a former administrator, the items in paragraph 99 of Schedule B1 are payable in priority to the expenses in this rule."

41. In contrast, employees whose contracts of employment are not adopted in the first 14 days (in other words, whose employment is terminated by administrators during this time or whose employment contracts are not adopted for some other reason), do not

gain the benefit of super-priority under Paragraph 99(5), and their claims are instead merely unsecured provable debts.

Paragraph 66 of Schedule B1

42. Paragraph 66 of Schedule B1 ("Paragraph 66") provides,

> "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 achievement of the purpose of administration."

43. For completeness I should observe that paragraph 65 of Schedule B1 relates to distributions to creditors and paragraph 13 of Schedule 1 to the Insolvency Act confers a power on an administrator to make a payment which is necessary or incidental to the performance of his functions. Neither counsel suggested that those provisions would enable an administrator to make the payments to employees in respect of the post-administration wages or salary which are in issue in the instant case, and I also do not think that they could apply. Payments to post-administration creditors are not "distributions", and they would not be sufficiently connected to the performance of the administrator's functions.

Analysis

Variation of the contracts of employment

44. The first issue to address is whether the Variation Letter has served validly to amend the contracts of employment of the employees to whom it was sent.

45. In my judgment, it is plain that the Variation Letter has had precisely that effect in the case of Consenting Employees who have expressly agreed to its terms. It will also have the same effect in relation to those Non-Responding Employees who subsequently agree to it. That is a critical step in the analysis, because the varied contracts mean that the Company cannot be liable for wages or salary in any amount which exceeds the amount of the grant paid to the Company under the Scheme in respect of the employee, and the Company is not obliged to pay the employee before receipt of the grant funds. It is equally clear that the Objecting Employees who have rejected the Variation Letter will be made redundant and their existing contracts of employment will be terminated. Mr. Segal QC agreed with these conclusions and did not seek to argue to the contrary.

46. The issue of the Non-Responding Employees is less clear. Mr. Segal QC submitted that, depending upon the facts, mere silence or inaction on the part of an employee can eventually be equated with agreement or consent to a variation of his contract of employment, and that is more likely to be the case where the variation is for the benefit of the employee. He suggested that this might enable me to find that the Non-Responding Employees had consented to the terms of the Variation Letter.

47. The principles in relation to implied variation of employment contracts were considered by the Court of Appeal in Abrahall v Nottingham CC [2018] ICR 1425. The case involved the issue of whether employees who had not expressly accepted a contractual variation to their contracts, but whose unions had initially protested, should, by

continuing to work for two years, be taken implicitly to have agreed to a variation which involved a pay freeze by removal of a right to pay progression.

48. After considering the authorities, Underhill LJ stated, at [85] – [89],

> "85. ….A contractual offer can of course be accepted by conduct, and that must include the offer of a variation. Under a contract of employment the parties are in a complex relationship in which they are both required to perform their mutual obligations on a continuous basis, and those obligations are frequently modified by their conduct towards each other. I can see no reason why an employee's conduct in continuing to perform the contract, in circumstances where the employer has made clear that he wishes to modify it, may not—in principle—be reasonably understood as indicating acceptance of the change….
>
> 86. However, to say that in some circumstances continuing to work following a contractual pay cut may be treated as acceptance does not mean that it will always do so. On the contrary, what inferences can be drawn must depend on the particular circumstances of the case. …. The authorities illustrate some specific points about the proper approach to the question of when continuing to work may constitute acceptance. I briefly identify them as follows.
>
> 87. First and foremost, the inference must arise unequivocally. If the conduct of the employee in continuing to work is reasonably capable of a different explanation it cannot be treated as constituting acceptance of the new terms: that is why Elias J in [Solectron Scotland v Roper [2004] IRLR 4] used the phrase " only referable to". That is simply an application of ordinary principles of the law of contract (and also of waiver/estoppel). It is not right to infer that an employee has agreed to a significant diminution in his or her rights unless their conduct, viewed objectively, clearly evinces an intention to do so. To put it another way, the employees should have the benefit of any (reasonable) doubt.
>
> 88. Secondly, protest or objection at the collective level may be sufficient to negative any inference that by continuing to work individual employees are accepting a reduction in their contractual entitlement to pay, even if they themselves say nothing. This is clear from Rigby v Ferodo Ltd [1988] ICR 29 …
>
> 89. Thirdly, Elias J's use in para 30 of his judgment in Solectron of the phrase "after a period of time" raises a point of some difficulty. It is easy to see how it may not, depending on the circumstances of the particular case, be right to infer acceptance of a contractual pay cut as from the day that it is first

> implemented: the employee may be simply taking time to think. Elias J's formulation is intended to recognise that a time may come when that ceases to be a reasonable explanation. However, it may be difficult to identify precisely when that point has been reached on anything other than a fairly arbitrary basis… I do not think that the difficulty in identifying the precise moment at which an employee should be treated as first accepting a contractual pay cut means that the question has to be answered once and for all at the point of implementation."

49. Sir Patrick Elias gave a short judgment to similar effect. He said, at [107] – [110],

> "107. In practice employees will often agree to a variation by conduct. This will readily be inferred, for example, where the change is to the employee's benefit, such as where he is given a pay increase. Unless the contract is wholly exceptional, he will not have expressly to confirm acceptance before the increase takes effect: see Attrill v Dresdner Kleinwort [2013] IRLR 548, paras 97–98. Similarly, if he is promoted, is given a new contract and acts in accordance with its terms, he will be deemed to have accepted the whole of the terms, and that is so even though the new contract may contain certain disadvantageous provisions and even though they do not immediately bite: see FW Farnsworth v Lacy [2013] IRLR 198, where an employee was treated as having agreed to the imposition of a restrictive covenant on this basis.
>
> 108. The difficulty arises where the variation is to the employee's disadvantage, as in this case, and there is either no compensating advantage, or it is being imposed to avoid a potentially worse disadvantage, such as being made redundant. The employment judge seems to have taken the view that a failure to complain which was referable to a fear of redundancy could never constitute a variation of the contract. He said this, at para 135.1:
>
> > "An employee's failure to complain about a breach of contract that is referable to his fear of losing his job if he does so is manifestly not only referable to his having accepted the new terms imposed by the employer."
>
> 109. I think there is force in Mr Laddie's criticism of this paragraph. I do not see why in an appropriate case the employee should not be taken to have accepted the variation in order to avoid the risk of redundancy. If the fear of redundancy can only be avoided by accepting the new terms, it is wholly artificial to treat these as separate and distinct reasons for failing to complain.
>
> 110. It may be said that the employee should never be held to have accepted a variation simply by working without protest

> under the new terms without more. After all, a party can bring a claim for breach of contract within the limitation period without having to notify the other party that he objects to the breach, and why should this be different? I think that the answer lies in the fact that the employment relationship is typically a continuing relationship based on good faith, and exceptionally in that context it might be appropriate to infer that a failure to complain about a proposed variation of the contract for the future may be taken as agreement to that variation which prevents it constituting a breach. It might also be said that an employer can always put the position beyond doubt by lawfully terminating the contract on notice and introducing the varied contract which includes the new disadvantageous term or terms. No doubt the employer's reluctance to do that is in part motivated by a desire to avoid potential unfair dismissal claims. But there are also less selfish reasons. In the context of a continuing relationship based on good faith, dismissing and re-employing might appear to be an unnecessarily hostile stance, only to be adopted as a last resort. Attempts to secure agreement should not be discouraged and exceptionally the circumstances may justify the inference that the employee has agreed to the new terms even where he has been reluctant to do so formally."

50. The judgments in Abrahall were of course set against the normal background in which an employee continues to attend for work after a variation has been proposed. In such a situation there is at least some conduct of the employee from which an inference of consent can be drawn. The current situation is, however, very different because the employees of the Company are unable to attend for work and there is no other conduct on the part of the Non-Responding Employees from which I can infer consent.

51. Further, reflecting the Scheme Guidance that furloughing should be done by agreement with employees, the terms of the Variation Letter expressly required employees to respond positively in order to agree the variation, and warned that a failure to respond could lead to them being considered for redundancy. These terms did not suggest that a failure to respond would be taken as consent to be furloughed, but suggested precisely the opposite.

52. In addition, only a matter of days has elapsed since the Variation Letter was sent. Non-Responding Employees might not even have received it, still less considered it. It would, I think, require very strong evidence to reach a conclusion that, without more, the absence of objection over such a short period was to be equated to consent.

53. Finally, although the option of furlough proposed in the Variation Letter has been regarded as manifestly advantageous by the overwhelming majority of employees who have accepted it, there are nonetheless a few employees who have rejected it. I had no evidence to explain why they did so, or to enable me to conclude that similar considerations would not apply to some of the Non-Responding Employees.

54. Taking these factors together, I cannot reach the conclusion that the absence of a response from the Non-Responding Employees gives rise to the clear inference that they must have consented to the variation proposed. I do not say that such an inference

might not be capable of being drawn if the letter had been differently phrased, if it could be proven to have been received, if more time had elapsed, or if the particular circumstances of the Non-Responding Employees had been explained in more granular detail (though I acknowledge that such an inquiry and explanation would be virtually impossible in the limited time available). As Underhill LJ observed in Abrahall, the inferences that can be drawn must depend on the particular circumstances of each case. All I can say, however, is that on the present facts of this case, no such variation can currently be established for the Non-Responding Employees.

The relationship between Paragraphs 66 and 99

55. Paragraph 66 is drafted in very wide terms, and has proven useful to administrators in dealing with particular difficulties arising in administrations. These have included making payments other than in accordance with the normal order of priorities to key suppliers to ensure continuity of supply; and making payments to overseas employees in accordance with their local employment rights so as to dissuade them from seeking to open secondary proceedings which might frustrate the purpose of the administration as primary insolvency proceedings: see e.g. Re MG Rover Espana SA [2006] BCC 599, especially at [12]-[15].

56. However, it is clear that Paragraph 99 is the provision which is specifically designed to deal with the ability and obligation of administrators to pay wages or salary to employees in an administration. I do not consider, and Ms. Toube QC did not seek to argue, that Paragraph 66, as a *lex generalis*, can modify or override the *lex specialis* of Paragraph 99: c.f. Re Allders Department Stores [2005] ICR 867 at [22]. In my view it is therefore clear that any analysis of the present position must commence with Paragraph 99.

Adoption under Paragraph 99

57. The leading case on the meaning of "adoption" in the context of Paragraph 99(5) is the decision of the House of Lords in Powdrill v Watson & Anor (Paramount Airways Ltd) [1995] 2 A.C. 394 ("Paramount").

58. In Paramount, the relevant employees were pilots who had been employed by an airline which had gone into administration. A week after the commencement of the administration, the administrators wrote to them and the other employees, confirming that their salaries and other contractual entitlements would continue to be paid in the administration, but unilaterally asserting that the administrators would not be adopting their contracts of employment or accepting personal liability in respect of them. At the time this practice was widespread among office-holders and its supposed efficacy was based upon an unreported 1987 decision, Re Specialised Mouldings Ltd, in which the judge had not given reasons.

59. Following such letters, the pilots continued to work for the company and were paid their wages whilst the administrators sought a buyer for the business as a going concern. After about four months, those attempts to find a buyer having failed, the administrators summarily terminated the employment of the pilots and their colleagues. The pilots claimed that their contracts of employment had been adopted by the administrators notwithstanding the Specialised Mouldings letters. They also contended that under the then applicable legislation, section 19(5) of the Insolvency Act, they were entitled to

super-priority payment of their contractual rights to salary in lieu of notice, pension contributions and holiday pay. The pilots' claims succeeded in the High Court and in the Court of Appeal.

60. By the time the matter came to the House of Lords, the appeal in Paramount had been joined by leap-frog appeals in two administrative receivership cases, Leyland DAF and Ferranti. In those cases, Lightman J had agreed that the Specialised Mouldings letters were ineffective to avoid adoption of employment contracts by the administrative receivers. He had also held that on the wording of section 44 of the Insolvency Act, the receivers were "personally liable on" the contracts that they had adopted for all outstanding contractual liabilities, whenever incurred.

61. Giving the only substantive speech dismissing the appeals in the House of Lords, Lord Browne-Wilkinson noted at pages 440-441 that section 19(5) had been introduced into the Insolvency Act in relation to administrations, together with section 44 in respect of administrative receiverships, in response to the decision of the Court of Appeal in Nicoll v Cutts [1985] BCLC 322. In Nicoll v Cutts, decided under the Companies Act 1948, it had been held that where employees were retained by a receiver and manager who had been appointed by the debenture holder but was deemed in the debenture to be acting as agent for the company, such employees had no recourse against the receiver to enforce payment of their wages for the work that had been done. Lord Browne-Wilkinson identified, at page 441E-F, that the new provisions in the Insolvency Act had been introduced to correct the mischief disclosed by Nicoll v Cutts, namely the risk that an employee who had rendered services during a receivership or administration would be unable to recover his wages for such services.

62. However, Lord Browne-Wilkinson also observed at page 442 that the result of the lower court decisions in Paramount, Leyland DAF and Ferranti was that the range of contractual liabilities to which super-priority attached in an administration, and for which administrative receivers were personally liable, went beyond the payment of wages for services actually rendered. He referred to what he described as the "furore" in the insolvency world that had followed the decision of the Court of Appeal in Paramount. He highlighted the inherent difficulties faced by insolvency office-holders who effectively had only what he described as a "quite inadequate" period of 14 days under the legislation within which to decide whether to adopt the relevant contracts of employment, and who faced potentially large liabilities for the company or personal liabilities for themselves if they did adopt the contracts. The alternative was simply to make the employees redundant and avoid the risk.

63. Lord Browne-Wilkinson indicated at pages 443F-444B that the combination of these factors was contrary to the rescue culture which the new Insolvency Act had been intended to promote. He also noted that Parliament had given some indication of its opinion of the decision of the Court of Appeal in Paramount, because it had moved with great speed after the decision to enact the Insolvency Act 1994 to limit the range of liabilities given super-priority in an administration or for which administrative receivers might be personally liable.

64. Against this background, Lord Browne-Wilkinson held at page 445A-D that the lower courts had been wrong to adopt a two-stage approach under which they asked first whether the contract had been adopted, and then secondly to ask what consequences flowed from that adoption. Lord Browne-Wilkinson indicated that in order to

determine Parliament's intention it was necessary to look at the joint effect of adoption followed by the statutory consequences said to flow from it. He said that if the words used by Parliament had a meaning which was consonant with its presumed intention not to frustrate the rescue culture and not to produce unworkable consequences, then that construction should be adopted.

65. So far as administrations are concerned, at pages 447E-448A, Lord Browne-Wilkinson noted that, in contrast to section 44 in relation to administrative receiverships, section 19(5) contained a temporal limit on the liabilities which qualified for super-priority, being only those sums payable in respect of debts or liabilities incurred during the administration. He concluded that this temporal limitation prevented the result reached by the Court of Appeal from being so absurd to enable the court to construe section 19(5) in a way which the words used did not sustain.

66. Having set the scene in this way, Lord Browne-Wilkinson turned to consider the meaning of "adopt". He said, at pages 448E-449B:

> "The meaning of the word 'adopt' in sections 19 and 44 of the 1986 Act therefore has to be gathered from the context in which it is used. It is important to bear in mind that the appointment of an administrator or receiver does not terminate the employee's contract of employment with the company. Only if the company (acting by the receiver or administrator) gives notice terminating the employment or, by failing to pay wages as they accrue due, repudiates the contract of employment will the contract with the company terminate. Therefore, so long as wages are paid by the company the employee remains the employee of the company. The Court of Appeal [1994] ICR 395, 402 lost sight of this factor when … they wondered how the employee continued to be employed if there had been no adoption by the administrators. Therefore, the mere continuation of the employment by the company does not lead inexorably to the conclusion that the contract has been adopted by the administrator or receiver.
>
> It is common ground that adoption does not mean an assumption of personal liability by the administrator … since there is no question of an administrator accepting personal liability under section 19. Nor in my judgment can it mean 'fail to disclaim' as in section 323 of the Companies Act 1948 since, as I have said, the issue is not whether the company is liable on the continued contract but whether the liability on the contract is to have a higher priority….In my judgment, as Mr Sumption submitted, adoption in sections 19 and 44 can only connote some conduct by the administrator or receiver which amounts to an election to treat the continued contract of employment with the company as giving rise to a separate liability in the administration or receivership."
>
> (my emphasis)

67. Lord Browne-Wilkinson went on to consider whether the administrator could attach conditions to his adoption, adopting some but not other liabilities associated with the contract. On this point Lord Browne-Wilkinson concluded that adoption was an all-or-nothing concept, stating, at pages 449F-450B:

> "My views on this argument have varied. But eventually I am, with regret, forced to the conclusion that there is no halfway house such as Mr Sumption proposes. The mischief aimed at by the Act (i.e. the decision in Nicoll v Cutts) must mean that the concept of adoption of the contract covers at least accepting liability for payment for services rendered to the administrator under contracts which he has continued. If it were to be open to the administrator or receiver to exclude such liability, the Act fails to remedy the mischief. Therefore the concept of adoption of the contract is inconsistent with an ability to pick and choose between different liabilities under the contract. The contract as a whole is either adopted or not: the consequences of adoption are then spelt out by the Act. If the employment is continued for more than 14 days after the appointment of the administrator or receiver, there seems to be no escape from the conclusion that the whole contract has been adopted. If the result of this view would be to produce an absurdity it would be permissible to reject the plain meaning of the words. But in relation to administration, the consequences of giving the word 'adoption' its all or nothing meaning, although unfortunate, are not absurd. There is nothing absurd in the view that an administrator can only use the services of employees on the basis that they are entitled to be treated in accordance with their contract of employment and, for example, to be given contractual notice of termination or paid in lieu of notice."

68. Finally, at page 452C-D, Lord Browne-Wilkinson summarised his views,

> "I therefore reach the following conclusions: (a) for the purposes of both section 19 and section 44 an employee's contract of employment is "adopted" if he is continued in employment for more than 14 days after the appointment of the administrator or receiver; (b) it is not possible for an administrator or receiver to avoid this result or alter its consequences unilaterally by informing the employees that he is not adopting their contracts or only doing so on terms; (c) in the case of both administration and receivership the consequence of adoption of contracts of employment is to give priority only to liabilities incurred by the administrator or receiver during his tenure of office."

The issues

69. Against that background, as I briefly outlined at the start of the judgment, the central issues are (i) how the Administrators can lawfully give effect to furlough arrangements with the employees who have agreed to the variation of their contract of employment on the terms of the Variation Letter, and (ii) whether the Administrators will be able to

avoid incurring liabilities by adoption of the unvaried contracts of employees who have not responded to the Variation Letter, so that they are not forced to make all of those employees redundant before the end of the first 14 days of the administration.

The "no services" argument and the rescue culture

70. I should first deal with a preliminary argument that Paragraph 99(5) is simply inapplicable in the current situation. Ms. Toube QC indicated that some commentators in the market apparently take the view that since Lord Browne-Wilkinson had identified that correction of the mischief in Nicoll v Cutts was the reason for the introduction of the forerunner to Paragraph 99(5) in the 1986 Act, and since the only identified mischief in Nicoll v Cutts was that employees might render services in the insolvency without payment, Paragraph 99(5) should be read as having no application whatever unless employees actually rendered services to the company in administration. Hence, so the argument goes, a contract which provides for an employee to be furloughed could never be adopted by administrators under Paragraph 99(5).

71. I reject that argument. It is certainly true that the mischief in Nicoll v Cutts involved an employee not being paid for services that they had rendered in an insolvency. But if Parliament had wanted to limit super-priority for wages and salary to cases where services are actually rendered to a company in administration, it could have said so simply and directly. Instead it chose to deploy the concept of adoption of the contract of employment itself, and to persist with that concept when making subsequent amendments to the Insolvency Act (first by the Insolvency Act 1994 and secondly by the Enterprise Act 2002 when introducing Schedule B1), long after any difficulties with that concept had become apparent.

72. Moreover, even in normal circumstances not involving COVID-19 or furlough, there are situations in which an administrator might, without committing any breach or repudiation of an employee's contract of employment, not require the employee to work for a period during the administration, but where it would nevertheless be entirely appropriate for the administrator to be required to continue to pay their wages or salary. To give one example, take an employee who has particular skills or know-how regarding the company's business which would, if available to a competitor, devalue the business which the administrator was seeking to sell. Even if there was no new work for the employee to do in the administration until it was known whether the business could be sold, it would be commercially important for the administrator not to terminate the employee's contract. In that way, the employee would continue to be available to the purchaser of the business, the restrictive covenants in his contract would continue in effect, and the maximum post-termination period of restraint would be available for the potential benefit of the purchaser. Given those benefits to the administration, even if, with the permission of the administrator, the employee were not required to attend the premises to work, it would be wrong if they were not entitled to payment of their wages or salary.

73. Moreover, although the coronavirus and the concept of furlough were obviously not foreseen by Parliament when it enacted and amended the relevant insolvency legislation, or by the House of Lords when Paramount was decided, it is very clear from Lord Browne-Wilkinson's speech at pages 441-442 and 445C-D that promotion of the rescue culture is an important consideration when interpreting the Insolvency Act. In the instant case, a conclusion that because furloughed employees could not provide

services, their contracts of employment could not be adopted under Paragraph 99(5) would have the unwelcome result that the main statutory provision dealing with the issue of employment in administrations would have no application and would not enable furloughed wages or salary to be paid as the Scheme plainly envisages. That would be entirely contrary to the rescue culture in the current situation in which such an approach may be needed more than ever before.

74. I therefore see no reason whatever to strive to reach a conclusion that Paragraph 99(5) is wholly inoperable in the current situation. Instead, if it is possible to do so, Paragraph 99(5) should be interpreted to permit the Scheme to be given effect, and thus support the rescue culture and the Government's efforts to deal with the economic consequences of the COVID-19 pandemic.

Non-termination, continuation and adoption

75. I therefore turn to examine the key concepts in Lord Browne-Wilkinson's speech in Paramount as to the meaning and distinction between termination, continuation and adoption of a contract of employment.

76. The starting point is that identified by Lord Browne-Wilkinson in the first paragraph quoted at paragraph 66 above. The appointment of an administrator does not terminate a contract of employment, which will continue in effect unless and until notice to terminate is given or the contract is repudiated. It was for that reason that Lord Browne-Wilkinson concluded that,

> "… the mere continuation of the employment by the company does not lead inexorably to the conclusion that the contract has been adopted by the administrator or receiver."

Put another way, the mere failure of the company (acting by the administrator) to terminate the contract does not lead inexorably to the conclusion that the contract has been adopted by the administrator.

77. That reading is also consistent with what I believe Lord Browne-Wilkinson was alluding to in the second paragraph of his speech quoted at paragraph 66 above, where he indicated that adoption could not mean "fail to disclaim". Since an administrator has no power to disclaim (unlike a liquidator), and given Lord Browne-Wilkinson's use of quotation marks around the expression, I think he simply meant "fail to terminate".

78. That conclusion led to the critical part of Lord Browne-Wilkinson's analysis at the end of the second paragraph quoted in paragraph 66 above, namely that,

> "…adoption in sections 19 and 44 can only connote some conduct by the administrator or receiver which amounts to an election to treat the continued contract of employment with the company as giving rise to a separate liability in the administration or receivership."

In that analysis, Lord Browne-Wilkinson's basic assumption was that the contract of employment is "continued" and hence that the liabilities under it continue to arise. But he held that adoption requires, in addition, some conduct by the administrator that

amounts to an election or decision that those liabilities arising under the continued contract will be a "separate" (i.e. prior ranking) liability in the administration, rather than simply ranking as an unsecured claim.

79. In the context of the normal situation, as in Paramount itself, that conduct on the part of the administrator is likely to occur when the administrator communicates to the employee that the business remains open, and that the employee should attend for work in the usual way. In order to avoid the manifest mischief of Nicoll v Cutts, that conduct of the administrator objectively signifies a willingness that the funds of the company should be used to pay wages or salary for the work done in priority to unsecured claims.

80. The only doubt that might be cast upon that analysis arises because in the subsequent part of his speech at pages 449F-450B which I have quoted in paragraph 67 above, Lord Browne-Wilkinson stated that,

> "The mischief aimed at by the Act (i.e. the decision in Nicoll v Cutts) must mean that the concept of adoption of the contract covers at least accepting liability for payment for services rendered to the administrator under contracts which he has continued. If it were to be open to the administrator or receiver to exclude such liability, the Act fails to remedy the mischief. Therefore the concept of adoption of the contract is inconsistent with an ability to pick and choose between different liabilities under the contract. The contract as a whole is either adopted or not: the consequences of adoption are then spelt out by the Act. If the employment is continued for more than 14 days after the appointment of the administrator or receiver, there seems to be no escape from the conclusion that the whole contract has been adopted."
>
> (my emphasis)

Similar wording appears in Lord Browne-Wilkinson's summary at the end of his speech at page 452C-D, where he stated that an employee's contract would be adopted "if he is continued in employment for more than 14 days after the appointment of the administrator".

81. If taken out of context, these phrases could be thought to mean that a contract of employment will necessarily or automatically be adopted if an administrator simply fails to terminate it within 14 days. But read in context, I do not think that is what Lord Browne-Wilkinson meant.

82. In the first of these paragraphs, commencing at page 449F, Lord Browne-Wilkinson was addressing the question of whether an administrator could choose to adopt a contract in part rather than as a whole. He was not readdressing the meaning of "adoption", which he had already decided.

83. Further, at the start of the paragraph, Lord Browne-Wilkinson spoke of "contracts which he [viz, the administrator] has continued", and referred to circumstances in which the administrator accepted liability for services rendered to him under the contract. I think that it is clear that Lord Browne-Wilkinson was not there speaking about a mere

non-termination of the contract, but of some conduct of the administrator relating to the employee.

84. As such, when Lord Browne-Wilkinson then referred to the employment being "continued for more than 14 days after appointment", or summarised his conclusions at the end of his speech by referring to the employee being "continued in employment", I believe that he was simply using shorthand for the same concept that he had described earlier - namely that the administrator's conduct amounted to an acceptance that he had to pay for services to be rendered under the contract, and hence amounted to an election to give super-priority to the claims for wages or salary.

85. This analysis of Lord Browne-Wilkinson's speech is consistent with the decision of Laddie J in Re Antal International Ltd [2003] 2 BCLC 406 ("Antal"). That case neatly illustrates the difference between (i) mere continuation or non-termination of the contract of employment (which does not amount to adoption), and (ii) some conduct of the administrator amounting to an election to give super-priority to the employee's claims for wages and salary (which does amount to adoption).

86. In Antal, the administrators found out more than 14 days after the commencement of the administration that, contrary to their earlier belief that certain individuals were employees of a subsidiary company, they were actually employed by the company in administration. The administrators thereupon immediately terminated their contracts of employment. However, in order to clarify the position that had arisen, they sought directions from the court as to whether the contracts of employment had been automatically adopted on the expiry of the 14 day period.

87. Laddie J held, applying Lord Browne-Wilkinson's explanation of the concept of adoption, that the mere failure to terminate the contracts within the first 14 days following the appointment (when the administrators did not know of the existence of the relevant contracts with the company) did not amount to adoption of the contracts. He held that it was necessary to look at the facts and to decide whether there had been some conduct by the administrators which could legitimately be treated as an election of the type required by Lord Browne-Wilkinson.

88. I respectfully agree with that decision. The mere fact that the contracts between the company and the employees had, unbeknown to the administrators, continued in existence for more than 14 days after the commencement of the administration did not amount to adoption. And as soon as the administrators learned of the existence of the contracts with the company, they acted to terminate them rather than adopt them.

89. With those principles in mind, I turn to analyse the position under Paragraph 99(5) as regards the Consenting Employees, the Objecting Employees and the Non-Responding Employees.

The Consenting Employees

90. As indicated above, the Consenting Employees are now employed on the basis of a contract which has been varied according to the Variation Letter and thus only requires payment of wages and salary at a level equal to the grant received under the Scheme in respect of the employee, and only at a time when the grant has been received. That position has been reached within 14 days from commencement of the administration,

and hence nothing that has thus far been done can amount to adoption of the varied contract.

91. However, it seems to me clear that, as and when the Administrators make an application under the Scheme in respect of the Consenting Employees or make any payment to the employees under their varied contracts, this would amount to adoption of the varied contracts of employment. Alternatively, although this is not anticipated, if funds were unexpectedly to become available to the Administrators to make payments of wages to the furloughed employees prior to the receipt of monies from the Scheme, that too would amount to adoption of the varied contract. In either case, applying the concept of adoption as explained by Lord Browne-Wilkinson in Paramount at page 449B, the Administrators would be doing an act which could only be explicable on the basis that they were electing to treat the varied contract as giving rise to liabilities which qualify for super-priority.

92. Accordingly, I consider that such steps would enable super-priority payments to be made to the furloughed employees under Paragraph 99(5) using the grant monies as and when received under the Scheme; or in the alternative would enable payments to the employees to be made from other funds of the Company, which would be reimbursed when the grant money was paid.

93. The only argument which might be made against such a conclusion arises from some unfortunate wording that was included in the Variation Letter. After requesting that the employees accept the terms of the Variation Letter, the letter went on to set out, under the heading "Ongoing arrangements" some standard instructions about how the Company was to be operated under the control of the Administrators. In between a statement about compliance with fire, buildings, safety, food and hygiene requirements (which seems strange given that the employees to which the letter was sent would not be able to attend the Company's premises), the letter stated,

> "As noted above, you continue to be employed by the Company. The Administrators act as agents of the Company and will not be adopting, and will not at any future date adopt, your contract of employment. The Administrators have not assumed, and will not at any future date assume, any personal liability in relation to your employment."
>
> (my emphasis)

94. Most of this paragraph is accurate as explaining that the Administrators merely act as agents for the Company and without personal liability, but the underlined words seem to be an echo of the type of wording used long ago in Specialised Mouldings letters. Paramount decided that such words have no effect when sought to be imposed unilaterally by administrators to prevent adoption of employment contracts. The potential difficulty here is that the words have been included in the Variation Letter which is the basis upon which the Consenting Employees have agreed to be furloughed. If given literal effect, they could arguably amount to an agreement to prevent the operation of Paragraph 99(5).

95. When I asked Ms. Toube QC whether those responsible for the drafting of the Variation Letter could explain the intention behind the inclusion of the words, she was unable to

offer any explanation. The inclusion of the words may reflect the fact that the furore caused by the decision in Paramount left deep scars that seem to have passed down through the generations of insolvency practitioners; or it may reflect the fact that even after an adverse decision of the House of Lords and 25 years to reflect on it, old habits die hard. Either way, I consider that the inclusion of the words was a mistake.

96. However, given the lack of prominence which the words had in the Variation Letter, which is otherwise admirably clear as to what the Administrators intended to do, together with the fact that, without further explanation, the words would have been as inexplicable to employees reading the letter as they seem to have been to those who included them, I do not consider that they should be taken to detract from the conclusion that I have reached that the varied contracts of employment of Consenting Employees will be adopted under Paragraph 99(5) in the manner that I have indicated.

Objecting Employees

97. For reasons that I have explained, the contracts of employment of the Objecting Employees will not either be varied or adopted by the Administrators, but will be terminated and the employees in question will be made redundant.

Non-Responding Employees

98. If Non-Responding Employees accept the offer in the Variation Letter (or any reiteration of it) prior to the expiry of 14 days into the administration, they will stand in precisely the same position as the Consenting Employees.

99. If, however, the Non-Responding Employees do not accept the offer in the Variation Letter (or any reiteration of it) prior to the expiry of 14 days into the administration, and nothing else happens, I consider that applying the principles set out by Lord Browne-Wilkinson in Paramount which I have explained above, the Administrators will not be treated as having adopted the unvaried contracts of employment of the Non-Responding Employees by the mere failure to terminate those contracts prior to the expiry of the 14 day period. Moreover, although the unvaried contracts will continue in existence, the employees cannot attend for work, and there will be nothing done or said by the Administrators that could amount to an election to treat those unvaried contracts as giving rise to super-priority liabilities in the administration. This is the crucial analysis that will enable the Administrators to avoid having to take the precaution of dismissing the Non-Responding Employees prior to the expiry of 14 days into the administration.

100. Thereafter, provided that the Administrators have not first decided to withdraw the Variation Letter or terminate the contract, if a Non-Responding Employee chooses, belatedly, to accept the terms of the Variation Letter, I consider that this will have the effect of varying the contract of employment. Even though it occurs after 14 days, the late acceptance of the terms of the Variation Letter by the employees will not, however, amount to the adoption of the varied contract, because it is not an act of the Administrators.

101. Rather, as with the Consenting Employees, I consider that adoption of the varied contract of a late consenter will occur when the Administrators act upon the varied contract by making an application in respect of the employee under the Scheme, or by

paying the employee wages. In short, belated acceptance of the Variation Letter after the expiry of 14 days will simply put the relevant employee into the same position as regards adoption as those who accepted the variation prior to the expiry of the 14 day period.

102. Those Non-Responding Employees who continue not to respond to the Variation Letter will simply continue to be employed by the Company on the terms of their unvaried contract unless and until it is terminated, but they will merely be an unsecured creditor in the administration in respect of any claim under the contract. Their contracts will not be adopted in a situation in which they do not attend for work and the Administrators do nothing to amount to an election to treat the liabilities under the contract as qualifying for super-priority in the administration.

Are the Administrators under a duty to apply under the Scheme?

103. In argument, Mr. Segal QC raised the issue of whether the Administrators are under a duty to apply under the Scheme in respect of any of the employees to whom the Variation Letter was sent.

104. There is plainly no such duty as regards the Objecting Employees. As regards the Consenting Employees or those who accept the terms of the Variation Letter late, I do not need to reach a conclusion on the point because it is plainly the current intention of the Administrators to make just such an application. In that regard, I would only observe that whilst I can see that such a duty might well be implied from the terms of the Variation Letter, it would of course be subject to the provision in the Scheme Guidance to which I referred in paragraph 22 above, and also to the overriding restrictions on the exercise of powers and duties by the Administrators as regards the prospects for achieving the objective specified in paragraph 3(1)(b) of Schedule B1. I did not understand Mr. Segal QC to dissent from those propositions.

105. So far as the Non-Responding Employees are concerned, Mr. Segal QC relied on the principle that an employment contract involves an implied term of mutual trust and confidence, together with cases such as Aspden v Webbs Poultry & Meat Group (Holdings) Ltd [1996] IRLR 521 and Brompton v AOC International Ltd and Unum [1997] IRLR 639. As I understand it, those cases suggest that an employer may be under a duty not to dismiss an employee who is on long-term sickness absence until it has explored whether the employee will be covered under the provisions of a permanent health insurance policy which the employer has taken out with a third party insurer.

106. I do not think that the analogy is a good one in circumstances in which, unless and until the Non-Responding Employee agrees to the variation of their contract, there will have been no agreement by the employee to be placed on furlough, which is what the Scheme Guidance appears to require. Moreover, I see no good reason why the Administrators should be under a duty to do something which will incur the risk of having to face an argument that they have elected to adopt the unvaried contract, thereby incurring super-priority for liabilities that could not be covered by the grants available under the Scheme.

107. I shall therefore indicate that the Administrators are under no such duty, other than in respect of Consenting Employees or others who have agreed to the variation of their contracts in accordance with the Variation Letter.

108. Mr. Segal QC also raised the question of whether, in addition to sending the Variation Letter which sought the consent of the employees to be furloughed, and indicated that if they did not respond they might be made redundant, the Administrators were under a duty to employees to go one step further and send a letter which indicated that even non-responders would be taken to have accepted the offer of variation so as to enable an application to be made in respect of them under the Scheme.

109. I do not propose to determine that issue, since it would, I think, require more information about the potential recipients of the letter in order to be able to consider whether I would be able to draw the necessary inferences as to consent. That issue will have to await a case in which such a letter has been used, or a further application for directions in this administration.

110. What I can say, however, is that I was given to understand that the Administrators are making continued efforts to try to ensure that the Variation Letter has reached the Non-Responding Employees and to assist them to make a decision in relation to it. That is, in my view, an entirely sensible and appropriate course for the Administrators to take. I also do not think that such a course should carry any risk of adoption of the non-varied contracts. A reiteration by the Administrators after 14 days of the offer of a varied contract is the antithesis of an act of adoption of the contract in its original form.

Paragraph 66

111. The conclusions that I have reached in relation to Paragraph 99 and the directions that I have given will enable the Administrators to proceed to implement their proposals for furloughing most of the employees of the Company without fear that they will be criticised in the future for acting inappropriately. That will be so even if the legal conclusions that I have reached turn out to be wrong or are overtaken by events or detailed legislation giving effect to the Scheme.

112. In the circumstances I do not propose to express any concluded views on the potential applicability of Paragraph 66 in the current situation. I will say, however, that I am attracted by the possibility that, as with cases such as MG Rover Espana to which I have referred, Paragraph 66 might be an appropriate way in which the Administrators could fill any gaps, or deal on an ad hoc basis with particular issues of detail that might arise in relation to the implementation of the Scheme.

Conclusion

113. I reiterate my gratitude to all those involved in bringing this matter before the court urgently and efficiently.

114. For convenience, the directions which I made on 9 April 2020 reflecting these reasons are set out in the Annex that follows.

ANNEX

THE DIRECTIONS

UPON the Joint Administrators having written to some of the Company's employees on 30 March 2020 (the "**Employees**"; the "**Variation Letter**") inviting those Employees to agree to a variation of their contracts of employment in order to allow them to be placed on furlough in accordance with the provisions of the Scheme. The terms of the variation are those set out in the Variation Letter, including in particular on terms that (a) the Employees will only be entitled to be paid 80% of their former wages (excluding any fees, commission and bonus) up to a maximum of £2,500 per month, (b) that any Employee will only be paid if and insofar as the Joint Administrators receive any sums as a grant under the Scheme in respect of that Employee, (c) any payment to any Employee will be limited to those sums received by the Joint Administrators in respect of that Employee, and (d) any payment by the Joint Administrators shall be paid within 7 days of receipt of any sums as a grant under the Scheme in respect of that Employee;

AND UPON some of the Employees having accepted the offer set out in the Variation Letter (the "**Consenting Employees**"), some of the Employees having rejected the offer set out in the Variation Letter (the "**Objecting Employees**") and some of the Employees not yet having responded to the Variation Letter (the "**Non-Responding Employees**");

IT IS DECLARED AND DIRECTED THAT without prejudice to any argument which an Employee may seek to raise as to the true legal position, and subject to any legislation or regulations that may subsequently be enacted to give effect to the Scheme, the Joint Administrators be at liberty to act on the following bases:

(1) In relation to the Consenting Employees:
   a. The employment contracts of the Consenting Employees are varied in accordance with the Variation Letter at the time at which each Consenting Employee expressly accepts the terms of the Variation Letter in writing;
   b. Adoption (within the meaning of paragraph 99(5) of Schedule B1 of the Insolvency Act 1986) ("**Adoption**") of the employment contracts (as varied in accordance with the Variation Letter) of the Consenting Employees will occur upon the earlier of
      i. the Joint Administrators making payments to the Consenting Employees under their employment contracts (as varied in accordance with the Variation Letter); or
      ii. the Joint Administrators making an application in respect of the Consenting Employees under the Scheme.

(2) In relation to the Objecting Employees:
   a. The employment contracts of the Objecting Employees are not varied in accordance with the Variation Letter;
   b. No employment contract of any Objecting Employee will be Adopted by the Joint Administrators.

(3) In relation to the Non-Responding Employees:
   a. The employment contracts of the Non-Responding Employees will not be varied in accordance with the Variation Letter (or any subsequent reiteration of

it by the Joint Administrators) unless and until a Non-Responding Employee accepts such offer prior to the termination of their employment contract;

b. Adoption of the said employment contracts (as varied in accordance with the Variation Letter or any reiteration of it) will occur upon the occurrence of the same events (mutatis mutandis) as set out in paragraph (1)b above.

(4) Prior to termination by the Joint Administrators of the employment contract of any Objecting Employee and/or any Non-Responding Employee, such Employee is an unsecured creditor of the Company with a provable debt in the administration or any future liquidation in respect of amounts due under their employment contracts.

(5) The Joint Administrators are not under any duty to apply for a grant under the Scheme in respect of any Employee other than a Consenting Employee or a Non-Responding Employee whose contract has been varied[1] in accordance with paragraph (3)a above.

(6) The Joint Administrators will not adopt the contract of employment of any Employee merely by virtue of not terminating the contract of employment of that Employee.

[1] The word "varied" replaces the word "adopted" to correct an inadvertent error in the Order originally made.