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No: CR-2025-000564

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

IN THE MATTER OF NVAYO LIMITED (IN SPECIAL ADMINISTRATION)
AND IN THE MATTER OF THE PAYMENT AND ELECTRONIC MONEY INSTITUTION INSOLVENCY REGULATIONS 2021

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

Date: 27 July 2026

Before:
Deputy ICC Judge Baister

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Between:

CHRISTOPHER JAMES SCANLON **Applicant**

- and -

(1) DANE O'HARA **Respondents**
(2) ALEX CADWALLADER
(3) ANDREW POXON
(as special administrators of Nvayo Limited)

Mr Tim Matthewson (instructed by **Kingsley Napley LLP**) for the **Applicant**
Mr Andrew Shaw (instructed by **Trowers & Hamlins LLP**) for the **Respondents**

Hearing date: 20 July 2026

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Approved Judgment

This judgment was handed down on 27 July 2026 by email to the representatives of the parties and by release to the National Archive

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Deputy ICC Judge Baister:

The background

1. Nvayo Limited is or was an electronic money institution, an FCA regulated electronic money issuer subject to the Electronic Money Regulations 2011. It ceased trading in August 2023 and went into special administration on 10 February 2025 under the Payment and Electronic Money Institution Insolvency Regulations 2021. The respondents are the joint special administrators.

2. Regulation 12 of the Regulations sets out three objectives applicable in the case of a special administration:

> objective 1, which is to ensure the return to customers of "relevant funds" (safeguarded funds) as soon as is reasonably practicable in accordance with regs 13 to 34;
>
> objective 2, which is to ensure timely engagement with payment system operators and regulators, including the FCA;
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> objective 3, which is either (a) to rescue the institution as a going concern, or (b) to wind it up in the best interests of the creditors.

3. Mr Scanlon was Nvayo's CEO. He is the ultimate beneficial owner of the company, of which he is also an unsecured creditor for £2,053,649 in respect of loans he made to it in 2019. He is/was also a customer of the company, in which capacity he has a claim on "relevant funds" subject to the customer safeguarding requirements provided for by the 2011 Regulations.

4. At the date of the special administration Nvayo held £5.32 million in safeguarded funds and had liabilities totalling £5.25 million to customers. It had unsecured creditor claims of £2,972,247, making Mr Scanlon the largest creditor. His claim as a customer is, in common with those of other customers, modest. He says he has safeguarded balances of £4,249.60 in six US$ accounts and £2,400 in a sterling account. Mr O'Hara calls into question whether in fact Mr Scanlon, as opposed to others connected to him, is the customer, but he concedes that he appears as such in the company's records. Whether or not Mr Scanlon is a customer in his own right is not an issue I am asked to determine. I proceed, therefore, on the basis of Mr O'Hara's concession as to what the books and records of the company show and on the basis of what is said in para 64 of Mr Shaw's skeleton argument: "The Administrators accept that Mr Scanlon is a customer of the Company in his own name in relation to a sterling account containing £2,400 and two US dollar accounts containing US$604.03 and US$488.96," although that is qualified in a footnote.

5. The remuneration and expenses claimed by the respondents after a year of special administration came to £1,889,327. Mr Scanlon considers that sum to be excessive. He has applied to challenge it under r 167 of the Payment and Electronic Money Institution Insolvency (England and Wales) Rules 2021 which provides as follows:

(1) The following persons may apply to the court for one or more of the orders in paragraph (7)[1] in respect of the administrator's remuneration for services set out in rule 163(1)(a)—

(a) a secured creditor,

(b) an unsecured creditor with either the concurrence of at least ten per cent in value of the unsecured creditors (including that creditor) or the permission of the court,

(c) a customer with the concurrence of customers whose relevant funds claims represent at least ten per cent of all relevant funds claims or with the permission of the court, or

(d) the FCA.

(2) A customer, with the concurrence of customers whose relevant funds claims represent at least ten per cent of the total relevant funds claims, or with the permission of the court, may apply to the court for one or more of the orders in paragraph (7) in respect of the administrator's remuneration for services set out in rule 163(1)(b).

(3) An application under paragraphs (1) and (2) may be made on the grounds that—

(a) the remuneration charged by the administrator is, or the expenses incurred by the administrator are, in all the circumstances, excessive, or

(b) the basis fixed for the administrator's remuneration is in all the circumstances excessive or inappropriate…

Rule 167(9) sets out the orders the court may make, which include an order reducing the remuneration which the administrator is entitled to charge, if it considers the application to be well founded.

6. Mr Scanlon made his first application on 31 October 2025; on 30 April 2026 he made a second application challenging a further tranche of the administrators' costs and expenses.

<u>The amendment applications</u>

7. This judgment deals with two applications by Mr Scanlon to amend his first application to challenge the administrators' remuneration. The first was made on 4 February 2026, the second on 16 February 2026. The need to amend arises in the following circumstances.

8. Rule163(1) of the Rules provides that the administrator is entitled to receive remuneration:

(1) out of the estate of the institution for services given in respect of the pursuit of objectives 2 and 3 (r 163(1)(a));

[1] It is common ground that the reference should be to (9) rather than (7), but nothing hangs on that.

(2) out of "relevant funds" for services given in respect of the pursuit of objective 1 (r 163(1)(b)).

9. By his first remuneration application Mr Scanlon applied for orders pursuant to rr 167(3) and 167(9). His application did not identify the provisions of r 167(1) and (2) on which he also wanted to rely, but the application was expressed to be made "as unsecured creditor of Nvayo…of at least 10% in value of the unsecured creditors." Mr Scanlon accepts that his first application (in its original form) was brought under r 167(1)(b) of the Rules, which (by virtue of the cross-reference in r 167(1)) only enables a challenge to be made to the services set out in r 163(1)(a) (i.e. services in pursuit of objectives 2 and 3). Mr Matthewson accepts on his behalf that this was an oversight (in the course of his submissions Mr Shaw confirmed that the respondents had also overlooked the defect in the application): Mr Scanlon's intention was always to challenge the administrators' remuneration and expenses incurred in the pursuit of each of the three objectives as, he says, is clear from his evidence in support. He points out that, in circumstances in which most of the remuneration and expenses in the period covered by the first remuneration application related to objective 1, it would make little sense to view that evidence as not challenging objective 1 remuneration and expenses. He also points out that the respondents themselves proceeded (at least initially) on the basis that Mr Scanlon was challenging remuneration and expenses in respect of all three objectives. It was the applicant (or his advisers), it seems, who identified the defect in his application and made the applications(s) to amend, which was plainly the right thing to do. Mr Scanlon also seeks permission under r 167(2) of the Rules to apply, notwithstanding the fact that his claim as a customer represents less than 10% of relevant funds claims.

10. The respondents oppose Mr Scanlon's first application to amend. Mr Scanlon's response, by way of his second amendment application, is to seek to rely on two additional gateways as means of challenging the administrators' remuneration: para 74 of Sch B1 Insolvency Act 1986 and the inherent jurisdiction of the court. Again, the respondents oppose.

The law on amendment

11. I can deal with the law briefly. It is common ground that the jurisdiction to allow amendment in this case arises under CPR 3.1(2)(p) which is applied by r 187 of the Rules and empowers the court to make "any […] order for the purpose of managing the case and furthering the overriding objective […]" The opening phrase of CPR 3.1(2) makes clear that the exercise of the power is discretionary; the wording of (p) makes specific reference to the overriding objective. A proposed amendment should have a "real prospect of success": *Kawasaki Kisen Kaisha Ltd v James Kemball Ltd* [2021] 1 CLC 274); *Elite Property Holdings Ltd v Barclays Bank plc* [2019] EWCA Civ 204. It must be supported by evidence which establishes a proper factual basis on which the test can be met: *Zu Sayn-Wittgenstein v Borbón y Borbón* [2023] 1 WLR 1162. Mr Shaw says that regard to the overriding objective should "be informed by the purpose of the special administration regime applicable to electronic money institutions." He may be right, and it is true that aspects of the applications do give rise to considerations that are peculiar to the regime in the context of which they are made, although for reasons which will become apparent I do not think those are decisive as to the exercise of the court's discretion in the circumstances of this case.

The submissions

12. In his skeleton argument Mr Matthewson identifies eight reasons why the court should exercise its discretion to allow the amendments sought, which I set out from his skeleton argument (with minor amendments).

(1) This is a case in which there should be scrutiny of the respondents' remuneration. After citing the figures I have mentioned above, Mr Matthewson points out that the total remuneration and expenses claimed after a year of special administration amount to £1,889,327, with no end to the special administration in sight. Most of the remuneration and expenses incurred relate to objective 1. Their amount, he says, raises obvious concerns about proportionality, hence the need for scrutiny.

(2) The respondents have already put in evidence in answer to Mr Scanlon's challenge to objective 1 costs incurred in the period covered by the first remuneration application in Mr O'Hara's second and third witness statements, so most of the costs of dealing with the objective 1 costs for this period have already been incurred.

(3) There will in any event be a challenge to the objective 1 costs for the period covered by the second remuneration application because, even if permission is not granted to challenge those costs in the applicant's capacity as a customer, his challenges under para 74 Sch B1 Insolvency Act and the inherent jurisdiction of the court remain. Reg 37 of the Regulations applies para 74 Sch B1 IA 1986 to electronic money institution special administrations with modifications.

(4) There will in any event be a challenge to objective 2 and 3 costs for both the periods covered by both remuneration applications.

(5) In light of the three preceding points, the directions given (and costs involved) in proceeding to a final hearing are not going to be materially different if the amendments are granted.

(6) Mr Scanlon has a "real interest" in challenging the objective 1 remuneration and expenses (a) as a customer (in his own capacity as a customer and to protect the interests of other customers); and (b) and, more materially so far as his own interests are concerned, as the majority unsecured creditor. That is plainly the case if there is a shortfall as regards creditors, but is also the case if there is a surplus sufficient to pay the unsecured creditors in full by reason of Mr Scanlon's interest as the ultimate beneficial owner of Nvayo. He accepts, as the respondents complain, that Mr Scanlon's interest as a customer is small (about 0.1% of all customer claims) and that he has not obtained the support of other customers. However, there are 7,993 customers with an average claim of £688.10, meaning he would have to obtain the support of around 800 customers to meet the 10% threshold. The prospects of mounting some kind of a "class action" is therefore unrealistic. That makes it appropriate for one customer to assume the burden of applying. The respondents say that other customers' interests would be more appropriately upheld by the FCA, but that is wrong: r 167 of the Rules does not give the FCA standing to challenge objective 1 costs (r 167(1)(d) only allows the FCA to challenge

objective 2 and 3 costs). The respondents also rely on the fact that the members of the creditors' committee do not share the applicant's concern about the level of remuneration. But a challenge under r 167 is not available to the creditors' committee. Apart from that, the committee is made up of one creditor (with a debt of just £19,200) and two individual customers. Mr Scanlon is the major unsecured creditor with a debt of £2,053,649, which represents 69% of unsecured creditor claims. As majority creditor, he has a direct financial interest in the level of objective 1 costs: there will be a shortfall in relevant funds (due to the remuneration and expenses of the respondents being paid out of relevant funds under r 99 of the Rules) and the shortfall claims of customers will then become unsecured claims reducing the amount paid to the unsecured creditors; alternatively there will be a surplus of relevant funds because, if customers do not submit their claims by the "hard bar" date set under regs 21 and 22 of the Regulations, any surplus of relevant funds will go into the general asset pool under reg 21(7) and become available for the benefit of unsecured creditors. Whilst Mr Scanlon has no desire to prevent customers from claiming funds to which they are entitled, the likelihood is that there will be a large number of unresponsive customers given the passage of time and the relatively small average value of customer claims. The likely reality is thus that for every £1 of remuneration charged by the respondents, the applicant, as majority unsecured creditor, will receive 69p less by way of dividend.

(7) The respondents say that the second amendment application should not be allowed to be used to "circumvent" r 167(2) of the Rules. But there is authority to the effect that para 74 of Schedule B1 and the inherent jurisdiction of the court may be used to challenge remuneration and expenses precisely when there is a lacuna in the rules that otherwise apply.

(8) The respondents say that the amendment applications are prejudicial to creditors because they would increase the time and costs they will incur in dealing with them. Mr Matthewson submits that this argument overlooks: (a) the counter-argument that, if his client's remuneration applications succeed, there will be a significant costs saving for creditors and customers; (b) the fact that the respondents have already incurred the costs of responding in evidence to the challenges to objective 1 costs, so there should be no material further time they need spend; and (c) if the respondents are successful in resisting the remuneration applications they will be likely to obtain a costs order against the applicant who has a valuable property in the jurisdiction against which any costs order could be enforced.

Much of the foregoing I take directly from Mr Mathewson's skeleton argument. I apologise if my limited editorial changes do violence to his submissions.

13. In support of his submission that the court should give Mr Scanlon permission to challenge the respondents' remuneration in his capacity as a customer, notwithstanding the absence of support from the requisite 10% of customers, Mr Matthewson relies on *Re*

Singh (a bankrupt) [2019] Bus LR 575. He posits an analogy between his client's position and that of a bankrupt applying for permission to challenge excessive remuneration or expenses under r 18.35 of the Insolvency Rules 2016. In that case the test for permission was described as being "no more prescriptive than that permission should be granted if it is appropriate to do so having regard to all the relevant circumstances." One relevant circumstance was held to be whether the applicant had a "real interest in the application," (hence the phrase in para 12(6) above), but the discretion was said to be exercisable having regard to all the circumstances, including whether it was appropriate for the office-holder to have to justify his costs or expenses.

14. On Sch B1 para 74 and the inherent jurisdiction of the court Mr Matthewson took me to *Re Hotel Company 42 The Calls Ltd; Whitfield v Al Jaber* [2013] EWHC 3925 (Ch); [2014] BCC 136. In that case HHJ Purle QC, sitting as a High Court Judge, considered an application brought under paras 74 and 75 of Sch.B1 in which a shareholder of a company in administration, JJW Ltd, and a director, Mr Al Jaber, claimed that unfair harm had been done by, amongst other things, the charging of excessive remuneration, noting, "That is something for which relief can be given to a member or creditor under para 74 or to a creditor or contributory under para 75." He went on to consider the inherent jurisdiction of the court to deal with the remuneration of an administrator:

> "16. I am inclined to the view that there is an inherent power in the court, in an appropriate case, to order administrators' remuneration to be assessed upon the application of a shareholder. It might be appropriate to do so, for example, in the case of a company whose assets exceed its liabilities, even though it may previously have been cash-flow insolvent, That must in my judgment follow from the court's power to direct administrators generally. Otherwise there would be an unacceptable lacuna in the statutory scheme. Rule 2.109 of the Insolvency Rules 1986 (SI 1986/1925) as amended presently contains provisions enabling creditors to challenge remuneration and expenses but is silent on the rights of shareholders in that regard.
>
> 17. The reason only creditors are mentioned in terms in the Insolvency Rules is presumably because ordinarily the dismal reality is that the only people interested in an administration are the company's creditors, but that is not necessarily so in every case, including this one. There is no doubt that the shareholder also is interested."

Mr Matthewson also referred me to *dicta* in *Pagden v Ridgley* [2024] EWHC 3047 (Ch) and [2025] EWHC 2674 (Ch), although I do not think I need go into the detail of those.

15. Mr Shaw began his oral submissions with a whistle-stop tour of the Regulations and the Rules. A review of both also appears in his skeleton argument at para 46 ff. I do not think I need to set out the detail. It is sufficient to note the two connected points that emerged: that together the Regulations and the Rules constitute a complete code for the special administration of electronic money institutions; and that code maintains a clear distinction between safeguarded funds and funds from which the claims of creditors may be satisfied. As Mr Shaw says in para 52 of his skeleton argument, "[I]t is a key part of the statutory scheme that there is a fundamental distinction drawn between customers, who have a claim on the asset pool and creditors, who have a claim on the special administration estate but no entitlement to funds in the asset pool unless and until any surplus in the asset pool vests in the institution."

16. The fact that Mr Scanlon is both customer and a creditor gives rise to a difficulty, Mr Shaw submits. Rule 167 of the Rules preserves the fundamental distinction made between customers and creditors in that only the former have standing to challenge remuneration and expenses incurred in relation to objective 1 because it is only customers who have a claim to relevant funds held in the asset pool. The interests of customers and creditors are not aligned, indeed they conflict. Mr Scanlon should therefore not be in the position of seeking to advance his interests as a creditor through a challenge to objective 1 costs where doing so could work to the detriment of the company's customers (a point Mr Shaw makes in relation to para 74 Sch B1 but which I take to have a more general application).

17. Mr Scanlon has a personal financial interest in objective 1 costs because he is an unsecured creditor and will be affected by any shortfall in relevant funds as a result of the administrators' objective 1 remuneration and expenses, because customers with unsecured shortfall claims will share any dividend with him. So in seeking to challenge objective 1 costs Mr Scanlon is not seeking to protect his rights as a customer but rather his rights as a creditor, although every creditor will be in the same position, i.e. affected by any surplus or shortfall in the asset pool; yet the Rules specifically exclude creditors from challenging objective 1 costs.

18. It is, Mr Shaw submits, "a fundamental feature of insolvency law that a person purporting to exercise rights as a member of a class [must act] *bona fide* in the interests of that class and not for any collateral purpose: see *In re Alabama, New Orleans, Texas and Pacific Junction Railway Company* [1891] 1 Ch 213; cf *Aabar Block SARL v Maud* [2016] Bus LR 1243. Mr Scanlon's admission that he wishes to challenge objective 1 costs, i.e. those relating to customers, to further his interests as a creditor, should therefore disqualify him from being able to do so. The interests of customers and creditors are not aligned because customers would wish to be paid in full, whereas creditors would wish there to be as large as possible a surplus in the asset pool following a final distribution to customers because that surplus would be available to meet their claims. For those reasons Mr Scanlon should only be able to challenge objective 2 and 3 remuneration.

19. Mr Scanlon's first amendment application turns on the question whether the court should give Mr Scanlon permission to challenge objective 1 remuneration at all, but in particular whether it should do so in circumstances where he has relevant funds claims amounting only to some 0.1% of total claims in the region of £5.5 million and does not enjoy the concurrence of 10% of relevant fund claims as provided by r 167(2). In his oral submissions Mr Shaw emphasised that the 10% threshold was there for a reason and should not readily be subverted.

20. Mr Shaw makes the obvious but cogent point that the creditors/customers committee is the proper body responsible for determining the administrators' remuneration. It has done so. Its role should not readily be subverted either.

21. He makes the equally obvious but equally cogent point that one effect of allowing the proposed amendments will be, contrary to what Mr Matthewson says, to increase costs. It is true that substantial costs have already been incurred on the basis of the remuneration applications as they stand, but more work will have to be done before the final hearing of the existing remuneration applications (expected to last 4-5 days), and there is the possibility of further challenges as further tranches of remuneration are claimed.

22. Criticism is made of Mr Scanlon's motive in pursuing his challenges to the administrators' remuneration. The administrators say that the challenges are not made *bona fide* but for collateral purposes. On 25 September 2025 Mr Scanlon wrote to them

in his capacities as an unsecured creditor of the company and its ultimate beneficial owner making various complaints, including complaints about their continued investigation into intercompany receivables in an amount of £10.5 million, their failure to reach a decision as to whether or not to accept an offer from him to purchase claims the company is said to have against the FCA, and about the costs of the administration. The administrators provided a detailed response on 14 October 2025. On 21 October 2025 Mr Scanlon sent another email reiterating his complaints, demanding that the administrators provide him with a wide range of documents, and demanding that they file a notice moving the company from administration to dissolution "in accordance with para 83 of Schedule B1 to the Insolvency Act 1986." He sought to impose deadlines for complying with his demands and coupled certain demands with the threat of a remuneration challenge. I am invited to draw the inference that Mr Scanlon's remuneration challenges are not genuine but made with a view to securing compliance with his demands.

23. The foregoing submissions go primarily to the r 167 gateway to a remuneration challenge. I turn next to the amendments seeking to include claims for relief under para 74 Sch B1 and by reference to the inherent jurisdiction of the court.

24. Mr Shaw deals with the Sch B1 para 74 issue in para 78 ff of his skeleton argument which I summarise as follows.

> (1) To bring a claim under para 74 an applicant must show he has been unfairly harmed in the capacity in which he brings the application: *Re Coniston Hotel (Kent) LLP* [2015] BCC 1; *Re BLV Realty Organization Ltd v Batten* [2010] BPIR 277. In *In re Meem SL Ltd* [2018] Bus LR 393 David Halpern QC (sitting as a High Court judge) considered the principles applicable to para 74 Sch B1 IA 1986 and held:
>
> "(i) The paradigm case under paragraph 74 arises where the administrator treats the applicant (either alone or together with further creditors) less favourably than another creditor or creditors. This constitutes harm, but it is not necessarily unfair harm. In order to be unfair, the applicant has to show that the decision cannot be justified by reference to the interests of the creditors as a whole or to achieving the objective of the administration. Mr Lilly might well be correct in saying that unfair harm which consists of differential treatment does not have to be perverse, but it is unnecessary for me to reach any concluded view on that point.
>
> (ii) I accept that the concept of unfair harm in paragraph 74 is not limited to differential treatment but can include a decision of the administrator to sell an asset at an undervalue, thereby causing harm to all creditors. However, in a case where there is no differential treatment of creditors, the court will not interfere with the administrator's decision to sell an asset unless the decision does not withstand logical analysis. This probably means the same thing as perversity."
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> (2) Mr Scanlon seeks to bring his challenge under para 74 as a customer, a creditor and as the ultimate beneficial owner of the company. However, as matters presently stand, the application to challenge the objective 1 costs under para 74 is bound to fail, first because, until the imposition of a hard bar date, it cannot be

said what distributions will be made to customers; it is possible that customers will be paid in full. As things stand, Mr Scanlon is therefore unable to say that the administrators' actions might unfairly harm his interests as a customer. Second, there is no, and cannot be, any suggestion of differential treatment as between Mr Scanlon and the other customers. Mr Scanlon would have to establish that the administrators' actions in relation to objective 1 costs are perverse. He has no realistic prospect of doing so.

(3) Similarly, the question of whether Mr Scanlon has been unfairly harmed in his capacity as a creditor has no prospect of success for the same reason as his claim as a customer must fail. He puts his claim on the footing that he would be unfairly harmed by any shortfall in the asset pool, but at present it is not known if there will be a shortfall. As Mr Scanlon is not being treated differently from any other creditor, again he would have to establish that the administrators' actions were perverse.

(4) Mr Scanlon's suggestion that he could be unfairly prejudiced in the event of a surplus in the special administration estate because it would reduce the funds available to him as ultimate beneficial owner is hopeless; an ultimate beneficial owner does not have standing to apply under para 74.

(5) Para 74 is concerned with unfair harm to a person in a relevant capacity. The administrators believe that Mr Scanlon's actions are motivated by collateral interests in capacities other than as a customer or creditor. Such interests cannot found legitimate claims to relief under para 74.

(6) The interests of customers and creditors are not aligned and conflict. Mr Scanlon cannot seek to advance his interests as a creditor under para 74 through a challenge to objective 1 costs when that could be to the detriment of the company's customers.

(7) Mr Scanlon's reliance on para 74 would unnecessarily broaden the scope of the matters before the court. Mr Scanlon should not be permitted to expand the scope of his application in circumstances in which the directions Mr Scanlon seeks are likely to result in the cost of the challenge approaching the sums that are realistically in dispute. That would be disproportionate and prejudicial to other customers.

25. As to the inherent jurisdiction issue I summarise, very briefly, the points he makes as follows.

(1) The question of what, if any, inherent jurisdiction the court has in an area which is regulated by statute is a difficult one: *Pagden v Ridgley* [2025] EWHC 2674 (Ch). Identifying whether any inherent jurisdiction remains requires careful construction of the relevant statute: *Harrison v Tew* [1990] 2 AC 523.

(2) While the court might rely on its inherent jurisdiction to fill a lacuna in a statutory regime, (*Pagden v Ridgley* at [84]) that is not the case here. The court cannot and should not seek to

> exercise its inherent jurisdiction to allow Mr Scanlon to challenge objective 1 costs because to do so would not involve filling a lacuna in the statutory scheme but acting at odds with it.

Again, I take the foregoing largely from Mr Shaw's skeleton argument with apologies for anything lost as a result of my editing.

26. I do not purport to have covered in the foregoing paragraphs everything that I heard from Mr Matthewson and Mr Shaw. I believe, however, that the material I have covered is sufficient to enable me to reach my conclusions on the applications before me, to which I now turn.

Conclusions

27. I begin with two points which go some way to informing what follows.

28. The first is that administrators, like other insolvency office-holders, are fiduciaries, trustees, who have an obligation to account for their stewardship of the assets they control. The rule that a trustee may not profit from his trust applies to all kinds of person who are in a fiduciary position, including insolvency office-holders. The allowance of remuneration is an exception to that rule. It inevitably involves a conflict between the interest of the fiduciary who is to receive remuneration and the interests of those to whom the fiduciary duties are owed who will bear whatever remuneration is allowed. The consequence of that is that an office-holder seeking remuneration must justify his entitlement to it. Those, and other, propositions, go back to Ferris J's seminal judgment in *Mirror Group Newspapers plc v Maxwell (No 2)* [1998] 1 BCLC 638. I was not referred to *Mirror v Maxwell* but hope to be forgiven for including reference to it on the basis that the propositions I draw from it are now trite in the area of law with which we are concerned here. There are, of course, points in Ferris J's judgment which operate in favour of an office-holder seeking proper remuneration, but the point I derive from his judgment that I think is relevant to what I have to decide is that the allowance of remuneration gives rise to an obligation to account, which seems to me to militate in favour of assisting a party who seeks to challenge remuneration where that party does so on a reasoned as opposed to an improper or frivolous basis.

29. The second point is this. As Mr O'Hara points out in para 17 of his second witness statement, the creditors' committee approved a resolution that the joint special administrators "be remunerated by reference to time properly given by [them] and their staff (calculated at the prevailing hourly rate) in attending to matters arising in the special administration, to be drawn as and when funds allow." This is a common formulation and often, perhaps usually, results in office-holders simply drawing remuneration based on the time cost they and their staff have recorded. It seems to me, however, that it is not necessarily as simple as that, and that the resolution contemplates a two stage process, the first being the recording of time spent on attending to the administration, the second involving consideration of whether that time has been *properly* spent on doing that in respect of which it is claimed. The second does not follow inexorably from the first. That, in my view, again militates in favour of someone who raises issues as to the amount of time spent and questions about duplication of work and the efficiency with which work has been done, all of which goes to whether the time that has been charged has been properly spent.

30. In his closing submissions Mr Matthewson described the respondents' submissions as being "technical." In his skeleton argument he described the respondents' stance as "opportunistic." I agree. But technical arguments are often good arguments; and, whilst

opportunism may not be attractive, most of us, when opportunity knocks, tend to open the door.

31. Mr Shaw's opening submission was indeed technical but none the worse for that. It took the form of an analysis of the special administration regime governed by the Rules and the Regulations and the two linked propositions I mention above. It is plainly the case that the regime set out in the Regulations and the Rules aims to distinguish between customers and creditors and the manner in which their claims in those two capacities are managed. However, the distinction breaks down, at least to some extent. There is interaction between the way in which safeguarded funds and the claims of creditors are dealt with: it is inherent in the special administration regime. Mr Scanlon's position as customer and creditor highlights the point. Plainly, as Mr Shaw urges, the positions of the two are different in significant respects, but they cannot be wholly divorced, the one from the other. Mr Scanlon's position may be unusual; perhaps it is not. I do not know.

32. The constitution of the committee that approved the administrators' remuneration also exemplifies a blurring of the customer/creditor divide. There are three committee members. I understand that two represent customers and one a creditor. If a committee with a mixed customer/creditor constitution can approve remuneration, I see no reason why an individual wearing both mantles should not challenge it.

33. I appreciate Mr Shaw's point about the conflict that arises from Mr Scanlon's dual position. Unfortunately conflicts do arise from time to time in all kinds of insolvency administrations. Such conflicts are sometimes resolved by the appointment of a conflict office-holder to whom a particular task may be entrusted; the office-holder conflict identified by Ferris J in *Mirror v Maxwell* is another example but is routinely managed. The courts have considerable experience of dealing with conflicts of this kind and are well used to ironing out the difficulties that arise from them. There is no reason to suppose that the judge who deals with the final hearing of Mr Scanlon's substantive application will have any particular difficulty in doing just that in this case. There is also strength in Mr Matthewson's submission that any conflict there might be cannot affect who claims what in what capacity. Whilst I appreciate the strength of Mr Shaw's point, I do not think in this case it should be determinative in the way that it sometimes is.

34. A final hearing that deals only with objective 2 and 3 remuneration makes little sense. Assessing the administrators' remuneration can only sensibly be done in the round. There are bound to be overlaps and grey areas which can only sensibly be confronted by reference to the remuneration as a whole.

35. The eight reasons relied on by Mr Mathewson (para 12 above) are compelling, albeit some more than others. The least compelling are his propositions about costs. His point about costs incurred to date in dealing with objective 1 remuneration is well made in the context of the applications before me. They are less compelling as to the future. Mr Shaw is right that, if Mr Scanlon's applications continue in their amended form, the costs will rise substantially. That does not, however, detract from the strength of his other points.

36. Mr Shaw's points about Mr Scanlon's motives for bringing his substantive applications are well made and anything but technical. Nor are they opportunistic. I take them seriously. In his submissions in reply Mr Matthewson drew my attention to para 105 of his client's second witness statement in which he says (about his intemperate correspondence with the respondents), "I am sure he [Mr O'Hara] will understand that this correspondence was written before I had any legal representation." I am not so confident of Mr O'Hara's understanding, nor do I have much understanding for Mr Scanlon's bullying threats and unreasonable deadlines. Conspicuously absent from Mr Scanlon's witness statement are a retraction of what he said and threatened and an

apology for his behaviour. The fact that he said what he said before he was represented and advised by solicitors may be indicative of precisely an improper objective collateral to the applications he now prosecutes which may still be in his mind.

37. That said, a collateral purpose need not be fatal to an applicant's case if a proper purpose coexists. That point can be taken from *Maud*, although the decision in that case was about abuse arising from what was claimed to be the prosecution of a bankruptcy petition for an abusive collateral purpose. The collateral purpose point now loses some of its force because Mr Scanlon is now represented, and his solicitors can (and no doubt will) act as a check on any unreasonable conduct to which he may incline in future. I think in those circumstances that the extent to which (if at all) any collateral purpose vitiates Mr Scanlon's entitlement to relief in relation to the administrators' remuneration can be left to the judge dealing with the substantive hearing. He/she will be in a better position to evaluate the issue in the light of all the evidence, including oral evidence, available to the court. Again, it cannot be determinative at this interlocutory stage.

38. For the reasons I have given I will allow the primary amendments sought. I am satisfied that the real prospect of success test has been met.

39. I am also of the view that I should allow the amendments that will enable Mr Scanlon to avail himself of the para 74 and inherent jurisdiction gateways for the reasons advanced by Mr Matthewson. There is force in Mr Shaw's submission that they become unnecessary if the court grants the relief I have indicated I propose to grant. It is possible that the relief I have granted will persuade those advising Mr Scanlon that it is no longer necessary to resort to the additional gateways, in which case there will be no costs implications. I am sceptical about Mr Shaw's contention that they will broaden the scope of the inquiry. The judge hearing the matter finally can exercise appropriate discipline as to scope. I see no harm in allowing them and take the view that Mr Scanlon should be in a position to have recourse to them, should he need to do so. Again, I shall allow the amendments sought.

40. That leaves the question whether I should give Mr Scanlon the permission required by r 167(1)(c) and (2). The provisions involve the exercise of a discretion. Both Mr Matthewson and Mr Shaw agree that there is no case law on the point. This judgment does not purport to fill that gap: it is a judgment that is largely specific to the facts of this case. I think I should give permission for the following reasons.

41. The substantive applications, as they stand, appear on their face to be made *bona fide*. That being the case, I do not believe that figures, numbers or percentages alone should be decisive. Mr Scanlon advances good reasons for supposing that getting the relevant percentage support will be impractical. Without presupposing what the end result might be, on the face of it, it is in the interests of all concerned that the administrators' remuneration be the subject of court scrutiny. The *dicta* in *Re Singh* suggest, as Mr Matthewson submits, that the hurdle for the grant of permission should not be set too high. Mr Scanlon plainly has a real interest in the relief he seeks.

42. Mr Shaw says that the percentage threshold requirements are there for a reason. This case highlights why it is there: to prevent a customer in particular from vexing the administrators with an application on the basis of a small or questionable interest in the outcome. It is a fair point, but it overlooks the fact that the provision for permission is also there for a reason, so the proposition cuts both ways. Mr Shaw also relies on the existence of the customer/creditor committee as the proper custodian of remuneration and the potential for the FCA to apply. But as Mr Matthewson points out, there is no basis on which the committee can apply, leaving to one side the fact that, having approved the remuneration in issue, it is unlikely to do so; and there is no indication of interest on the

part of the FCA. So if there is to be any scrutiny, Mr Scanlon is the only person likely to instigate it. In my view he should be able to do so.

43. I end by thanking counsel for their helpful skeleton arguments and oral submissions and their patience in dealing with the points I raised in the course of them. I also thank the solicitors for the exemplary way in which the bundles were prepared, which has been a great help.

Postscript

44. This is a case about money. It is susceptible of and suitable for mediation. I invite the parties to consider it. If they have already done so and it has not been considered likely to be fruitful, I urge reconsideration.