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Case No: CR-2021-002181

**IN THE HIGH COURT OF JUSTICE**
**BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES**
**INSOLVENCY AND COMPANIES LIST**

The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Wednesday 24 November 2021

BEFORE:

**MR JUSTICE ADAM JOHNSON**

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IN THE MATTER OF:

**BULB ENERGY LIMITED**

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**MR ANDREW DE MESTRE QC & MS LARA HASSELL-HART** appeared on behalf of the Gas and Electricity Markets Authority
**MR MARK ARNOLD QC & MR HENRY PHILLIPS** appeared on behalf of the Energy Administrators of Bulb Energy Limited
**MR DANIEL BAYFIELD QC** appeared on behalf of Bulb Energy Limited
**MR NICHOLAS COX** appeared on behalf of the Secretary of State
**MR GLEN DAVIS QC & MR MATTHEW ABRAHAM** appeared on behalf of BNY Mellon Corporate Trustee Services Limited

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**JUDGMENT**
(Approved)

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(Official Shorthand Writers to the Court)

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1. MR JUSTICE ADAM JOHNSON: There are now two applications pending before the court. They are interrelated. The first is an application by the Gas and Electricity Markets Authority, operating through Ofgem, for the making of an energy supply company administration order ("*ESCA order*") and for the appointment of special administrators to Bulb Energy Limited ("*Bulb*" or "*the Company*"). The second is an application by the proposed special administrators ("*the Proposed Administrators*") for directions. They seek a particularly important direction in relation to the entry into of a funding agreement with the Government ("*the Funding Agreement*") under which the Government will provide ongoing funding to Bulb subject to certain conditions which I will come on to.

2. Originally there was also a third application before me this afternoon. That was an application by the directors of Bulb's parent company, Simple Energy Limited ("*Simple*") for an administration order in relation to that company. That application, however, was overtaken by events because during the course of the afternoon administrators were appointed out of court by a secured creditor, which I will come on to mention in a moment.

3. As I say, the remaining two applications are interrelated. In summary, that is because the purpose of placing Bulb into special administration is only likely to be achieved if it has ongoing funding available under the proposed Funding Agreement.

4. I have heard detailed submissions today orally and have had the benefit of detailed written submissions. The matter is an urgent one, however, and the hour is late and so I will try to state these oral reasons for my decision as briefly as possible.

5. The background is by now well-known and has been much in the news. The short point is that Bulb's business model is no longer working effectively. This is explained in a document referred to as "*the Company's Letter*". As of 18 November 2021, the December 2021 price for gas was 240p per therm and for electricity £233 per MWh, as compared with 133p per therm and £124 per MWh on 1 September 2021 and 41p per therm and £48 per MWh on 19 November 2020.

6. Like other energy supply companies, Bulb is restricted in how much of these increased costs it is able to pass on to its variable rate customers due to the Default Tariff Price Cap which caps the price the company can charge at 67 pence per therm for gas and £82 per MWh for electricity. The result is that the Company is trading at a loss. Because it is obliged to keep supplying energy under condition 22 of its licences, these losses cannot be avoided. Its financial position does not permit it to hedge past December 2021 and its hedging counterparty has indicated that it does not have any appetite to keep even the December hedging in place past the end of November.

7. I will mention one more point which is relevant to the analysis, which is that Bulb and Simple have had the benefit of funding from an existing third party lender, Sequoia IDF Holdings SA ("*Sequoia*") which has lent approximately £55 million to Bulb pursuant to a facility agreement dated 7 May 2021. Simple has guaranteed repayment of Bulb's liabilities under that agreement and has provided security by means of fixed and floating charges granted in favour of a security trustee, BNY Mellon Corporate Trustee Services Limited ("*BNY*"). It is BNY which secured the appointment out of court of administrators to Simple during the course of this afternoon.

8. That is the broad background and the essential problem. The proposed solution is the making of an ESCA order under the relevant machinery in the Energy Act 2004 and the Energy Act 2011.

9. Before dealing with the substance, I should deal with a preliminary matter which concerns the timing of the present applications. They are brought at short notice. I am satisfied that the court is empowered to abridge the relevant notice period or periods by reason of Civil Procedure Rule 3.1(2), which applies by virtue of the Energy Supply Company Administration Rules ("*ESCA Rules*"), Rule198.2. It is now settled that in ordinary administration applications where there are similar requirements for service ahead of the hearing, the court has the power to abridge the time period for service and indeed dispense with service.

10. I am satisfied here that the urgency is such that it is entirely appropriate to make the order sought by Ofgem for the abridgement of time and in relation to the service of documents. Although the application itself has only very recently been issued, the

effective parties have been on notice of it for several days and have been updated with draft documents. The overall urgency is obvious and clear, given that the position of Bulb has been well publicised in recent days and the resultant uncertainty if left unresolved is bound to have an effect on customers, employees and suppliers. I will therefore, to the extent necessary, truncate or dispense with any relevant periods of notice.

11. I move on then to the substance. To begin with, I note the objectives of an energy supply company ("*ESC*") administration. These are set out at section 95 of the Energy Act 2011 and are to secure (1) that energy supplies are continued at the lowest cost which it is reasonably practicable to incur; and (2) that it becomes unnecessary, by one or both of the means specified, for the ESCA order to remain in force for that purpose. The means specified are then (1) the rescue as a going concern of the company subject to the ESCA order; and (subject to certain conditions) (2) the transfer as a going concern to another company or the transfer of different parts of the undertaking to two or more different companies to achieve the objective.

12. In his submissions, Mr Mark Arnold QC for the Proposed Administrators also drew my attention to section 158(3) of the Energy Act 2004. This deals, amongst other things, with the position of creditors. It provides:

> "*The energy administrator of a company must exercise and perform his powers and duties in the manner which, so far as it is consistent with the objective of the energy administration to do so, best protects -*
>
> *(a) the interests of the creditors of the company as a whole; and*
>
> *(b) subject to those interests, the interests of the members of the company as a whole*."

13. In plain English, the objective of an ESC administration is to keep the energy supply company going with a view to it being rescued, if that is possible, and the ESCA order then being discharged. The alternative to an ESCA order, which has been followed in many other cases, is the appointment of a supplier of last resort. That is thought to be impracticable here given the size and importance of Bulb as a supplier. It supplies energy to about 1.6 million customers and 14,900 SMEs. That vastly exceeds the size

of the largest ESC successfully managed through the supplier of last resort process. Amongst other matters, Ofgem is simply not confident that a supplier of last resort would be able to manage the transition of so many customers in a sufficiently orderly way. That seems to me, in the circumstances, to be an entirely justified concern and one which I will take into account in due course in exercising my discretion.

14. Here, so far as Bulb is concerned, the evidence is that it needs funding in order to keep going. As to this, where an ESCA order is made, the Secretary of State is empowered under sections 165 to 167 of the Energy Act 2004 to make grants or loans to the ESC and to indemnify or guarantee liabilities incurred in the administration. Under paragraph 26 of Schedule 20 of the Energy Act 2004, any sums payable by a company to the Secretary of State as a result of a grant, loan, indemnity or guarantee under these provisions are payable in priority to the expenses of the ESC administration and any unsecured creditors at the date of the ESC administration. To the extent that such funding is not recovered from the company through the ESC administration, the Secretary of State is empowered to recover such sums from other market participants under the terms of their licences. What is proposed here, as I have said, is that funding should be made available by the Secretary of State via the Funding Agreement.

15. I have thus far described the general background and the overall objective of the proposed administration process. I will need to come back to the question of the overall objective and say a little more about the Funding Agreement. Before doing that, however, I will deal with certain threshold matters.

16. The court's powers on an ESC administration application are set out in section 157(1) of the Energy Act 2004. They include the power to make an ESCA order. The court may only make an ESCA order where it is satisfied (see section 157(2) of the Energy Act 2004):

> "(*a) that the company is unable to pay its debts;*
>
> *(b) that it is likely to be unable to pay its debts; or*
>
> *(c) that, on a petition by the Secretary of State under section 124A of the 1986 Act (petition for winding up on grounds of public interest), it would be just and equitable (disregarding the objective*

*of the energy supply company administration) to wind up the company in the public interest*."

Section 157(8)(a) then provides that a company is "*unable to pay its debts*" if "*it is a company which is deemed to be so unable under section 123 of the 1986 Act (definition of inability to pay debts*)".

17. Here, I am entirely satisfied, having regard to these provisions, that, by any measure, Bulb is insolvent. I do not understand that proposition to be disputed by anyone. For one thing, Bulb's balance sheet at the end of October 2021 shows current net liabilities of £272,700,880 (total current assets of £305,447,804 and current liabilities of £578,148,684). It also shows total net liabilities of £325,208,112. The Company's Letter, which I have already referred to, states Bulb's own view that it is balance sheet insolvent. For another thing, Bulb has produced a cash flow forecast which shows a projected closing cash balance for December 2021 of minus £171,394,577. That is consistent with the Company's Letter, which explains that it presently forecasts that Bulb's cash position will reach negative figures on around 17 December 2021. As was made clear in the *Eurosail* decision (*BNY Corporate Trustee Services Ltd* v. *Eurosail-UK 2007-3BL Plc* [2013] UKSC 28; [2013] 1 WLR 1408) at paragraph 37, the cash flow test for insolvency is concerned not only with debts already due but with "*debts falling due from time to time in the reasonably near future*". What is "*the reasonably near future*" will depend on all the circumstances but especially on the nature of the company's business. I am satisfied that that test is met here, given the timescale I have described and the comments I have already made as to Bulb's loss-making business model.

18. As to other threshold matters, I should also say I am satisfied on the evidence that the formalities required by the ESCA Rules, Rules 5 and 6 have been complied with, and in particular I should mention I have received written statements from each of the Proposed Administrators stating, amongst other things, that they consent to accept their proposed appointments.

19. I come back then to the objective of making the proposed ESCA order. Unlike the test for making a normal company administration order under paragraph 11 of Schedule B1, there is no statutory requirement upon the court to be satisfied that an

ESCA order is reasonably likely to achieve the purpose of ESC administration. However, the question of whether the objective of the administration will be achieved is a relevant one for the court to consider in exercising its discretion to make a special administration order: see the observations of ICC Judge Briggs in *Secretary of State for Education v Hadlow College* [2019] EWHC 2035 (Ch) at [20]. I agree with that analysis, and it makes it appropriate at this stage to analyse briefly the Funding Agreement with the Secretary of State.

20. The central feature of the Funding Agreement is the provision of a £1.69 billion working capital facility. This is to be made available by the Secretary of State to Bulb: see clause 2.1 of the Agreement. It may be increased at the discretion of the Secretary of State: see clause 2.5. The working capital facility can be drawn upon by Bulb by means of so-called utilisations for relevant specified purposes. These purposes include the payment of what are called "*Pre-Appointment Liabilities*". These are effectively customer credit balances which have accrued as at the date of the administration, the payment of various industry costs and the payment of social and environmental levies. Not only that, but the Secretary of State has also specified that those categories of payment and some other ongoing payments must be made as a pre-condition to any ongoing funding being available, ie as a condition to Bulb's ability to draw down further utilisations under the Funding Agreement. This conditionality requirement is expressed in a provision at clause 8.1(c) of the Funding Agreement. To put it in a more technical way, the Secretary of State has considered it appropriate to make funding available under the Funding Agreement only on terms which require the payment in full of certain liabilities out of any utilisations.

21. As to repayment to the Secretary of State, repayment of sums advanced pursuant to the Funding Agreement are, by reason of having been advanced in respect of a loan made under section 165 of the Energy Act 2004, granted super priority status in the administration, in priority to the Administrators' remuneration and expenses, by reason of paragraph 99(4)(a) of Schedule B1. They would in any event qualify, as an expense of the ESC administration, as "*necessary disbursements by the energy administrator in the course of the energy supply company administration*" within the meaning of rule 36(1)(f) of ESCA Rules.

22. However, pursuant to clause 7.8 of the Funding Agreement, the Secretary of State has agreed contractually to subordinate any right to repayment in respect of the Funding Agreement to the administration expenses listed at Rule 36(1)(a) to (h) of the ESCA Rules.

23. In addition, following correspondence with the secured creditor (which I have mentioned), the Secretary of State has also agreed to subordinate its right to repayment in respect of amounts borrowed to discharge Pre-Appointment Liabilities to the repayment of sums owed to the secured creditor under its floating charge, save to the extent payment of such amounts is (disregarding the conditionality under clause 8.1(c)) likely to assist achievement of the purpose of the administration.

24. The overall practical effect of these provisions is that creditor claims that would otherwise have been unsecured and would have ranked *pari-passu* on any distribution will be paid in full, and payments will be made otherwise than in accordance with the usual ranking of priorities.

25. A question then arises as to whether the entry into of the Funding Agreement, given such terms, is within the Proposed Administrators' powers and would be an appropriate exercise of those powers. The Proposed Administrators answer both questions in the affirmative, and they seek an indication from the court that they are correct and that, if appointed, they will be given an appropriate direction to enter into the Funding Agreement.

26. Dealing first with the question of the existence of the power, I accept the submissions of Mr Mark Arnold QC for the Administrators. He has pointed out that under paragraphs 3 and 9 of Schedule 1A of the 1986 Act, energy administrators have the power to *"raise or borrow money and grant security therefore over the property of the company*" and "*do all acts and to execute in the name and on behalf of the company any deed, receipt or other document*". Under paragraph 13 of Schedule 1 of the Insolvency Act 1986, the energy administrators have a power "*to make any payment which is necessary or incidental to the performance of their functions*". Further, under paragraph 66 to Schedule B1 of the Insolvency Act 1986, the energy administrators are entitled to make payments to unsecured creditors of the relevant company otherwise

than in accordance with paragraph 65 of Schedule B1 of the Insolvency Act 1986 or paragraph 13 of Schedule 1 of the Insolvency Act 1986 if they "*think it likely to assist achievement of the purpose of the administration*".

27. The scope of paragraph 66 of Schedule B of the Insolvency Act 1986 has been considered in a number of cases, including in particular *MG Rover Espana* [2006] BCC 599 [13]-[15]. That authority and those which follow it confirm that paragraph 66 of Schedule B1 of the Insolvency Act 1986 permits payments to be made otherwise than in accordance with the usual ranking of priorities where the administrators think doing so is likely to assist achievement of the purpose of the administration. In the *MG Rover Espana* case HHJ Norris QC (as he then was) sitting as a High Court judge explained the scope of paragraph 66 of Schedule B of the Insolvency Act 1986 in the following terms at paragraphs 13 to 15:

> *"Paragraph 13 of Schedule 1 to the 1986 Act enables administrators to make any payment which is necessary or incidental to the performance of their functions. I think it has been conventionally regarded primarily as enabling the administrators to secure the provision of goods and services for the purposes of administration rather than as authorising the distribution to creditors, though it is not so confined. But paragraph 66 of Schedule B1 is in much wider terms … On its face, the paragraph permits an administrator, amongst other things, to depart from the strict ranking of claims if he thinks it is likely to assist achievement of the broader purpose of administration.*
>
> *I have no doubt that such a reading is correct. First, as a matter of construction, paragraph 66 is plainly intended to confer the widest of powers on an administrator and to supplement the already wide powers of distribution and payment conferred elsewhere … ".*

28. I respectfully agree with that analysis and it fits precisely the circumstances of this case. I therefore conclude that the Proposed Administrators do have power to engage on the terms of the Funding Agreement.

29. Moving on then to consider the proposed exercise of the power in this case, it would in my judgment be an appropriate exercise of the Administrators' powers for them to enter into the Funding Agreement on the proposed terms.

30. In a letter to Ofgem dated 20 November 2021 the Secretary of State said as follows:

> *"I have set out three principles which have consistently guided the Government's approach to manage the impact of the current high gas prices. Firstly, consumers, especially the most vulnerable, must be protected. Secondly, the Government will not use taxpayers' money to bail out failed energy suppliers or reward companies who have poor business models and did not plan ahead. Finally, we must ensure that the energy market remains competitive in the long-term."*

31. As I understand it, the spirit of those principles is what underlies the firm position adopted by the Secretary of State in relation to the terms of the Funding Agreement to which I have drawn attention. The Secretary of State has insisted on them as a matter of policy in order to protect consumers to ensure regulatory compliance and to avoid the risk of market contagion. Thus, those terms are effectively non-negotiable.

32. The evidence served on behalf of the Administrators is that they are plainly of the view that entry into the Funding Agreement would facilitate, and indeed is essential to, the achievement of the objectives of the proposed administration. I can readily understand why they hold that view. Any administration requires the statutory objective to be pursued. The Company must therefore trade. As far as Bulb is concerned, it is entirely obvious that in order to trade it needs funding, and the only available funding is that on the terms proposed by the Secretary of State. As the evidence makes clear, there are no other funding options available. The Funding Agreement is the only show in town. It therefore seems to me obvious that entry into of the Funding Agreement is a proper exercise or would be a proper exercise of power by the Proposed Administrators.

33. I mention also briefly the position of the secured creditor, Sequoia. In the end, although there was a concern at an earlier stage that an objection might be taken to the Proposed Administrators' application, no objection as such was advanced by Mr Glen Davis QC who appeared before me today acting for the security trustee BNY. It seems to me that in fact, the position of the secured creditor is sufficiently protected by the agreed subordination arrangement which I have already mentioned.

34. This is expressed in rather cumbersome terms, as will be apparent from my summary earlier, but the logic of it is to seek to ensure that, despite the Secretary of State making

the payment of Pre-Appointment Liabilities a condition to ongoing funding being made available under the Funding Agreement, the secured creditor is left in no worse position than it otherwise would have been be in in the course of any ordinary administration. Policing the agreed position may involve investigating how and why particular payments come to be made but, as Mr Davis QC pointed out in his submissions, those are essentially factual questions, not issues of principle, and need not detain me today or prevent me, all other things being equal, from making the order I am invited to make.

35. I will mention one other discretionary factor which Mr De Mestre QC drew attention to in the course of his submissions and which Mr Arnold QC also mentioned. That is that the continued functionality and operational effectiveness of Bulb is dependent to a large extent on the continued provision of services and other management infrastructure by the parent company, Simple. Although, as we sit here today, no finally concluded agreement for the provision of such services and infrastructure has been entered into, I have been informed that the relevant parties are confident that services will continue to be provided and that, in the meantime, negotiations with a view to concluding an appropriate form of document will carry on and that there is an expectation that that will happen at some point in the relatively near future.

36. Drawing the threads together, I am satisfied that the jurisdictional requirements for the making of an ESCA order are satisfied and I am satisfied also that it is appropriate to make such an order as a matter of discretion.

37. That being the case, I will therefore make the administration order sought. The Proposed Administrators, having been formally appointed, will also, in my judgment, be entitled to a direction in the form they seek, authorising their entry into of the Funding Agreement. That is, in my judgment, a sufficiently momentous decision as to justify the seeking of the court's imprimatur: see the comments of Snowden J (as he then was) in *Re Nortel Networks UK Ltd (No 2)* [2016] EWHC 2769 [49]. Indeed, for all the reasons I have given, the entry into the Funding Agreement is of existential importance to Bulb. It is fairly described, I think, as a momentous decision for the Proposed Administrators to make.

38. Other directions are also sought, referred to as *the Day 1 directions*. I need not deal with them in any detail in this Judgment. They concern the practicalities of giving notice to creditors and customers. The directions sought seem to me entirely sensible and, I would think, uncontroversial. Subject to any further submissions from Mr Arnold QC, I propose to make the order sought in the form identified by the Proposed Administrators.

**Epiq Europe Ltd** hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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**This transcript has been approved by the Judge**