INSOL International

The Cross-border Insolvency of the European Collins & Aikman Group

Case Study Series - 4

Acknowledgement

INSOL is pleased to present the 4th case study under the INSOL Technical Case Study Series on the European insolvency filings of the automotive supplier Collins & Aikman which is unique in many ways.

Following the collapse of the US-parent and the American group in May 2005, the entire European group filed for an administration order in the High Court in London after the companies had become insolvent. The central filing under the European Insolvency Regulation of 24 legal entities in ten different European jurisdictions became the continent's most prominent cross-border insolvency during that time.

In this landmark case the Regulation was brought to the test where practical issues that had not been dealt with by the Regulation had to be addressed, and where pragmatic solutions had to be found.

It remains to be tested whether in the light of more recent rulings by the European Court of Justice, an English court would still follow the COMI argument in similar circumstances. In the interest of creditors, customers and employees however the route pursued and the solution found in this case was clearly beneficial to everyone.

We would like to thank Michael Thierhoff of Thierhoff Illy & Partner, Germany for preparing this excellent case study that highlights important issues discussed in these landmark court decisions. We appreciate the time Mr. Thierhoff has spent on this INSOL project.

April 2010

Case Study: The Cross-border Insolvency of the European Collins & Aikman Group

INSOL International
6 - 7 Queen Street
London
EC4N 1SP
Tel: +44 (0)20 7248 3333
Fax: +44 (0)20 7248 3384
www.insol.org

Case Study: The Cross-border Insolvency of the European Collins & Aikman Group

A. Introduction

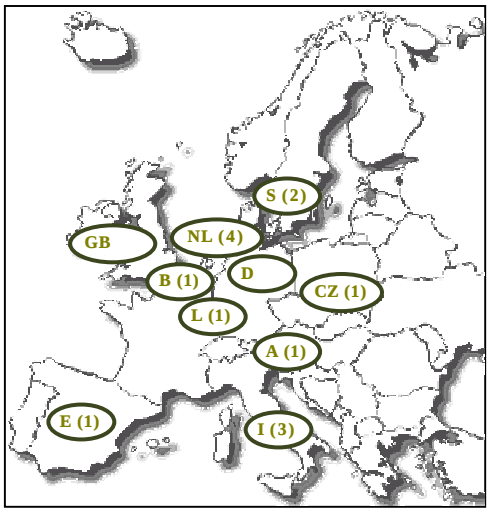
In 2005 the European insolvency filing of automotive supplier Collins & Aikman ("C&A") was making headlines especially in the industry and in insolvency publications around the globe. Little wonder: Following the collapse of the ultimate US-parent and the American group in May 2005, on 15 July 2005 the entire European group filed for an administration order in the High Court in London after the companies had become insolvent. The central filing under the European Insolvency Regulation ("Regulation" or "EIR") of 24 legal entities in ten different European jurisdictions became the continent's most prominent cross-border insolvency during that time. The appointed administrators co-ordinated 70 people from 10 different nations plus a large team of lawyers from across Europe to handle the case.

This is a landmark case where the Regulation was brought to the test and where practical issues that had not been dealt with by the Regulation had to be addressed, and also where pragmatic solutions had to be found. It is also a case that involved some landmark court decisions and this study will highlight some of the most significant aspects.

B. Background summary

1. History

Since late 2004, the American car industry was in crisis. The US-manufacturers were struggling with declining sales and naturally this had an impact on the suppliers. Collins & Aikman's financing was mainly based on factoring receivables. When major lenders became reluctant to buy GM and Ford receivables, the crisis had a direct negative impact on Collins & Aikman's traditionally strong sales volume with these two major players. As a consequence, on 15 May 2005 the ultimate parent company and the American group of companies filed for creditor protection under Chapter 11 with the United States Bankruptcy Court, Eastern District of Michigan. During that time Collins & Aikman had about 120 production facilities in some 15 countries employing about 25,000 people. Annual revenue was about USD 4 billion. The group was seen as a leading supplier of cockpit modules and acoustic systems.



Subsequent attempts to instantly sell the European operations failed in the time available. When the US ceased funding the European operations, an insolvency filing for this part of the group became inevitable. On 15 July 2005, the entire European operations jointly applied for administration under English law with the High Court in London. This included 24 legal entities in 10 jurisdictions with annual revenues of about 1.5 billion Euros and more than 4,300 employees. At the time this was the biggest cross-border insolvency in Europe.

2. The Group

While the structure of the European group may have been appropriate for the good times, it was definitely unfit for insolvency. Most of the 24 legal entities that were spread over 10 European Union jurisdictions were mere production sites. The units produced one or more components for either one or a group of car manufacturers (OEMs). The individual single unit did not have a marketing function or a sales force and it did not have engineering and development facilities. In addition the procurement of major supplies and the treasury functions were also not locally available. During pre insolvency days, a lot of the core

management functions were exercised from the Americas. Marketing, engineering and development, and purchasing were centralised in specific European legal entities that would have no production. In addition, there was vital inter company trading where companies would rely heavily on supplies from another company in the group. A single manufacturing unit would also not have the resources and skills to handle a product change, to assure a proper and well-timed transition to a new car or even an upgraded start of production.

Against this background it was vital to keep the entire group trading from day one and to establish clear and acceptable rules for the provision of inter company supplies and services that were vital.

As a result of market pressures and internal problems a considerable number of the entities required funding to keep trading. Others needed funding for major capital expenditures required for a change in product. As the central clearing function and group wide cash management could not be maintained post filing, financing had to be secured for a large part of the group in order to continue trading.

The administrators had instantly set up core teams to deal with these problems. These teams were set up to handle the following tasks centrally:

- Sale of business
- Business reviews
- Trading and protocols
- Communication, PR
- Major customer liaison
- Case management
- Compliance
- Finance and treasury
- IT
- Supplier liaison
- Employees and trade unions

Within days the teams negotiated funding arrangements with the customers that applied to all entities. While these arrangements assured the appropriate funding for the C&A companies they were also in the interest of the customers as they would in turn assure a seamless supply of a products that could not have been supplied by anyone else in the short to medium term future. As the majority of units were unable to survive without the continued support from the other group companies supplies or services, it was obvious that the companies had to be marketed as a whole rather then unit by unit. Managed by the sale-of-business-team a data room was set-up in a co-ordinated effort and potential buyers were identified and approached.

The sales process developed according to plan when the US-parent intervened and claimed to be the owner of the intellectual property and know how that was of essence to continue the business of the European Group. While there was room for argument to dispute this to a large extent, this was not helpful as it was seen as unrealistic to agree an attractive price while at the same time not being able to assure a buyer that it would have undisputed title to the intellectual property and know-how of the companies it acquired. When by the end of November 2005 a sale and purchase agreement was finally signed one of the conditions was to provide the intellectual property and know-how free of potential claims from the US-Group.

In the following weeks contradicting expert opinions were exchanged between the administrators and the US and finally a deal was negotiated and signed that transferred the IP rights to the European Group. The consideration to be paid to the US was to be taken from the purchase price and the allocation of the consideration in Europe was based on the expert opinion of the value of the IP in question. The majority of the European companies were sold in one pack in late November. This transaction was completed at the beginning of March 2006.

Excluded from the transaction were some UK sites, one site in the Netherlands and another site in Germany that had to be closed down. One Swedish entity and the Austrian entity were sold in management buyouts while the Italian Group was subject to a separate sale.

C. Procedural history

- 15 July 2005 filing in London, High Court of Justice Chancery Division.
- 21 July 2005 secondary proceedings in Austria was commenced at Landesgericht Leoben for Collins & Aikman Products GmbH.
- 23 August 2005 secondary proceedings in Germany were commenced at Amtsgericht Cologne for Collins & Aikman Automotive Trim GmbH (debtor in possession).
- 31 August 2005 Landesgericht Leoben (Austria) concluded that a stay of a secondary proceeding can only stay a liquidation process and the court is not able to instruct the appointed office holder of the secondary proceedings to sign a co-operation agreement with the office holder of the main proceedings. The decision was confirmed by OLG Graz on 20 October 2005.
- 9 June 2006 the High Court of Justice of the Chancery Division agreed that priorities of creditors provided for in other jurisdictions should be observed in the English proceedings.
- 14 July 2007 administration proceedings ended

D. Main parties

Joint administrators	Simon Appell, Alastair Beveridge, Gary Squires, Andrew Pepper, Anne O'Keefe (all of Kroll Ltd., now Zolfo Cooper Europe) Phillip Sykes (Moore Stephens) for Collins & Aikman Europe S.A. Luxembourg, the central cash management entity
Administrator's advisers	Denton Wilde Sapte LLP (UK) Wragge & Co LLP (UK) 3-4 South Square (UK) Molitor, Fisch & Associés (Luxembourg) Lenz & Staehelin (Switzerland) Uría Menéndez (Spain) Hausmaninger Herbst Rechtsanwälte - Gesellschaft mbH (Austria, now: Hausmaninger Kletter Rechtsanwälte) Advokatfirman Cederquist KB (Sweden) Lontings & Partners (Belgium, now: Lydian Lawyers) Gianni, Origoni, Grippo & Partners (Italy) Giese & Partner (Czech Republic) Loyens & Loeff N.V. (Netherlands) Thierhoff Illy & Partner (Germany)
Debtor's advisers	Kirkland & Ellis International LLP

E. Relevant issues

1. Finding the COMI

The application for a Centre of Main Interest (COMI) filing in England for the entire European Group was disputed by a major customer and two creditors. The two creditors made third party filings on the morning of 15 July 2005 at the local court ("Amtsgericht") in Cologne, Germany, in an attempt to open main proceedings for one of the four German entities. In a separate proceeding in England, after hearing the parties the English court allowed the application of the debtor to open main proceedings in England in the afternoon of the same day. In Germany upon a third party insolvency filing the court will in normal circumstances always hear the debtor to comment on a third party filing before issuing an order. In this case, by this time English proceedings were already in progress. Accordingly, (Art. 3 EIR) the German court rejected the application to open main proceedings.

2. Behind mountains – Austrian secondary proceedings

Based on a third party filing the regional court ("Landesgericht") in Leoben (Austria) opened secondary proceedings for C&A Products GmbH on 21 July 2005.

The court appointed an Austrian office holder to the small 40 people operation. The office holder however was reluctant to the propositions by the English administrators to co-operate or co-ordinate the secondary Austrian proceeding with the main proceedings elsewhere. In order to maintain the co-ordinated approach the joint administrators sought the assistance of the Austrian courts with an intent to stay the Austrian secondary proceedings, and to request that the court instructs the Austrian office holder to agree to a co-operation agreement between the main proceedings administrators and himself. On 31 August 2005 the regional court in Leoben rejected both claims of the administrators.

The court concluded that a stay – according to the Austrian/German interpretation – did in no way mean to not allow the appointed office holder to take charge but it would just mean that the office holder was not allowed to liquidate the company but had to continue trading. The heart of the problem was the German interpretation of a stay in insolvency proceedings. This is very much in line with what "stay" would mean under local Austrian or German law. In both jurisdictions it is rather unthinkable that in an area as sensitive as insolvency law a stay would not allow the office holder to act at all. A stay here just refers to a preservation of the status quo under the supervision and control of a court appointed trustee.

The ruling of the regional court in Leoben was confirmed on 20 October 2005 by the OLG Graz, the Appeal Court.

The Austrian secondary proceedings were run pretty much apart from the other process and the Austrian entity was later sold separately in a management buy-out by the secondary proceedings liquidator.

3. Same language, different approach – German secondary proceedings

Following the surprise secondary filing in Austria and the looming prospect of uncoordinated secondary proceedings, the administrators considered a solution to avoid a repeat in Germany, where at the outset, attempts by creditors had been made to start main proceedings. The master plan developed for Germany was therefore to actively seek a secondary proceeding for the main German entity in Cologne. In negotiations with the legal council of the main creditors, the administrators filed for secondary proceedings. Before doing so they had appointed a new director who was a recognised insolvency expert in Germany and with the filing they also applied for debtor in possession proceedings. Compared with most other European jurisdictions the German Insolvency Code does allow debtor in possession. This was supported by the third party filing of a major creditor concurring with the administrators filing. As a consequence on 23 August 2005 the Cologne court opened secondary proceedings as debtor in possession proceeding and appointed a trustee to supervise these secondary proceedings. The debtor in possession proceedings allowed the administrators to maintain control and to assure that the course of

the secondary proceedings was in line with the overall intentions pursued in the main proceedings. The continued trading of the operations and the later sale was therefore achieved in a co-ordinated manner. Supervision of the proceedings was carried out by a creditors committee that was the same for both the main English and the secondary German proceedings. Communication with the trustee appointed in the secondary proceedings in Germany was very constructive and the trustee was kept involved in all the developments of both the main and the secondary proceedings.

4. Flexibility – A common law USP?

In order to prevent further secondary filings elsewhere, the administrators communicated openly with all creditors locally. Creditors meetings were held in the local countries rather than in England. In the locally held creditors meetings the administrators assured the creditors that they would safeguard their position and they would even attempt to seek permission from the English Court to observe any priorities of creditors granted by the local law even if this was not provided for under English law.

Accordingly the English administrators approached the London court to obtain permission to observe priorities defined by local law in the English main proceedings. The most important difference between the local laws and English law was that under most local laws, third party creditors would be preferred over inter company creditors. To make it easier for the English court to concur with the proposal of the administrators, they obtained from the major intercompany creditor, the ultimate US parent, and a statement of consent with the proposal of the administrators. The US parent company consented in the light of the circumstances because it was apparent that otherwise local creditors were likely to exercise their right to apply for secondary proceedings to achieve the same result, and that would have meant risking the co-ordinated approach and incurring the additional costs of such secondary proceedings.

The consent of the English court on 9 June 2006 with the proposal of the administrators was commented on by experts as a landmark decision because it clearly showed that an English court would allow deviations from the law for pragmatic reasons. It remains unresolved whether the court would have agreed to such a solution if the party that would have been potentially affected most negatively, i.e. the US group would not have consented.

5. Keep it short

The standard UK practise would have been to terminate the administration proceedings once the business had been sold and to then enter into a separate liquidation process for the entity to distribute the funds available to creditors. With the permission of the court in London the administrators continued the administration and made the dividend distribution out of the administration proceedings. The result was a much more efficient approach without the inevitable delays incurred when opening fresh proceedings and without incurring the additional cost of such proceedings.

Remaining in the administration proceedings was also essential in order to determine that the proceedings were finalised within 24 months, as this is the maximum allowable period for administration proceedings under English law.

F. Summary

The Collins & Aikman case was unique in many ways. The joined filing of 24 entities across 10 jurisdictions in the European Union is and was without parallel. It remains to be tested whether in the light of more recent rulings by the European Court of Justice an English court would still follow the COMI argument in similar circumstances. In the interest of creditors, customers and employees however the route pursued and the solution found in the Collins & Aikman case was clearly beneficial to everyone.

The case also gave an opportunity to the English court to demonstrate the flexibility of the common law which allowed to deviate from the written law if it is in the best interest of the parties involved and by allowing to observe creditor priorities of local laws rather than follow the English insolvency statute.

Avoiding secondary proceedings is one of the key achievements of the administrators as this probably was the only way to assure a co-ordinated approach for the entire group. This approach gave the administrators huge bargaining powers in their talks with the key customers and the OEMs which resulted in funding the trading process. As a consequence dividends that the creditors got paid were for most of them beyond their expectations. For example in three of the four German proceedings the creditors dividends were 100 % plus interest and even in the fourth proceedings they are above 60 %. This compares very favourably with traditionally single digit dividends German creditors receive. In addition, the main proceedings were completed within 24 months which again is much shorter than an average German proceeding which would have taken much longer.

G. Appendices

- 15th July 2005: High Court Administration Order Collins & Aikman Automotive Trim GmbH
- 23rd August 2005: "Amtsgericht "Cologne Order Collins & Aikman Automotive Trim GmbH (In German)
- 9th June 2006: High Court Judgment permitting to depart from the application of English law

No. of 2005

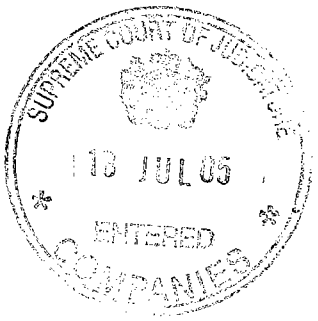
IN THE HIGH COURT OF JUSTICE

CHANCERY DIVISION

COMPANIES COURT

Mr. Justice Lawrence Collins

Friday 15th July 2005



IN THE MATTER OF COLLINS & AIKMAN AUTOMOTIVE TRIM G.M.B.H

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

ORDER

UPON THE APPLICATION of Collins & Aikman Automotive Trim GmbH presented to the Court on 15 July 2005 in respect of Collins & Aikman Automotive Trim GmbH of Ivenshofweg 41, D-50769 Cologne, Germany ("the Company")

AND UPON hearing Counsel for the Company, Counsel for the proposed administrators and Counsel for Ford Motor Company Limited ("Ford")

AND UPON reading the evidence recorded on the Court file as having been read

IT IS ORDERED that:

1. Simon Jonathan Appell, Alastair Paul Beveridge and Gary Peter Squires, all of Kroll, 10 Fleet Street, London EC4M 7RB, United Kingdom be appointed joint administrators of the Company (the "Joint Administrators")

2. during the period for which this order is in force the affairs, business and property of the Company be managed by the Joint Administrators

3. the Court being satisfied on the evidence before it that the EC Regulation does apply and that these proceedings are main proceedings as defined in Article 3 of the EC Regulation

4. during the period for which the administration order is in force any act required or authorised under any enactment to be done by either or both of the Joint Administrators may be done by any one or more of the persons for the time being holding that office

5. the Joint Administrators appointed shall conduct the Administration for the purpose and with the powers set out in the Schedule to this Order

6. service of the application on the Joint Administrators be dispensed with

7. pursuant to rule 7.31(5) of the Insolvency Rules 1986 the witness statements of Mr. Jay Knoll, Mr. Simon Kesterton, and Mr. Jens Hoehnel and the exhibits thereto shall not be available for public inspection without the Court's leave

8. the application of Ford for an adjournment of the hearing be dismissed and permission to appeal be refused

9. Ford do have liberty to apply to the Court for the discharge of this Order such application to be made with evidence in support by 11 am on Monday 18th July 2005

10. the costs of and incidental to this application be paid as expenses of the Administration with no order as to the costs of Ford

This appointment shall take effect from 4.00 p.m. on 15th July 2005

Dated 15 July 2005

SCHEDULE

to

Order of Mr. Justice Lawrence Collins dated 15 July 2005 (the "Order")

1. The purpose of this Schedule is to inform the reader of the effect of the Order, the purpose of the administration and the status and powers of the Joint Administrators. This Schedule is without prejudice to all of the provisions of English law relating to administration of the Company. Should the reader require further detail, reference should be made to the Insolvency Act 1986 and all related legislation.

The Effect of the Order

2. By way of summary, the effect of the Order is as follows:

   2.1. No resolution may be passed to wind up the Company;

   2.2. No order may be made for the winding up of the Company;

   2.3. No step may be made to enforce any security over the Company's property without consent of the Administrators or permission of the English court.

   2.4. No step may be taken to repossess any goods in the Company's possession under any hire purchase agreement, except with the consent of the Administrators or leave of the English Court.

   2.5. A landlord may not exercise a right of forfeiture by peaceable re-entry in relation to any premises let to the Company except with consent of the Administrators or leave of the English court.

   2.6. No legal process (including legal proceedings, execution, distress and diligence) may be instituted or continued against the Company or the property of the Company, except with the consent of the Administrators or leave of the English court.

The Purpose of the Administration

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

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

   3.2. achieving a better result for the Company's creditors as a whole than would be likely if the Company were wound up (without first being in administration) or (if that objective is not reasonably practical and it does not

unnecessarily harm the interests of the creditors of the Company as a whole) then

3.3. realising property of the Company in order to make a distribution to one or more secured or preferential creditors.

4. The Joint Administrators must make a statement setting out their proposals for achieving the purpose and must, inter alia, send those proposals to every creditor of the Company of whose details the Administrators are aware.

Status and Powers of Joint Administrators

5. The Joint Administrators are officers of the Court.

6. The Joint Administrators have a duty to take custody or control of all the property of the Company on being appointed.

7. By way of summary the Joint Administrators have the following powers:

7.1. The power to do anything necessary or expedient for the management of the affairs, business and property of the Company and, in particular, without prejudice, to this general power the Joint Administrators have the specific powers set out in Schedule 1 to the Insolvency Act 1986 which are summarized in Appendix A to this Schedule.

7.2. No officer of the Company may exercise a management power without consent of the Administrators.

7.3. The Joint Administrators may remove and appoint Directors of the Company.

7.4. The Joint Administrators may convene and hold meetings of members and creditors of the Company.

7.5. The Joint Administrators may apply to the court for directions in connection with his functions.

7.6. The Joint Administrators may pay monies to secured or preferential creditors of the Company and with the consent of the Court may make a distribution to unsecured creditors.

7.7. The Joint Administrators may make a payment other than to a secured or preferential creditor without permission of the Court if they consider that making such a payment is likely to assist in the achievement of the purpose of administration set out in paragraph 3 above.

7.8. The Joint Administrators may make payments to the employees of the Company, such that they receive the same monies as the employees would receive if secondary proceedings were commenced under Article 27 of the EC Regulation on Insolvency Proceedings 2000 provided that the Joint Administrators think that the making of such payments are likely to assist in the achievement of the purpose of the administration.

8. In exercising their functions the Joint Administrators act as agents of the Company.

9. The Joint Administrators must obtain approval for payment of their fees and disbursements by the creditors of the Company or by a committee of the creditors of the Company or by the Court.

APPENDIX A

(SCHEDULE 1, INSOLVENCY ACT 1986)

POWERS OF THE JOINT ADMINISTRATORS

1. Power to take possession of, collect and get in the property of the company and, for that purpose, to take such proceedings as may seem to him expedient.

2. Power to sell or otherwise dispose of the property of the company by public auction or private auction or private contract.

3. Power to raise or borrow money and grant security therefore over the property of the company.

4. Power to appoint a solicitor or accountant or other professionally qualified person to assist him in the performance of his functions.

5. Power to bring or defend any action or other legal proceedings in the name and on behalf of the company.

6. Power to refer to arbitration any question affecting the company.

7. Power to effect and maintain insurances in respect of the business and property of the company.

8. Power to use the company's seal.

9. Power to do all acts and to execute in the name and on behalf of the company any deed, receipt or other document.

10. Power to draw, accept, make and endorse any bill of exchange or promissory note in the name and on behalf of the company.

11. Power to appoint any agent to do any business which he is unable to do himself or which can more conveniently be done by an agent and power to employ and dismiss employees.

12. Power to do all such things (including the carrying out of works) as may be necessary for the realisation of the property of the company.

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

14. Power to carry on the business of the company.

15. Power to establish subsidiaries of the company.

16. Power to transfer to subsidiaries of the company the whole or any part of the business and property of the company.

17. Power to grant or accept a surrender of a lease or tenancy of any of the property of the company, and to take a lease or tenancy of any property required or convenient for the business of the company.

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

19. Power to call up any uncalled capital of the company.

20. Power to rank and claim in the bankruptcy, insolvency, sequestration or liquidation of any person indebted to the company and to receive dividends, and to accede to trust deeds for the creditors of any such person.

21. Power to present or defend a petition for the winding up of the company.

22. Power to change the situation of the company's registered office.

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

No. of 2005

IN THE HIGH COURT OF JUSTICE

CHANCERY DIVISION

IN THE MATTER OF COLLINS & AIKMAN AUTOMOTIVE TRIM GMBH

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

ORDER

Kirkland & Ellis International LLP
Tower 42
25 Old Broad Street
London
EC2N 1HQ

Tel. No: 0207 816 8700
Fax No: 0207 816 8800
Ref:LEN/RCE

71 IN 478/05 - Ausfertigung –

AMTSGERICHT KÖLN

BESCHLUSS

Über das Vermögen

der im Handelsregister des Amtsgerichts Köln unter HRB eingetragenen Collins & Aikman Automotive Trim GmbH, Ivenshofweg 41, 50769 Köln, vertreten durch die Geschäftsführer Bryce M. Koth, USA- Dearborn/Michigan und Michael Thiehoff, An der Welle 5, 60322 Frankfurt

wird wegen Überschuldung heute, am 23.08.2005, um 13:00 Uhr das Insolvenzverfahren eröffnet.

Zugleich werden die Verfahren 71 IN 478/05 und 71 IN 398/05 und 71 IN 479/05 gemäß § 4 InsO, § 147 ZPO zu einem einheitlichen Verfahren verbunden; das erstgenannte Aktenzeichen führt.

Es wird Eigenverwaltung angeordnet. Die Schuldnerin ist berechtigt, unter der Aufsicht des Sachwalters die Insolvenzmasse zu verwalten und über sie zu verfügen (§§ 270 – 285 InsO).

Zum Sachwalter wird ernannt Rechtsanwalt Hans-Gerd Jauch, Sachsenring 81, 50677 Köln, Tel. 0221/33660130, Fax +492213366085.

Forderungen der Insolvenzgläubiger sind bis zum 14.10.2005 unter Beachtung des § 174 InsO beim Sachwalter anzumelden.

Die Gläubiger werden aufgefordert, dem Sachwalter unverzüglich mitzuteilen, welche Sicherungsrechte sie an beweglichen Sachen oder an Rechten der Schuldnerin in Anspruch nehmen. Der Gegenstand, an dem das Sicherungsrecht beansprucht wird, die Art und der Entstehungsgrund des Sicherungsrechts sowie die gesicherte Forderung sind zu bezeichnen. Wer diese Mitteilungen schuldhaft unterläßt oder verzögert, haftet für den daraus entstehenden Schaden (§ 28 Abs. 2 InsO).

Termin zur Gläubigerversammlung, in der auf der Grundlage eines Berichts der

Schuldnerin über den Fortgang des Verfahrens beschlossen wird, (Berichtstermin) und Termin zur Prüfung der angemeldeten Forderungen ist am

Mittwoch, 16.11.2005, 10:00 Uhr

im Gebäude des Amtsgerichts Köln, Hauptstelle, Luxemburger Straße 101, 50939 Köln, 1. Etage, Saal 142.

Der Termin dient zugleich zur Beschlußfassung der Gläubiger über die Person des Sachwalters, den Gläubigerausschuss, gegebenenfalls die Zahlung von Unterhalt aus der Insolvenzmasse (§§ 100, 101 InsO) und die in §§ 149, 159 bis 163 Abs. 2, 271 und 272 InsO bezeichneten Gegenstände
und unter Umständen zur Anhörung über eine Verfahrenseinstellung mangels Masse (§ 207 InsO).

Der Sachwalter wird beauftragt, die nach § 30 Abs. 2 InsO zu bewirkenden Zustellungen an die Schuldner der Schuldnerin (Drittschuldner) sowie an die Gläubiger durchzuführen (§ 8 Abs. 3 InsO).

Gründe:

Die im Handelsregister des Amtsgerichts Köln unter HRB 35928 eingetragene Schuldnerin betreibt in Köln ein Unternehmen, das sich mit der Herstellung und dem Vertrieb von Erzeugnissen für die Automobilindustrie und damit zusammenhängende Tätigkeiten befasst. Die Schuldnerin ist eine operative Gesellschaft der Collins&Aikman-Gruppe. Alleinige Gesellschafterin der Schuldnerin ist die Collins&Aikman Automotive Holding AG in Krefeld. Die Konzernobergesellschaft ist die Collins&Aikman Corporation mit Sitz in den USA. Diese Gesellschaft hat am 10.5.2005 Antrag auf Gläubigerschutz nach Chapter 11 des US-Bankruptcy Code gestellt.

1.

Am 15.7.2005 stellte die Gläubigerin Antrag auf Eröffnung des Insolvenzverfahrens über das Vermögen der Schuldnerin (71 IN 398/05). Sie trug vor, ihr stehe gegen die Schuldnerin eine Forderung über 903.824,02 Euro aus Warenlieferungen zu. Die Schuldnerin sei zahlungsunfähig und überschuldet. Mit Schreiben vom selben Tage beanstandete das Gericht den Antrag und wies darauf hin, weder die geltend gemachte Forderung noch der Insolvenzgrund seien hinreichend glaubhaft gemacht. Insbesondere reiche die bloße Behauptung, die Zwischenbilanz der Schuldnerin vom 16.5.2005 sei wertzuberichtigen und es läge daher eine Überschuldung vor, reiche nicht aus.
Mit Schriftsatz ihrer Verfahrensbevollmächtigten vom 19.8.2005 stellte die Gläubigerin einen Antrag auf Eröffnung eines Sekundärinsolvenzverfahrens über das Vermögen der Schuldnerin. Bereits mit Schreiben vom 22.7.2005 hatte sie darauf hingewiesen, dass eine Umdeutung des ursprünglich gestellten Antrags auf Einleitung eines Hauptinsolvenzverfahrens möglich sei, jedenfalls aber der Antrag vom 15.7.2005 in der Weise geändert werden könne, dass ein Antrag auf Eröffnung eines Sekundärinsolvenzverfahrens gestellt werden könne.

2.

Am 20.7.2005 stellte die Schuldnerin beim Amtsgericht Köln wegen drohender Zahlungsunfähigkeit Antrag auf Eröffnung des Insolvenzverfahrens über ihr Vermögen. Bereits am 15. 7.2005 hatte sie in England einen Antrag auf Eröffnung der Verwaltung nach Schedule B1 of the English Insolvency Act 1986 gestellt, dem der High Court of Justice, Chancery Divsion, Companies Court in London/England, am selben Tag entsprach. Zu Joint Administrators ernannte das Gericht die Herren Simon Jonathan Appell, Alastair Paul Beveridge und Gary Peter Squires.
Die Schuldnerin wies in ihrem Antrag vom 20.7.2005 darauf hin, sie stelle den Antrag nur, um ihren Pflichten gem. § 64 GmbHG vorsorglich auch in Deutschland nachzukommen. Ihr Antrag sei weder direkt noch indirekt als Antrag auf Eröffnung eines Sekundärinsolvenzverfahrens nach Art. 27 ff. EuInsVO gerichtet. Durch Beschluss vom 10.8.2005 wies das Amtsgericht Köln den Antrag der Schuldnerin auf Eröffnung eines Hauptinsolvenzverfahrens über ihr Vermögen als unzulässig zurück.
Mit Schriftsatz ihrer Verfahrensbevollmächtigten vom 19.8.2005 stellte die Schuldnerin Antrag auf Eröffnung eines Sekundärinsolvenzverfahrens über ihr Vermögen. Gleichzeitig stellte sie den Antrag auf Anordnung der Eigenverwaltung. Diesen Anträgen fügte sie ein Gutachten des Wirtschaftsprüfers Illy vom selben Tage zu der Frage der Massekostendeckung bei.

3.

Mit Schriftsatz ihrer Verfahrensbevollmächtigten vom 19.8.2005 stellten die Joint Administrators Simon Jonanthan Appell, Alastair Paul Beveridge und Gary Peter Squires Antrag auf Eröffnung eines Sekundärinsolvenzverfahrens über das Vermögen der Schuldnerin. Gleichzeitig stellten sie den Antrag auf Anordnung der Eigenverwaltung.

II.

Die Eröffnungsanträge der Gläubigerin, der Schuldnerin und der Joint Administrators sind zulässig.

1.

a. Das Amtsgericht Köln ist gemäß Art. 3 Abs. 2 EUInsVO international zuständig.

aa. Bei den Anträgen der Verfahrensbeteiligten vom 19.8.2005 auf Eröffnung eines Insolvenzverfahrens über das Vermögen der Schuldnerin handelt es um einen Antrag auf Eröffnung eines Sekundärinsolvenzverfahrens i.S.d. Art. 3 Abs. 3 S. 1 EuInsVO. Als Sekundärinsolvenzverfahren werden die am Ort einer Niederlassung des Schuldners durchgeführten Insolvenzverfahren bezeichnet, die erst nach einem Hauptverfahren eröffnet worden sind.

bb. In Deutschland befindet sich auch eine Niederlassung der Schuldnerin i.S.d. Art. 2 lit h EuInsVO. Nach dieser Vorschrift ist eine "Niederlassung" jeder Tätigkeitsort, "an dem der Schuldner einer wirtschaftlichen Aktivität von nicht vorübergehender Art nachgeht, die den Einsatz von Personal und Vermögenswerten voraussetzt". Vorliegend kann dahinstehen, ob ein Sekundärinsolvenzverfahren nur über unselbständige Niederlassungen durchgeführt werden darf oder auch über selbständige (siehe dazu Paulus, NZI 2003, 1725, 1728; Ehricke, EWS 2002, 111 ff.; Virgos/Schmidt, Erläuternder Bericht Rdn. 43 a). Denn das in Deutschland belegene Vermögen der Schuldnerin – und nur darum geht es nach der Eröffnung des Hauptverfahrens in England – erfüllt die

Definition des Niederlassungsbegriffs aus Art. 2 lit h EUInsVO. Die in Köln belegenen Mittel dienen ohne Zweifel wirtschaftlichen Aktivitäten. Dort wird produziert und es werden Mitarbeiter zur der Herstellung und dem Vertrieb von Erzeugnissen für die Automobilindustrie eingesetzt.

cc. Den Anträgen auf Eröffnung eines Sekundärinsolvenzverfahrens ist die Eröffnung eines Hauptinsolvenzverfahrens vorausgegangen. Durch administration order vom 15.7.2005 hat der High Court of Justice in London auf der Grundlage des Abschnitts 22 der Schedule B 1 des United Kingdom Insolvency Act von 1986 das Insolvenzverfahren über das Vermögen der Schuldnerin eröffnet. Das englische Gericht hat bei seiner Entscheidung ausdrücklich auf Art. 3 EUInsVO Bezug genommen. Damit hat das Gericht zum Ausdruck gebracht, dass es die europäische Dimension seiner Entscheidung erkannt hat und gerade nicht ein rein nationales Verfahren zu eröffnen beabsichtigte. Das durch den High Court of Justice bei dem eröffnete Verfahren ist demnach das Hauptverfahren i.S. der Europäischen Insolvenzverordnung.

b. Das Amtsgericht Köln ist für das Sekundärinsolvenzverfahren auch örtlich zuständig. Nach § 1 Abs. 2 Art. 102 EGInsO Durchführung der Verordnung (EG) Nr. 1346/2000 über Insolvenzverfahren ist bei Bestehen einer Zuständigkeit der deutschen Gerichte nach Art. 3 Abs. 2 EuInsVO ausschließlich das Insolvenzgericht zuständig, in dessen Bezirk die Niederlassung des Schuldners liegt. Wie bereits oben festgestellt wurde, sind die Voraussetzungen des Art. 3 Abs. 2 EUInsVO erfüllt. Die Niederlassung der Schuldnerin i.S.d. Art. 2 lit h EuInsVO befindet sich in Köln und damit im Zuständigkeitsbereich des Amtsgerichts Köln.

2.

Sowohl die Gläubigerin als auch die Schuldnerin und die joint administrators sind befugt, einen Antrag auf Eröffnung des Sekundärinsolvenzverfahrens zu stellen.

a. Die Antragsberechtigung der Gläubigerin folgt aus Art. 29 lit b EuInsVO. Die Gläubigerin zählt zu den Personen, denen das Antragsrecht nach dem Recht des Mitgliedsstaats zusteht, in dessen Gebiet das Sekundärinsolvenzverfahren eröffnet werden soll (vgl. § 14 InsO).
aa. Gegen die "Umstellung" ihres Antrags auf Eröffnung eines Hauptinsolvenzverfahrens in einen Antrag auf Eröffnung eines Sekundärinsolvenzverfahrens bestehen keine rechtlichen Bedenken. Selbst wenn die Gläubigerin ihren Antrag vom 15.7.2005 nicht ausdrücklich umgestellt hätte, hätte das Gericht ihn angesichts der vorliegenden Umstände als einen solchen auslegen und zulassen können. Als Prozeßhandlung ist der Insolvenzantrag der Auslegung zugänglich. Dafür gilt der Grundsatz, dass "im Zweifel dasjenige gewollt ist, was nach den Maßstäben der Rechtsordnung vernünftig ist und der recht verstandenen Interessenlage entspricht" (BGH NJW RR 1996, 1211; NJW 2001, 2095). Nachdem der Antrag der Gläubigerin durch die zwischenzeitliche Eröffnung eines Hauptinsolvenzverfahrens in England unzulässig geworden war (vgl. § 3 Abs. 1 S. 1 Art. 102 EGInsO), kann sie ihrem Anliegen auch mit einem Sekundärinsolvenzantrag zur größtmöglichen Wirksamkeit verhelfen. Sie ist befugt, ihre Forderung sowohl im Haupt- als auch im Sekundärinsolvenzverfahren anzumelden (Art. 32 EuInsVO), wobei sie ihre Anmeldung auf das Sekundärinsolvenzverfahren beschränken kann. Dies kann insbesondere für Kleingläubiger aus Kostengründen von Vorteil sein. Das Sekundärinsolvenzverfahren bezweckt den Schutz inländischer Interessen, der dadurch gewährleistet ist, dass die im Gebiet des Eröffnungsstaats des

Sekundärinsolvenzverfahrens geltenden Insolvenzgesetze zumindest hinsichtlich des dort belegenen Vermögens des Schuldners zur Anwendung gelangen (vgl. Kodek, ZIK 2005, 6, 7 m.w.N.). Da nach zutreffender Auffassung (Kodek, a.a.O., 10) bei gleichzeitiger Anhängigkeit mehrerer Insolvenzverfahren in jedem Verfahren eine eigenständige Prüfung der angemeldeten Forderungen stattzufinden hat, entspricht die Eröffnung eines Sekundärinsolvenzverfahrens durchaus der recht verstandenen Interessenlage der Gläubigerin.
Abgesehen davon lässt sich für die Zulässigkeit der Umstellung des Antrags auch anführen, dass das Gericht von Amts wegen die richtige Verfahrensart ermittelt und feststellt (vgl. LG Frankfurt ZIP 2000, 1067; AG Köln NZI 1999, 241; Vallender/Fuchs/Rey, NZI 2001, 525). Kann die beantragte Verfahrensart nicht zur Überzeugung des Gerichts festgestellt werden, so ist erst nach entsprechendem Hinweis auf die Möglichkeit einer Umstellung des Antrags der Antrag als unzulässig zurückzuweisen. Erfolgt die Umstellung trotz Hinweises nicht, so ist der Insolvenzantrag "als in der gewählten Verfahrensart unzulässig" zurückzuweisen (OLG Celle ZIP 2000, 802; OLG Schleswig NZI 2000, 164; AG Köln NZI 2000, 241, 243).
Für das zuvor gewonnene Ergebnis spricht schließlich, dass auch bei andere Fallkonstellationen gegen eine Fortsetzung eines Verfahrens in der richtigen Verfahrensart keine Bedenken bestehen. So entspricht es einhelliger Auffassung in der Literatur, dass ein infolge des Todes des Schuldners unzulässigerweise eröffnetes Insolvenzverfahren als Nachlassinsolvenzverfahren fortgesetzt werden kann (vgl. Uhlenbruck/Uhlenbruck, InsO, § 13 Rdn. 85 m.w.N.).

b. Nachdem die Schuldnerin in ihrem Eröffnungsantrag ausdrücklich auf das Antragsverfahren der Gläubigerin Bezug genommen und ihr Verfahrensbevollmächtigte erklärt hat, die Forderung der Gläubigerin werde nicht angezweifelt, bestehen auch insoweit keine Bedenken mehr gegen die Zulässigkeit ihres Insolvenzantrags. Dies gilt gleichermaßen für die zunächst beanstandete fehlende Glaubhaftmachung des Insolvenzgrundes.

b. Nach Art. 29 lit a EUInsVO bzw. § 356 Abs. 2 InsO sind auch die Joint Administrators befugt, als Verwalter des Hauptinsolvenzverfahrens einen Antrag auf Eröffnung des Sekundärinsolvenzverfahrens zu stellen. Diese Befugnis haben sie mit ihrem Antrag vom 19.8.2005 ausgeübt.

c. Darüber hinaus steht auch der Schuldnerin ein solches Antragsrecht zu. Hiervon hat sie durch Antrag ihres Geschäftsführers vom 19.8.2005 Gebrauch gemacht.

aa. Die Befugnis der Schuldnerin, einen Antrag auf Eröffnung des Sekundärinsolvenzverfahrens über ihr Verfahren zu stellen, folgt aus Art. 29 lit b EUInsVO. Danach kann jede andere Person oder Stelle, der das Antragsrecht nach dem Recht des Mitgliedsstaats zusteht, in dessen Gebiet das Sekundärinsolvenzverfahren eröffnet werden soll, die Eröffnung eines Sekundärinsolvenzverfahrens beantragen. Das Antragsrecht der Schuldnerin folgt aus § 13 InsO (so auch Kemper, ZIP 2001, 1609, 1613; Lüke, ZZP 111 (1998), 302; Paulus, NZI 2001, 505, 514; Duursma-Kepplinger/Duursma, Chalupsky, EUInsVO, Kommentar, Art. 29 Rdn. 8). § 354 InsO steht dem nicht entgegen. Nach Abs. 1 dieser Vorschrift ist bei Partikularverfahren nur auf Antrag eines Gläubigers die Eröffnung eines besonderes Insolvenzverfahrens über das inländische Vermögen des Schuldners zulässig. Die ausschließliche Erwähnung des Gläubigerantrags soll klarstellen, dass der Schuldner nicht berechtigt ist, ein unabhängiges Insolvenzverfahren zu beantragen. Er soll nicht versuchen, ohne

Beantragung eines Hauptinsolvenzverfahrens die Unternehmung von ihren Rändern her zu liquidieren (so die Begründung zu § 354 des Gesetzentwurfs der Bundesregierung, Bundesrat-Drucks. 715/02, S. 30/31). Dies ist vorliegend nicht der Fall. Die Schuldnerin hat bereits in England die Eröffnung des Hauptinsolvenzverfahrens beantragt, weil sich dort der Mittelpunkt ihrer hauptsächlichen Interessen befindet.

bb. Der Umstand, dass durch administration order vom 15.7.2005 die Befugnisse des Vorstands bzw. der Geschäftsführung) (board of directors) auf die joint administrators übergegangen sind (Abschnitt 14 und Schedule (1) des United Kingdom Insolvency Act von 1986 in Verbindung mit den Regelungen der Art. 3 Abs. 1, 4 Abs. 2, 17 und 19 Abs. 1 der EUInsVO), steht der Befugnis des Geschäftsführers der Schuldnerin, in Deutschland einen Antrag auf Eröffnung des Sekundärinsolvenzverfahrens zu stellen, nicht entgegen. Zwar sprechen aus diesem Grunde zahlreiche Stimmen in der Literatur dem Schuldner das Antragsrecht ab (Duursma-Kepplinger/Duursma, Chalupsky, EUInsVO, Kommentar, Art. 29 Rdn. 8; FK-InsO/Wimmer Anhang I Art. 102 EGInsO Rdn. 387, Uhlenbruck/Lüer, Art. 102 EGInsO, Rdn. 200). Diese Auffassung läßt indes unberücksichtigt, dass grundsätzlich auch nach Eröffnung des Insolvenzverfahrens die Gesellschaftsorgane mit ihren Aufgaben bestehen bleiben (näher dazu Gutsche, Die Organkompetenzen im Insolvenzverfahren, 2003, S. 94 ff.). Die Wirkung der Insolvenzeröffnnung beschränkt sich auf den Übergang der Verwaltungs- und Verfügungsbefugnis über das Insolvenzmasse gehörende Vermögen nach § 80 Abs. 1 InsO und die Auflösung der Gesellschaft gemäß § 60 Abs. 1 Nr. 4 GmbHG bzw. § 262 Abs. 1 Nr. 3 AktG. Wenn auch dieser Übergang einen Kompetenzverlust der nach dem Gesellschaftsrecht zuständigen Organe zur Folge hat, stehen der insolventen Gesellschaft im Insolvenzverfahren gleichwohl zahreiche Mitwirkungs- und Verfahrensrechte zu (z.B. §§ 34, 156, 158 Abs. 2, 161, 219, 270 Abs. 2 Nr. 1 InsO). Zu deren Wahrnehmung bedarf es grundsätzlich einer Organstruktur. Diese Befugnisse gehören zum Zuständigkeitsbereich der vertretungsberechtigten Organe und wirken insoweit kompetenzzuweisend.
Selbst wenn der Schuldnerin ein Antragsrecht nicht zustände, könnte das Verfahren jedenfalls auf Grund der zulässigen Anträge der Gläubigerin und der joint administrators eröffnet werden.

III.

Die Anträge auf Eröffnung des Insolvenzverfahrens sind auch begründet.

Es kann dahinstehen, ob bei Eröffnung eines Sekundärinsolvenzverfahrens die nationalen Eröffnungsvoraussetzungen nicht gegeben sein müssen (so Virgos/Schmit, Erläuternder Bericht zur EUInsVO, 32 (106); dagegen Balz, ZIP 1996, 948, 953; Fritz/Bähr, DZWIR 2001, 221, 231). Eine kostendeckende Masse ist nach den überzeugenden Ausführungen des Wirtschaftsprüfers Illy in seinem – von der Schuldnerin mit ihrer Antragsschrift vorgelegten - Gutachten vom 19.8.2005, denen sich das Gericht vollinhaltlich anschließt, vorhanden (§§ 26 Abs. 1, 27 InsO). Der Einzahlung eines Kostenvorschusses bzw. der Erbringung einer angemessenen Sicherheitsleistung bedurfte es nicht (vgl. Art. 30 EuInsVO), weil nach den Vorschriften der Insolvenzordnung als dem maßgeblichen nationalen Recht (vgl. Art. 28, 4 EuInsVO) die Eröffnung des Insolvenzverfahrens von der Einzahlung eines Kostenvorschusses abhängig gemacht werden kann, wenn das Vermögen des Schuldners voraussichtlich nicht ausreichen wird, um die Kosten des Verfahrens zu decken. Dies ist vorliegend nicht der Fall.
Eine erneute Überprüfung der Insolvenz findet dagegen nach Art. 27 Abs. 1 S. 1 EUInsVO nicht statt.

IV.

Der Antrag der Schuldnerin bzw. der Joint adminsitrators auf Anordnung der Eigenverwaltung ist zulässig und begründet.

1.

Zunächst bestehen aus Sicht der EuInsVO keine Bedenken gegen die Anordnung der Eigenverwaltung in einem Sekundärinsolvenzverfahren. Unbestritten fällt auch die Eigenverwaltung nach deutschem Recht unter den sachlichen Anwendungsbereich des Art. 1 Abs. 1 EuInsVO, weil sich aus Art. 2 Ziff. b) EuInsVO ergibt, dass Verwalter im Sinne des Gesetzes auch derjenige ist, der nur überwacht (MünchnerKommentar-Reinhart, InsO, EuInsVO Art. 1, Rdn. 4 m.w.N.). Auch das Gebot der EuInsVO, dass es sich bei dem Sekundärverfahren um ein Liquidationsverfahren handeln muss, steht der Anordnung der Eigenverwaltung nicht entgegen, da diese nicht zwangsläufig auf eine Sanierung des Schuldners gerichtet ist.

2.

Ebensowenig stehen die Wirkungen des Hauptverfahrens der Anordnung der Eigenverwaltung entgegen. Durch die Eröffnung des Sekundärinsolvenzverfahrens bleiben grundsätzlich die Wirkungen des Hauptinsolvenzverfahrens bestehen, es werden aber einzelne Wirkungen des ausländischen Verfahrens durch die spezielleren Wirkungen des hiesigen Sekundärverfahrens verdrängt. Dies gilt freilich nur insoweit, als die Wirkungen des ausländischen Verfahrens mit den Wirkungen des deutschen Verfahrens kollidieren. Durch die Eröffnung des Sekundärinsolvenzverfahrens wird aus der Masse des Hauptinsolvenzverfahrens quasi ein Teil herausgelöst. Die in Deutschland belegenen Vermögenswerte verlieren nicht den Insolvenzbeschlag des Hauptverfahrens; vielmehr tritt ein spezieller Insolvenzbeschlag hinzu, der den ersten Beschlag nur überdeckt. Die Wirkungen des Hauptinsolvenzverfahrens bestehen auch nach Eröffnung des Sekundärverfahrens in Deutschland fort, soweit sie nicht mit den spezielleren Wirkungen des deutschen Verfahrens kollidieren (Kübler/Prütting-Kemper, Art. 102 EGInsO, Rz. 247; Thieme, in: Stoll, Stellungnahmen, S. 212, 247; vgl. auch MünchnerKommentar-Reinhart, InsO, EuInsVO Art. 18, Rz. 1).
Unmittelbar lässt sich dies bereits aus den Regelungen der Art. 3 und 27 ff. EuInsVO begründen. Dort wird ausweislich des Wortlauts nämlich nicht die Anerkennung der ausländischen Verfahrenseröffnung zum Teil verweigert; geregelt wird nur die Abweichung vom Grundsatz, nämlich, dass sich das Sekundärinsolvenzverfahren nach dessen nationalen Recht richtet. Regelungsgehalt ist damit, dass das Recht des Sekundärverfahrens spezieller ist, falls es eine Regelung trifft. Im übrigen bleibt es bei dem Grundsatz, dass das Recht des Hauptinsolvenzverfahrens gilt.
Mittelbar läßt sich dies auch aus Art. 18 Abs. 2 EuInsVO entnehmen: wenn sogar der Verwalter des Partikularinsolvenzverfahrens im Ausland seine Befugnisse bezüglich der von dem Partikularinsolvenzverfahren beschlagenen Masse ausüben kann – was freilich nur dann möglich ist, wenn auch das Ausland die Eröffnungswirkungen des Partikularverfahrens anerkennt -, gilt dies erst Recht für den Verwalter des Hauptverfahrens (vgl. Huber, EuZW 2002, 490, 495).
In dogmatischer Hinsicht wird durch das Sekundärinsolvenzverfahren also weder der räumlichen noch der sachlichen Universalität des Hauptverfahrens die Anerkennung verweigert, lediglich in sachlicher Hinsicht wird eine speziellere Regelung getroffen. Trifft das deutsche Insolvenzrecht keine eigenständige Regelung über die Übertragung der

Verwaltungs- und Verfügungsbefugnis über das Vermögen des Schuldners, greift die entsprechende Regelung des englischen Hauptverfahrens auch hier wieder ein. Nach Abschnitt 14 und Schedule (1) des United Kingdom Insolvency Act von 1986 in Verbindung mit den Regelungen der Art. 3 Abs. 1, 4 Abs. 2, 17 und 19 Abs. 1 der EUInsVO geht mit Eröffnung des Insolvenzverfahrens das Verwaltungs- und Verfügungsrecht des Schuldners auf die vom Gericht bestellten Joint Administrators über. Die Anordnung der Eigenverwaltung ändert hieran nichts. Zwar ist die Auslegung der §§ 270 ff. InsO im Bezug auf den Übergang bzw. die Belassung der Verwaltungs- und Verfügungsmacht umstritten (umfassend zum Streitstand: Huhn, Die Eigenverwaltung im Insolvenzverfahren, Rz. 579 ff. je m.w.N.). Nach zutreffender Ansicht verzichten die §§ 270 ff. InsO im Gegensatz zu einem "normalen" Regelinsolvenzverfahren auf den Übergang der Verfügungsbefugnis und belassen es bei dem status quo. Dies entspricht auch dem Willen des Gesetzgebers.
Nicht argumentieren lässt sich allerdings mit dem Wortlaut der Vorschriften, weil sich aus diesem auch die Auffassung rechtfertigen läßt, dass dem Schuldner mit Eröffnung des Insolvenzverfahrens die Verwaltungs- und Verfügungsbefugnis zunächst entzogen und dann an diesen originär (zurück)übertragen wird.
Auch mit dem Sinn und Zweck, den der Gesetzgeber bei Schaffung der Eigenverwaltung verfolgt hat, lassen sich beide Auslegungen begründen: Eigenverwaltung soll angeordnet werden, wenn der Betrieb durch den Schuldner aufgrund seiner besonderen Fähigkeiten für die konkrete Betriebsführung besser durch ihn, als durch einen Verwalter geführt werden kann. Dies müsste dann aber auch der Schuldner selbst, nicht ein anderer Verwalter sein. Allerdings kann im vorliegenden Fall der Verwalter des Hauptverfahrens den Betrieb unter Umständen besser führen, als ein neuer Verwalter, da er durch die bisherige Betriebsfortführung bereits eingearbeitet ist und für Kontinuität bei der Betriebsfortführung sorgt (ähnlich in den Fällen, in denen Insolvenzspezialisten im Vorfeld der Insolvenz zu Geschäftsleitern bestellt werden).
Eine Argumentation mit den Wirkungen des Hauptinsolvenzverfahrens ist ebenfalls indifferent: Vertreten ließe sich, dass es einen Widerspruch darstellen würde, wenn das Hauptinsolvenzverfahren, das den Schuldner von der Verfügungsbefugnis entbunden hat, hier anerkannt wird, um dann aber mit der Eigenverwaltung durch die Rückgabe der Verfügungsbefugnis dessen Wirkungen wieder außer Kraft zu setzen. Dagegen spricht: die Wirkungen des deutschen Verfahrens sind für das hiesige Vermögen spezieller; daran ändert auch der Umstand nichts, dass diese Wirkungen hier (zufällig) zu einem dem Hauptinsolvenzverfahren gegenteiligen Ergebnis führen.
Gegen die Auslegung, dass die Verwaltungs- und Verfügungsbefugnis zunächst entzogen und dann an den Schuldner originär (zurück)übertragen wird, spricht aber die Begründung des Gesetzentwurfes des Bundestages. Dort heißt es in der Einleitung des Kapitels zur Eigenverwaltung, dem Schuldner sei die Verwaltungs- und Verfügungsbefugnis "zu lassen", BT-Drucks. 12/2443. Ergänzt wird dieses Argument indiziell dadurch, dass die zitierte Formulierung in Zusammenhang mit einem Verweis auf das Vergleichsverfahren gebraucht wird, wo anerkannt ist, dass der Schuldner aufgrund seiner eigenen ursprünglichen Rechtsmacht handelt (Huhn, Rz. 591; Häsemeyer, Insolvenzrecht, 2. Aufl., Rz. 8.13.).
In diese Richtung deutet auch ein Vergleich mit der Vorschrift des § 150b ZVG. Dort können die Rechte des Zwangsverwalters unter bestimmten Umständen ebenfalls auf den Schuldner übertragen werden. Im Gegensatz zu den §§ 270 ff. InsO spricht § 150b ZVG aber ausdrücklich davon, dass "der Schuldner zum Verwalter zu bestellen ist", woraus deutlich wird, dass der Schuldner die Befugnisse des Verwalters nicht behält, sondern originär verliehen bekommt. Wäre das bei der Eigenverwaltung auch gewollt gewesen, hätte sich eine entsprechende Formulierung angeboten.

Auch aus § 270 Abs. 1 Nr. 3 InsO lässt sich ein Indiz für die bloße Erhaltung des status quo herleiten: Der Insolvenzrichter soll bei der Überlegung, ob einem Antrag auf Eigenverwaltung statt zu geben ist, die Prognose treffen, ob durch die Eigenverwaltung Nachteile zu befürchten sind. Als Grundlage für diese Entscheidung kann er nur auf die aktuelle Geschäftsleitung blicken, kaum auf die Geschäftsführung anderer Personen in der Vergangenheit. Dann müssen es aber auch diese Personen sein, die bei Anordnung der Eigenverwaltung ihre Befugnisse behalten.
Zwar ist nicht zu verkennen, dass sich einzelne, flankierende Befugnisse des Eigenverwalters nicht damit erklären lassen, dass dieser seine ursprüngliche Rechtsmacht behält, so beispielsweise das Wahlrecht nach §§ 279, 103 ff. InsO, das Verwertungsrecht gem. § 282 InsO oder das Bestreitensrecht nach § 283 InsO. Dies widerspricht aber nicht zwangsläufig de Annahme des status quo, da zum einen das Erfordernis der originäre Übertragung dieser Befugnisse aus den Besonderheiten des Insolvenzrechts folgt und damit keinen zwingenden Rückschluss auf obige Fragestellung zulässt. Zum anderen gab es auch im Rahmen der Vergleichsordnung entsprechende zusätzliche Befugnisse, ohne dass dies die obige Sichtweise angefochten hätte (so auch Huhn, Rz. 598)
Da das Sekundärverfahren bei Anordnung der Eigenverwaltung keinen Anspruch auf die Verwaltungs- und Verfügungsbefugnis erhebt, sondern diese dort belässt, wo es sie vorfindet, kommt es vorliegend nicht zu einer Kollision mit den Wirkungen des Hauptverfahrens. Die Verwaltungs- und Verfügungsbefugnis richtet sich weiterhin nach englischem Recht und steht dem dortigen administrator zu.

3.

Auch die – weiteren - formellen und materiellen Anordnungsvoraussetzungen gemäß § 270 Abs. 2 InsO sind gegeben.

a. Die Schuldnerin hat gemäß Schriftsatz ihrer Verfahrensbevollmächtigten vom 19.8.2005 Antrag auf Anordnung der Eigenverwaltung gestellt (§ 270 Abs. 2 Nr. 1 InsO).
b. Die Gläubigerin hat in Ihrem Antrag auf Eröffnung eines Sekundärinsolvenzverfahrens vom 19.8.2005 dem Antrag der Joint Administrators und dem Antrag der Schuldnerin auf Anordnung der Eigenverwaltung ausdrücklich zugestimmt (§ 270 Abs. 2 Nr. 2 InsO).

c. Die Anordnung wirkt auch nicht verfahrensverzögernd oder gläubigerbenachteiligend (§ 270 Abs. 2 Nr. 3 InsO).

aa. Der Umstand, dass durch die administration order des High Court of Justice in London vom 15.7.2005 das Insolvenzverfahren über das Vermögen der Schuldnerin eröffnet und nach Abschnitt 14 und Schedule (1) des United Kingdom Insolvency Act von 1986 in Verbindung mit den Regelungen der Art. 3 Abs. 1, 4 Abs. 2, 17 und 19 Abs. 1 der EUInsVO das Verwaltungs- und Verfügungsrecht über das Vermögen der Vermögen der Schuldnerin auf die Joint Administrators übergegangen ist, ändert nichts daran, dass die Schuldnerin befugt ist, einen Antrag auf Anordnung der Eigenverwaltung zu stellen. Wenn die Schuldnerin berechtigt ist, einen Antrag auf Eröffnung des Sekundärinsolvenzverfahrens zu stellen, steht ihr auch das Recht zu, die Anordnung der Eigenverwaltung zu beantragen. Dieses Befugnis ist von dem Insolvenzeröffnungsantragsrecht umfaßt. Für die Antragsbefugnis spricht im Übrigen der Umstand, dass einem Schuldner auch nach dem Verlust des Verwaltungs- und Verfügungsrechts auf Grund Anordnung einer sogenannten starken vorläufigen Insolvenzverwaltung nicht die Möglichkeit genommen ist, die Anordnung der

Eigenverwaltung zu erreichen (vgl. FK-InsO/Jaffe, § 270 Rdn. 9).
Selbst wenn man davon ausginge, dass die Organe der Schuldnerin durch die englischen Insolvenzverwalter ersetzt würden und diese die verfahrensrechtlichen Befugnisse der organschaftlichen Vertreter der GmbH ausüben würden, bestünden keine rechtliche Bedenken gegen die Anordnung der Eigenverwaltung, weil die Joint Administrators mit Schriftsatz ihrer Verfahrensbevollmächtigten vom 19.8.2005 ebenfalls Antrag auf Anordnung der Eigenverwaltung gestellt haben.

bb. Es ist auch nicht zu erwarten, dass die Anordnung der Eigenverwaltung zu einer Verfahrensverzögerung und zu sonstigen Nachteilen für die Gläubiger führt (§ 270 Abs. 2 Nr. 3 InsO). Das Gesetz fordert vom Insolvenzrichter insoweit eine Prognoseentscheidung. Nach Würdigung aller Gesichtspunkte ist davon auszugehen, dass sich die Anordnung der Eigenverwaltung nicht nur nicht verfahrensverzögernd und gläubigerbenachteiligend auswirkt, sondern zu einer schnelleren Verfahrensbeendigung und zu einer höheren Befriedigungsquote der Gläubiger führen dürfte.
In diesem Zusammenhang war vor allem zu berücksichtigen, dass die Zulässigkeit von parallelen, in ihrer Wirkung territorial begrenzten Verfahren häufig zu einer ganz erheblichen Verkomplizierung transnationaler Insolvenzen führt (so mit Recht Lüke, ZZP 111 (1998), 303; a.A. Hanisch, ZIP 1994, 1 ff.; Wimmer, ZIP 1998, 982, 985). Die besondere Schwierigkeit liegt darin, die Insolvenzen in Verwaltung und Wirkung aufeinander abzustimmen. Zwar verpflichten Art. 31 Abs. 1 und Abs. 2 EUInsVO die Verwalter von Haupt- und Sekundärinsolvenzverfahren zur gegenseitigen Unterrichtung und Zusammenarbeit. Hierunter fällt die Verpflichtung, sich bei der Durchführung der jeweiligen Insolvenzverfahren abzustimmen und zu koordinieren. Ziel der Abstimmung ist stets die effiziente Verfahrensabwicklung, damit keine Verzögerungen zu Lasten der Gläubiger zu befürchten sind. Zu solchen Verzögerungen kann es aber vor allem in den Fällen kommen, in denen der Verwalter des Hauptverfahrens eine Sanierung des schuldnerischen Unternehmens anstrebt, während der Verwalter des Sekundärinsolvenzverfahrens zur Liquidation verpflichtet ist (vgl. Art. 3 Abs. 3 S. 2 EUInsVO). Die unterschiedliche Ausrichtung solcher Verfahren und die sich daraus ergebenden unterschiedlichen Interessen der Insolvenzverwalter können die Zusammenarbeit erheblich erschweren.
Die Anordnung der Eigenverwaltung im Sekundärinsolvenzverfahren, bei der das Verwaltungs- und Verfügungsrecht über das (gesamte) schuldnerische Vermögen beim Hauptinsolvenzverwalter verbleibt, kann dagegen in besonderem Maße dazu beitragen, diese Schwierigkeiten zu reduzieren bzw. zu beseitigen.
Dies kann sich wiederum vorteilhaft auf die Befriedigungschancen der Gläubiger auswirken.
Dies gilt um so mehr, als in England das Hauptinsolvenzverfahren über das Vermögen der Schuldnerin eröffnet wurde. Denn das wesentliche Vermögen der Schuldnerin befindet sich nicht in England, sondern am Ort der Niederlassung. Daher decken sich die Vermögensmassen von Haupt- und Sekundärinsolvenzverfahren, was ebenfalls dafür spricht, beide Verfahren durch die Anordnung der Eigenverwaltung miteinander zu verbinden.
Ferner spricht für die Anordnung der Eigenverwaltung, dass die Joint Administrators beabsichtigen, sämtliche Vermögenswerte der Collins&Aikman Gruppe einheitlich als ein am Wirtschaftsverkehr teilnehmendes Unternehmen zu veräußern.
Die Hauptinsolvenzverwalter haben schlüssig dargetan, dass ein höherer Erlös für die in Frage stehenden Vermögenswerte erzielt werden kann, als wenn die Teilunternehmen der insgesamt 21 von Insolvenzverfahren betroffenen Gesellschaften getrennt, bzw. im Falle einer Zerschlagung zu Liquidationswerten verwertet würden. So würden bei

isolierter Verwertung der schuldnerischen Vermögenswerte eingespielte Organisations- und Finanzierungsstrukturen innerhalb der Collins&Aikman Gruppe aufgebrochen. Dies dürfte wiederum den aus dem Verkauf des Unternehmens erzielbaren Erlös zu Lasten der Gläubiger schmälern.
Für die Anordnung der Eigenverwaltung spricht schließlich, dass mit Herrn Wirtschaftsprüfer/Steuerberater Thierhoff ein erfahrener deutscher Insolvenzverwalter zum alleinvertretungsberechtigten Geschäftsführer der Schuldnerin bestellt wurde. Der neue organschaftliche Vertreter der Schuldnerin verfügt über die erforderliche Sachkenntnis und Erfahrung im Umgang den Regelungen der Insolvenzordnung. Probleme bei der Abwicklung des Verfahrens, die auf einer etwaigen Unkenntnis der joint administrators mit den Regelungen der Insolvenzordnung bheruhen könnten, sind daher nicht zu erwarten.
Das Gericht hat in diesem Zusammenhang nicht unberücksichtigt gelassen, dass in der Literatur die Befürchtung geäußert wird, durch Bestellung eines erfahrenen Insolvenzverwalters zum organschaftlichen Vertreter der Schuldnerin werde die gerichtliche Auswahlentscheidung eingegrenzt bzw. gesteuert (*Frind,* ZInsO 2002, 745, 751; siehe auch AG Duisburg, ZIP 2002, 1636=NZI 2002, 556). In einer solchen Konstruktion liegt indes nur dann eine unzulässige Umgehung des in § 56 InsO verankerten Grundsatzes der Unabhängigkeit des Insolvenzverwalters, wenn der Schuldner beabsichtigt, die gewählte Konstruktion der Eigenverwaltung zu nutzen, um sich und/oder einzelnen Gläubigern ungerechtfertigte Vorteile zu verschaffen (*Graf-Schlicker*, in: Festschrift für *Kirchhof*, S. 135, 146). Dafür haben sich konkrete Anhaltspunkte nicht ergeben. Im Gegenteil war nach den überzeugenden Ausführungen der Schuldnerin und den joint administrators in ihrer Antragsschrift vom 19.8.2005 davon auszugehen, dass die Anordnung der Eigenverwaltung eher Vorteile für die Gläubiger bringen werde. Abgesehen davon sieht die Insolvenzordnung eine Vielzahl von Vorkehrungen vor, um die nicht gerechtfertigte Bevorzugung eines Gläubigers oder einer Gläubigergruppe zu verhindern. Dabei ist zunächst zu berücksichtigen, dass der Gesetzgeber den Schuldner bzw. Schuldnervertreter in der Eigenverwaltung nicht etwa als Insolvenzverwalter ansieht (*Uhlenbruck*, in: Festschrift für *Metzeler*, S. 85, 99). So tritt an die Stelle eines Insolvenzverwalters ein überwachender Sachwalter, für den das Gesetz die Vorschriften über den Insolvenzverwalter weitgehend für entsprechend anwendbar erklärt. Angesichts der ihm eingeräumten Befugnisse (vgl. §§ 274 Abs. und 3, 275 Abs. 1, 277 Abs. 1, 279, 282 Abs. 2, 275 Abs. 2, 281 Abs. 2, 283 Abs. 2 InsO sowie §§ 129 bis 147 (§ 281 Abs. 2 InsO) ist ein Sachwalter – als erfahrener Insolvenzverwalter – ohne Probleme in der Lage, die geeigneten Maßnahmen zu ergreifen, um Missbrauchsmöglichkeiten zu unterbinden.
Letztlich waren auch keine konkreten Anhaltspunkte dafür vorhanden, die begründete Zweifel an der Einstellung des neuen Geschäftsleiters der Schuldnerin entstehen lassen könnten, er vertrete nicht die Interessen der Gesamtgläubigerschaft.

Köln, 23.08.2005
Amtsgericht

Prof. Dr. Vallender
Richter am Amtsgericht

Ausgefert

Kein
Justizangestellte
als Urkundsbeamtin der Geschäftsstelle

Neutral Citation Number: [2006] EWHC 1343 (Ch)

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

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
COMPANIES COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/06/2006

Before :

MR JUSTICE LINDSAY

In the Matters of Collins & Aikman Europe SA
Collins & Aikman Automotive Systems SL
Collins & Aikman Automotive Holding GmbH
Collins & Aikman Systems GmbH
Collins & Aikman Systems AB
Collins & Aikman Automotive Company Italia SRL
Collins & Aikman Automotive Trim Bvba
Collins & Aikman Automotive Holdings BV
Collins & Aikman Automotive Trim BV
Collins & Aikman Automotive SRO
- and -
In the Matter of The Insolvency Act 1986

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

Hearing dates: 6th April 2006

- -

Approved Judgment

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

.....

MR JUSTICE LINDSAY

Mr Justice Lindsay:

1. In this judgment I deal with some questions arising where, for the particular reasons given, the English-appointed Joint Administrators of a number of related companies incorporated and previously carrying on business in several European jurisdictions now wish to respect, albeit indirectly, some special provisions of the law of those local jurisdictions notwithstanding that those provisions differ from those of the law which is the law of the main proceedings under Articles 3 and 4 of the Council Regulation of 29th May 2000, namely English law.

2. On the 6th April 2006 I had in front of me an Ordinary Application in the above matters. It sought provisional approval by the Court of a specified course of action, firstly, as to distributions proposed to be made by the Joint Administrators (whom I shall describe below), secondly as to consultations with creditors' committees and with creditors in relation to such distributions and, thirdly, for the matters to return to Court after an interval. The plan was that on the return the Court might take into account the result of those consultations and of any objections duly raised to the proposals before then, if appropriate, issuing directions in relation to them. At that hearing in April I gave the provisional approval asked of me. I made ancillary directions to carry forward the consultation process and directed the matter to return to Court on the 6th June.

3. Today, the matter having returned to me on the 6th June, I make the order of today's date which refers to this judgment. I now give the reasons for that order.

4. The Collins & Aikman Group was a leading supplier of automotive components, typically plastic and soft-trim products used in the interiors of motor vehicles. It supplied, inter alios, Ford, General Motors and Daimler Chrysler. In Europe there were within the Group 24 companies spread over 10 countries. A broad indication of the size of the Group's European operations is given by the facts of its having employed some 4,000 persons in Europe at 27 operational sites with a turnover in all of the order of $1bn p.a..

5. The Group carried on business also within the USA where, on the 17th May 2005, the United States wing filed voluntary petitions for re-organisation under Chapter 11 of the US Bankruptcy Code. That the US operations were placed into Chapter 11 proceedings put the European Companies under severe financial pressure and on the 15th July 2005 the 24 European Companies applied to the High Court in England for Administration Orders. Lawrence Collins J. made such orders in each of the 24 cases before him, which included a Luxemburg holding company and, of the trading companies, 6 companies in England and Wales and companies in Spain, Sweden, Germany, Belgium, Italy and the Netherlands.

6. Those Administration Orders were made within this jurisdiction on the basis that the High Court was satisfied on the evidence put before it that the EC Regulation applied and that the proceedings in England and Wales were main proceedings for the purposes of Articles 3 and 4 of the Regulation. By the Orders then made Messrs S.J. Appell, A.P. Beveridge and G.P. Squires of the firm of Kroll were appointed Joint Administrators (hereinafter called "the Joint Administrators"). A Schedule forming part of those Orders described the effect and purpose of the administration in each case. At paragraph 3 of that Schedule it said:-

> "By way of summary, the Joint Administrators must perform their functions with the objective of:
>
> 3.1 Rescuing the Company as a going concern or (only if it is not reasonably practical to achieve that objective, or if the pursuit of the objective set out in 3.2 would achieve a better result for the company's creditors as a whole) then
>
> 3.2 Achieving a better result for the company's creditors as a whole than would be likely if the Company were wound up (without first being in administration)
>
> ……."

7. The Schedule pointed out that the Joint Administrators were officers of the Court and, in summary, described their powers (a subject to which I shall later return).

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

9. By April 2006 the realisations were virtually complete and the Joint Administrators held over $125m for distribution to the creditors of the European companies and the Joint Administrators had come to the view that it was of the utmost importance to seek to give effect to the assurances which had been given and which had led to the

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

10. By April 2006, then, the Joint Administrators had a problem before them. They had given assurances which they wished to honour, assurances given not only with a view to the benefit of creditors generally but assurances which had conduced to achievement of that benefit. Those assurances had included performance by the Joint Administrators of differing provisions, country by country, as to local law as to, for example, the preferences to be given to particular classes of creditors and the subordination or not of inter-company indebtedness, provisions which were different from the applicable provisions of English law, the law of the main proceedings. The Joint Administrators and their advisers took the view, however, that, properly examined, so wide were the powers conferred upon them by English law (at all events if their proposals received the sanction of the Court by appropriate directions being given) that full effect could be given to the assurances notwithstanding that that involved payments to creditors which, had the assurances not been given, would have been alien to or inconsistent with the law of the main proceedings.

11. Taking that view, the Administrators applied to the Court in April, as I have mentioned. The applications before me (both on 6th June and, earlier, in April) directly concern only the 10 companies that are listed at the head of this judgment. Each of them has funds available for distribution to creditors. Of the rest of the 24 group companies describable as the European companies, the 6 incorporated in England and Wales were, of course, not the subject of assurances of the kind with which I am concerned and hence play no part in the application before me. 5 of the European companies are such that there will ultimately be no funds available for distribution to their creditors so that, again, they have no reason to be made subject to the present application. There were, though, 3 companies in relation to which secondary proceedings were opened and, as to 2 of those, distributions to creditors will be made within those secondary proceedings. Of the 24, that leaves only 1 company, Collins & Aikman Automotive Trim GmbH, with respect to which a separate application will be made to cope with its particular circumstances.

12. At the conclusion of the argument in April I then provisionally acceded to the Joint Administrators' argument. However, as I then only had the Joint Administrators before me, their plan, as I have touched upon, was that there should be a consultation with creditors and creditors' committees and the opportunity to express dissent before a final ruling, if any, were to be made.

13. The Joint Administrators' argument as to the propriety of the directions which they seek may be broadly split into two: as to jurisdiction on the one hand and, if there are found to be one or more relevant jurisdictions, the exercise of that or those jurisdictions as a matter of discretion on the other. I shall deal first with jurisdiction.

Jurisdictions suggested

14. As to jurisdiction, the Joint Administrators, appearing by Mr Gabriel Moss Q.C. and Mr Tom Smith, urge that the English Court and the English Joint Administrators are enabled to honour the local assurances given in the circumstances which I have described and thereby indirectly to respect local law, not that of the main proceedings, by way of one or more of 3 routes, namely:-

    (i) Under the express powers of the English legislation,

    (ii) Under the inherent jurisdiction of the English Court over the Joint Administrators as officers of the Court, and

    (iii) Under the rule in E*x parte James*.

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

The rule in *Ex parte James*

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

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

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

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

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

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

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

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

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

An inherent jurisdiction?

18. The argument here begins with an assumption that under common law the High Court has a jurisdiction to control its own officers and hence to control administrators.

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

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

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

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

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

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

The legislation

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

> "3 (1) The administrator of a company must perform his functions with the objective of -
>
> (a) rescuing the company as a going concern, or
>
> (b) achieving a better result for the company's creditors as a whole than would be likely if the company were wound up (without first being in administration), or
>
> (c) ……
>
> (2) Subject to sub-paragraph (4), the administrator of a company must perform his functions in the interest of the company's creditors as a whole.
>
> (3) The administrator must perform his functions with the objectives specified in sub-paragraph (1) (a) unless he thinks either that –
>
> (a) that it is not reasonably practicable to achieve that objective
>
> (b) that the objective specified in sub-paragraph (1) (b) would achieve a better result for the company's creditors as a whole
>
> (4) …….
>
> (5) The administrator of a company must perform his functions as quickly and efficiently as is reasonably practicable."

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

> 59. (1) The administrator of a company may do anything necessary or expedient for the management of the affairs, business and property of the company.
>
> (2) A provision of this Schedule which expressly permits the administrator to do a specified thing is without prejudice to the generality of sub-paragraph (1).

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

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

> "13. Power to make any payment which is necessary or incidental to the performance of his functions.
>
> ……
>
> ……
>
> 18. Power to make any arrangement or compromise on behalf of the company.
>
> ……
>
> ……
>
> 23. Power to do all other things incidental to the exercise of the foregoing powers."

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

> "65. (1) The administrator of a company may make a distribution to a creditor of the company.
>
> (2) Section 175 shall apply in relation to a distribution under this paragraph as it applies in relation to a winding-up.
>
> (3) A payment may not be made by way of distribution under this paragraph to a creditor of the company who is neither secured or preferential unless the Court gives permission."

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

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

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

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

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

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

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

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

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

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

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

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

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

Paragraph 65 of Schedule B1

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

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

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

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

Paragraph 66 of Schedule B1

30. Paragraph 66 of Schedule B1, it is to be noted, contains no limit related to payment of secured or preferential creditors; in particular the importation of section 175 of the 1986 Act in paragraph 65 (2) is only as to distributions "under this paragraph", i.e. under paragraph 65 only, and the negative provisions of paragraph 65 (3) are correspondingly limited to relate only to distributions "under this paragraph", paragraph 65.

31. Paragraph 66 relates to "payments", a term wide enough to include and certainly not such as would exclude the "distributions" which had been the subject matter of paragraph 65. If, contrary to my doubts, implementation of the Joint Administrators' assurances would be in accordance with paragraph 65 then there would be no need to invoke paragraph 66 but if I am right in harbouring those doubts then the payments which are proposed would be "otherwise than in accordance with paragraph 65" and hence potentially would be within paragraph 66. Equally, if the making of the payments now proposed can be regarded as necessary or incidental to the performance of the Joint Administrators' functions within Schedule 1 paragraph 13 supra then, again, one need look no further for authority to direct the Joint Administrators as they propose. But if paragraph 13 does not apply either then paragraph 66 can step into the breach so long as the payments can properly be regarded as such that the Joint Administrators think them, and reasonably think them, to be "likely to assist achievement of the purpose of administration" within paragraph 66.

32. There can, on the facts here, be no doubt but that the *giving* of the assurances was, at the time they were given, thought by the Joint Administrators to be likely to assist the objectives described in Schedule B1 paragraphs 3 (1) (a) and (b). That, of itself, does not *necessarily* answer the question as to whether joint administrators can reasonably *now* think that *performance* of the assurances is likely to assist achievement of the purpose of the administration. However, when an assurance is given in enforceable contractual form incorporating a promise of its later performance, I cannot think that the legislature would wish to distinguish between the giving of such an assurance and

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

33. Here, though, it is not said that the assurances were given in contractual form. Does that make any difference? In my opinion it does not. Firstly, the legislature would naturally expect its creatures, administrators, to behave honourably. Secondly, to distinguish between the giving of the promise (thought likely to assist etc.) and its performance would be to open the door to tortious liability in the administrator and to time and money being taken up in contests on that subject. Creditors would be able to claim in misrepresentation (presumably innocent misrepresentation) that assurances had been given on which they had relied and on account of which, as I have explained, they had lost their ability to launch local secondary proceedings to their advantage for want of there any longer being any local establishment. Thirdly, administration is a process which greatly depends for its success upon a good degree of confidence existing between the creditors of a company and the administrators who take over its control. Were the administrators, even against their wishes, to be required to ignore their own promises properly given to assist achievement of the purpose of the administration, the attractive form of corporate re-organisation which administration was intended to create would be brought into disrepute, an outcome which the legislature, in creating administration, cannot have intended. It may be that exceptional circumstances could arise when assurances given and thought at the time of their giving to assist achievement of the purpose of the administration in question become no longer so thought at the time for their performance but that is emphatically not the case here. There is here no reason not to carry forward from giving the assurances to performing them.

34. I should add that I respectfully agree with Judge Norris' view in *MG Rover Belux* that where, as here, the law of the main jurisdiction is sufficiently flexible, as English law is, to acknowledge that in the particular circumstances of an administration it is the provisions of a local non-English law that may have (albeit indirectly) to be respected, then there is nothing in Article 3 of the Regulation of 29th May 2000 that precludes that respect.

35. If for such reasons (to which the Rule in *Ex parte James* and any relevant inherent jurisdiction, as I shall return to, can only add) it would be wrong in a case such as this to distinguish between the performance of contractual and non-contractual promises, then the fact that, at the time the assurances were given, their giving was (reasonably) thought likely to assist achievement of the purpose of the administration should normally suffice, firstly, to enable the Joint Administrators without impropriety to propose under paragraph 66 that the assured payments should now be paid and, secondly, for them to *seek* directions in relation thereto under paragraph 63.

36. Whether that suffices also for the Court to be enabled to *give* directions in that behalf under paragraphs 63 and 66 requires a brief look at Schedule B1 paragraph 68 (2) and (3) supra. I do not regard the directions I am invited to give as "in connection with any aspect" of the Joint Administrators' *management* as there described and thus I see the width of paragraph 63 as not here cut down by a need to satisfy the conditions set out in the alternative to one another in paragraph 68 (3). I have thus not needed to look into whether, for example, under paragraph 68 (3) (b), the present proposals are

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

To revert to an inherent jurisdiction

37. The subjects upon which an administrator may apply to the Court for directions are not circumscribed beyond the very wide description of their being "in connection with his functions" – Schedule B1 at paragraph 63. To pick up the distinction between "positive" and "negative" legislative provisions to which I earlier referred, that at paragraph 63 can hardly be regarded as sufficiently "negative" in the sense in which Lord Wilberforce used the word in *Shiloh supra* to exclude any inherent jurisdiction. It is not as if the legislature, when it intended to limit the Court's ability to direct its officers, administrators, did not know how to do so; paragraph 68 (3), for example, begins with a "negative" provision – "The Court may give directions under sub-paragraph (2) *only if* -" and then it prescribes conditions. The terms of paragraph 68 (2), though, are also "positive"; they do not, for example, in terms prescribe that no directions may be given by the Court other than in relation to the company's affairs, business or property so that, there again, an inherent jurisdiction can survive.

38. However, coming closer to the particular inherent jurisdiction here being contemplated, one to make distributions to creditors, the statutory provisions are undoubtedly in part negative. Paragraph 65 (2) supra imports section 175's requirement that preferential debts shall be paid in priority to *all other* and is thus (as gives rise to the doubts I have mentioned as to the applicability of paragraph 65) "negative" in the sense of precluding other types of payment being made under paragraph 65, despite paragraph 65 (1) itself being entirely general and positive in its language. There is thus, as it seems to me, nothing in paragraph 65 which ousts an inherent jurisdiction of the High Court to give directions to administrators save a fetter to the limited extent indicated in paragraph 65 (2) and (3) where the distribution would be to one or more of the existing ordinary creditors yet whilst those who under English law are secure or preferential creditors were left unprovided for.

39. Schedule B1 paragraph 66 supra is also "negative" but only to a limited and, in practice, unnecessary extent; it could be required to import from the terms of paragraph 66 that the Court has no inherent jurisdiction to direct an administrator to make a payment that is outside paragraph 65 or paragraph 13 of Schedule B1 unless he thinks it likely to assist achievement of the purpose of administration. Otherwise there is, in my view, nothing in paragraph 66 to cut down whatever inherent jurisdiction lies in the Court to give directions to its officers.

40. But where does this discussion lead? If, as I have held, there is a plain ability in the Court conferred by statute to give the directions which are here sought, what matter is it that a corresponding ability may be arrived at by another route? If adequate braces can plainly be seen to be worn, does one have to examine whether there is also a belt available? Nothing I say here is intended to be a narrowing (or widening) of the Court's inherent jurisdiction to give directions to administrators as its officers save to the extent that I have seen it to be fettered by recent and current statutory provision; rather it is that on the particular facts of this case a more detailed examination of the interaction between statute and the inherent jurisdiction of the High Court is here

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

The conclusion as to jurisdiction

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

Discretion

42. If, then, I have jurisdiction to give the directions to the Joint Administrators that they invite, ought I, in point of discretion, to do so? Mr Moss and Mr Smith point out that the alternatives to the Joint Administrators' proposals under English law are Creditors' Voluntary Liquidations ("CVLs"), Compulsory Voluntary Arrangements ("CVAs") and a number of secondary winding up proceedings in the relevant local jurisdictions. In comparison with the Joint Administrators' proposals each has significant disadvantages.

43. CVLs, apart from involving a fresh insolvency procedure and the risk that, if someone other than one of the incumbent administrators were to be selected as liquidator, that incoming officeholder would have to get up to speed, so to speak, at the expense of the creditors, runs the further risk that in a liquidation, a much less flexible system than administration, the liquidator might find himself unable to depart from the statutory scheme for distribution. Nor, a voluntary liquidator not being an officer of the Court, would he be subjected to the strictures of the Rule in *Ex parte James*. The unfairness of a scheme under which the office-holder would *not* be able to honour the promises given would be obvious.

44. As for CVAs, time and expense would be taken up in preparing the proposals and obtaining approval for them in the meetings that would have to be called. Again, the supervisor of a CVA is not an officer of the Court.

45. As for there being a number of secondary proceedings in local jurisdictions, inescapably that would lead to complication, expense and delay in the cases where secondary proceedings could still be started on the basis that there was still some local "establishment" and would lead to considerable uncertainty and a real sense of grievance where there was not.

46. It had from the outset here been indicated that the appropriate exit route from the administrations in the European companies would be a matter of consultation between the Joint Administrators and the various creditors' committees. The adjournment from April was in part for that to take place. It has now taken place. The creditors' committees have without exception unanimously approved the Joint Administrators' proposals.

47. As for the 3 applicant companies which have no creditors' committee, the position is as follows. The only creditors of Collins & Aikman HoldingsBV are the U.S. parent

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

48. Given the degree of approval to which I have referred and given also the disadvantages of each of the 3 alternatives to the Joint Administrators' proposals, I feel well able, in point of discretion, subject only to consideration of the practical effects of doing so, to exercise the jurisdiction which I have held that I have by giving to the Joint Administrators directions of the kind which they have invited.

49. What, then, are the practical effects of such a direction? The practical effect that is most relevant is that North American creditors, chiefly because of the local law as to subordination of inter-company debts, will receive less than they would have done had English law been applicable to them. Most of the North American creditors are creditors of the Luxemburg holding company, Collins & Aikman Europe SA. As I have mentioned, it does not have a creditors' committee but its creditors, chiefly the North American companies, had indicated support for the application made to me in April and, as I have said, have not since withdrawn that support**.** As early as March the 31st 2006 the Chief Restructuring Officer of Collins & Aikman North American Group had written:-

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

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

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