Neutral Citation Number: [2020] EWHC 3442 (Ch)

Case No: BL-2018-002138

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

Rolls Building
Fetter Lane,
London, EC4A 1NL

Date: 15/12/2020

Before :

MR JUSTICE MILES

- -

Between :

PJSC URALKALI	**Claimant**
- and -	
(1) GEOFFREY ROWLEY	
(2) JASON BAKER	
(as former joint administrators of Force India Formula One Team Limited (in liquidation))	**Defendants**

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- -

Tim Lord QC, Fred Hobson and Caley Wright (instructed by **Debevoise & Plimpton**) for the **Claimant**

Jonathan Crow QC, Stephen Robins, Stefanie Wilkins and Daniel Judd (instructed by **Mishcon de Reya**) for the **Defendants**

Hearing dates: 10, 11, 12, 13, 16, 20 and 23 November 2020

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JUDGMENT

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 14:00 on 15 December 2020.

Mr Justice Miles :

Introduction

1. This case is about the sale of the Force India F1 racing team. It was owned and operated by a company called Force India Formula One Team Limited ("FI" or "the company").

2. The team was more successful on the track than it was financially and by the summer of 2018 the company was in severe financial straits.

3. On 27 July 2018 FI went into administration and the defendants, Mr Rowley and Mr Baker, were appointed as joint administrators ("the Administrators"). Mr Rowley had been providing insolvency advice to the company's senior management since May 2018 and had a good understanding of its financial difficulties.

4. A number of parties were interested in acquiring the team or its business and assets. Some of them had been exploring an acquisition since the summer of 2018. Mr Rowley decided to undertake a sales process. He immediately set up a data room and met or spoke to the various suitors. He arranged emergency funding of £5m. He instructed solicitors from Mishcon de Reya ("MDR") to advise and assist him with the sales process.

5. Mr Baker had very little involvement in the administration and Mr Rowley, assisted by MDR, conducted the sales process.

6. Mr Rowley concluded that time was tight. He was concerned that the team's staff would be poached by other teams and wanted to complete a rescue or sale before the Belgian Grand Prix on the weekend of 31 August. He initially invited offers by 17:00 on 3 August 2018. Mr Rowley explained to the various suitors that there were three parties whose approval would be required for any successful acquisition (whether a rescue or purchase of the business and assets). These were the Federation International de L'Automobile ("the FIA"), which owned and regulated the Formula One Championship, Formula One Management Limited ("FOM") which owned the commercial rights, organised the championship and distributed prize money, and Mercedes/Daimler ("Mercedes"), the engine and gearbox supplier of FI's cars and a major creditor. He also explained that the main sponsor, an Austrian company called BWT, had terminated its sponsorship agreement with FI, but might be willing to renew it.

7. There were two main ways a buyer could structure an acquisition. One was to buy the shares from the existing shareholders in FI and inject sufficient funding into the company to restore it to solvency and seek an exit from administration. The second was to buy the business and assets.

8. The first of these routes required the buyer to deal with the shareholders as well as the Administrators. The shares in FI were owned by Orange India Holdings Limited ("OIH"). The ultimate owners of OIH were Dr Vijay Mallya, an Indian businessman, as to 42.5%; Subrata Roy, the principal of an Indian conglomerate called the Sahara Group, as to 42.5%; and Michiel Mol, as to 15%. Mr Rowley explained to suitors that they appeared not to be a united group. Dr Mallya was facing extradition proceedings

from the Government of India. In November 2017 a group of thirteen Indian banks had obtained a freezing injunction against Dr Mallya and OIH which prohibited dealings in the shares held by OIH in FI. He explained that a suitor seeking to rescue the company by acquiring the shares would have to obtain the consent of the Indian banks. The Indian banks had solicitors, TLT.

9. On 2 August 2018 Mr Rowley met representatives of the claimant ("Uralkali"), one of the interested suitors. Uralkali asked for information and guidance about a possible rescue or acquisition of the business and assets. Uralkali had met Dr Mallya the previous evening and was reasonably confident that it could acquire the shares. Mr Rowley outlined a possible structure for a rescue: he said that if there was evidence of a binding deal to buy the shares, and an agreement to inject sufficient funds into the company to pay all creditors and provide sufficient working capital for twelve months trading, he would be prepared to allow a period (of up to a fortnight) to seek to obtain the consent of the Indian banks. He also said that he would require non-refundable funding of £10m to cover cash outflows (including payrolls) for that period. They also discussed a possible offer for the business and assets. One of the key issues is what was said during the meeting and in an email sent by MDR later the same day. But it is common ground that Uralkali understood by 2 August that, if it wished to propose a rescue plan, it would have also to offer to buy the business and assets to take effect automatically if it failed to complete the rescue.

10. On 3 August 2018 two suitors, Uralkali and a drinks company called Rich Energy, made rescue offers. They both claimed to have reached a binding agreement to acquire the shares in the company from OIH. Both could not be right. A number of suitors, including Uralkali and a company called Racing Point UK Limited ("Racing Point"), also made bids for the company's business and assets. On the morning of 4 August DWF, a firm of solicitors acting for the Sahara Group, confirmed to Mr Rowley that its clients were at an advanced stage of discussions with both Uralkali and Rich Energy.

11. Hence by 3 August 2018 there appeared to be two potentially viable rescue bids for the acquisition of the company's shares but, by definition, only one could proceed to completion. Mr Rowley and MDR also considered that some aspects of the offers made to buy the business and assets were unclear. He took advice from MDR and Mr Collings QC on the morning of 4 August and, having done so, decided to invite best and final offers by 16:00 on 6 August 2018.

12. Uralkali continued to seek to reach terms with the ultimate owners of OIH. They found this a confusing and frustrating process as the owners seemed a disparate and disunited group.

13. On 5 August 2018 Mr Rowley had lunch with the principal of Racing Point, Lawrence Stroll. They discussed where things stood. Racing Point had not submitted a rescue plan and Mr Rowley expressed surprise about this as other suitors had done so. Mr Stroll referred to the problem with the Indian banks' freezing order. Mr Rowley explained that a buyer could seek to agree binding terms with the shareholder subject to obtaining the consent of the Indian banks and, in return for advancing irrevocable funding, be given a period to seek to obtain that consent, with a fall-back offer to buy the business and assets if such consent could not be obtained. Uralkali contends that during that lunch Mr Rowley disclosed confidential information about

its bid to Mr Stroll. After the lunch meeting there was a short meeting between Mr Rowley and MDR on the one hand and Mr Stroll and his lawyers, Withers, on the other. Mr Stroll said that he was going to contact Dr Mallya to seek to acquire the shares.

14. Between 5 and 6 August 2018 both Uralkali and Mr Stroll were negotiating with Dr Mallya to acquire the shares. In the event Mr Stroll succeeded. On the morning of 6 August Mr Stroll and Withers told Mr Rowley and MDR that they expected to be able to buy the shares and provided MDR with draft documentation for a rescue plan. MDR commented on those drafts. By the afternoon of 6 August Mr Rowley thought Racing Point would probably reach agreement with the shareholders.

15. Shortly before 16:00 on 6 August 2018 Uralkali submitted its revised offer. It did not make a rescue bid as it had not been able to reach an agreement with the shareholders. It offered to acquire the business and assets of the company for £101.5m.

16. By 16:00 on 6 August Withers had sent an offer letter which was marked as a draft and, by mistake, only half the pages had been scanned. The letter contained a rescue plan (acquisition of the shares and an injection of new funds into the company, conditional on obtaining the consent of the Indian banks) and an offer for the business and assets but the page containing the purchase price was missing. A properly scanned version was sent at 16:13. It was still marked "draft" and contained a purchase price of £70m. The letter stated that the offer to buy the business and assets would automatically kick in if the rescue plan was not completed.

17. The figures of £101.5m offered by Uralkali for the business and assets and £70m offered by Racing Point were well above Mr Rowley's estimate of the creditors of the company at that time. He thought that the claims of valid creditors were in the order of £50m.

18. Mr Rowley and MDR considered the offers. They had a meeting later that afternoon with leading counsel, Ms Hilliard QC (with Mr Collings joining by phone). During or shortly after the meeting Mr Rowley decided to offer Racing Point a period of exclusivity of about a fortnight to seek to complete the rescue, in return for non-returnable funding of £10m.

19. At 13:00 on 7 August 2018 Mr Rowley and Mr Stubbs met Mr Stroll and Withers to discuss the exclusivity agreement and the arrangements for an exit from the administration. During their meeting a solicitor from Withers handed Mr Stubbs a finalised copy of the Racing Point offer. The word "draft" had been removed. The purchase price under the fall-back purchase offer was now £90m. The way this increase from £70m to £90m came about is one of the issues in dispute.

20. Mr Rowley believed at that stage that a rescue would probably be achieved and he and MDR prepared an application to the Court to discharge the administration. It appeared that the consent of the Indian banks was likely. On 15 August 2018, however, Mr Stroll informed Mr Rowley that he was not prepared to go ahead with the rescue as he was not prepared to provide some of the documents required by the Indian banks.

21. Mr Rowley took advice from MDR and leading counsel and concluded that he was committed to proceeding with Racing Point's fall-back offer to buy the business and assets. That then happened. The team's name was changed to Racing Point. It continues to compete under that name in the F1 Championship.

22. Uralkali contends that the Administrators failed to conduct a fair and proper sales process and that the Administrators mispresented the criteria they would follow in assessing bids. It claims that:

    (a) the Administrators negligently misrepresented on 2 August 2018 that they would select the successful bidder on the basis of the most favourable offer for the business and assets of the company (the "Rescue Offer Representations");

    (b) the Administrators negligently misrepresented that the bidding process would be operated on a level playing field as between all bidders (the "Level Playing Field Representations");

    (c) the Administrators conducted the bid process negligently; and

    (d) the Administrators breached an equitable duty of confidence by disclosing confidential information to Mr Stroll on 5 August 2018 relating to Uralkali's bid.

23. This has been a trial of liability only. It is agreed between the parties that this includes issues of causation. Uralkali seeks damages for loss of a chance. It says that the court should, at this hearing, assess the percentage terms of the lost chance. The Administrators say that is a matter for the assessment of damages. I shall return to this difference later.

24. The claim is against both Administrators. Mr Baker had little involvement in the events giving rise to the claims. I shall first consider the claims against Mr Rowley and then address the position of Mr Baker.

Parties and other relevant entities and individuals and the background to Formula One

25. Uralkali is one of the largest producers and exporters of potash in the world. It is a public joint stock company based in Russia. Dmitry Mazepin is the ultimate beneficial owner of Uralkali's principal shareholder.

26. Uralkali put together a team for the bid process consisting of Mr Mazepin, Anton Vishanenko (its CFO), Paul Ostling (its senior independent director), and Oliver Oakes. Mr Oakes was a director of a company called Hitech Grand Prix Limited ("Hitech"), a company involved in managing Formula One drivers, in which Mr Mazepin had an indirect ownership interest.

27. Mr Mazepin's son, Nikita Mazepin, is a driver. He had participated by 2018 in the FI driver development programme. This had been arranged by Hitech. He currently races for the Hitech team in the FIA F2 Championship.

28. Uralkali instructed lawyers from two firms for the bid process: Alan Kartashkin and Maxim Kuleshov of Debevoise & Plimpton, Moscow, and Giles Boothman and Drew Sainsbury (both restructuring and insolvency partners) of Ashurst.

29. Mr Wormleighton of Deloitte also had some early involvement, including attending the meeting on 2 August 2018, but Uralkali did not formally engage Deloitte.

30. The Administrators are partners in FRP Advisory LLP ("FRP"), a restructuring and corporate insolvency advisory firm. Mr Rowley is one of the founders. They are insolvency practitioners. Other members of the firm who feature in the history are Mr Baggs, a senior manager, and Mr Watkins, a partner.

31. As already stated, Mr Rowley instructed MDR to advise and assist with the sales or bidding process. The main partners were Mike Stubbs, an insolvency partner; Kevin McCarthy a corporate partner; and David Leibowitz and Danny Davis, both insolvency and dispute resolution partners. At various stages Mr Rowley and MDR were advised by Matthew Collings QC and Lexa Hilliard QC.

32. I have already described OIH and its ultimate beneficial owners. One of them, Sahara Group, instructed DWF. The lead partner was Finella Fogarty, an insolvency and restructuring partner.

33. The senior management of FI consisted of Otmar Szafnauer, the COO; Robert Fernley, the Deputy Team Principal; Leslie Ross, General Counsel; and Margaret Sweeney, the chief accountant.

34. Racing Point UK Limited ("Racing Point") was the bidding vehicle of Lawrence Stroll, a Canadian businessman. His son, Lance Stroll, was a F1 driver, racing in 2018 for the Williams team. Since 2019 he has raced for the Racing Point team.

35. Mr Stroll and Racing Point instructed Withers. The relevant individuals there were Anthony Indaimo, a corporate partner, and Jamal Saleh, a corporate solicitor.

36. As already explained, the Formula One Championship is owned and regulated by the FIA. The rules of the FIA govern the terms on which teams may take part. Jean Todt was its President.

37. The broadcasting, organisation and promotional rights are controlled (under contracts with the FIA) by FOM. Teams are paid prize money which is calculated under a complicated contractual formula depending on results. FOM distributes the prize money. The CEO of FOM was Chase Carey and its General Counsel was Sacha Woodward Hill. FOM's owner was Liberty Media.

38. At the relevant times there were ten teams taking part in the annual championship. The evidence shows that FOM and the FIA wanted to maintain that number of teams if possible.

39. Another source of income for F1 teams is sponsorship. FI's main sponsor was BWT, an Austrian water technology company.

40. The heart of any Formula One car is the engine and gearbox. Cars are designed around a specific engine and gearbox. You cannot pull out the engine and gearbox and slot in another. Mercedes was the supplier of engines and gearboxes to FI. It was also a major creditor of FI and had not been paid for several years. Mercedes also owned a F1 team called Mercedes Formula One Racing Team. It was operated by

Mercedes Grand Prix Limited. Its team principal and CEO was Toto Wolff. The head of legal was Oliver Rumsey. Mercedes instructed Hogan Lovells. The lead partner there was Deborah Gregory, an insolvency and restructuring partner.

41. As already explained, there were a number of other parties interested in buying the company or its business. These included Rich Energy, a British drinks company; Andretti Group, an auto sports group; Moorad Group, a US sports franchise investor; and Castle Harlan, a private equity firm.

42. I have already mentioned the consortium of Indian banks which had obtained a freezing injunction over (among other things) the shares in FI in 2017. They instructed TLT Solicitors, who were led by James Forsyth, a restructuring and insolvency partner.

The witnesses and evidence

43. I heard evidence from four witnesses: Mr Ostling for Uralkali and Mr Rowley, Mr Stubbs, and Mr McCarthy for the Administrators. In making findings on disputed issues of fact I have considered the documentary record, the written and oral evidence of the witnesses and the inherent probabilities. The documents included emails, electronic messages (texts and WhatsApps) and notes from various notebooks. These form the bedrock for many of my findings of fact. I have taken account of the fallibility of memory and the inevitable biases inherent in the forensic process. I shall make detailed findings about the disputed evidence, but I shall record my general impressions of the witnesses at this stage.

44. Mr Ostling is and was at the relevant times the senior independent director of Uralkali. The Administrators contended that he was not a witness of truth and was a mere spokesman. That overstated things. Mr Ostling had an engaging manner and is clearly an impressive businessman. For the most part he gave his evidence straightforwardly. I have however concluded that at some important points in his evidence he said what he thought would help Uralkali's case, without much regard for accuracy. He also lacked a clear recollection of some of the important events. I shall comment on his evidence when setting out my detailed findings but give some examples at this stage:

    (a) His main witness statement overstated the extent of his early involvement in Uralkali's decision to bid. It said that he had been contacted on 30 July 2018, a day before he actually was. He said the same thing orally. He also said that he had done more research and reading about OIH and FI before coming to London than he actually had.

    (b) His statement gave the impression that it was only after a meeting he attended on 1 August 2018 in London that Uralkali had decided to make a bid, but the evidence showed that by 28 or 29 July 2018 (before Mr Ostling's involvement) Mr Mazepin had already decided to bid.

    (c) I had real concerns about his evidence about the meeting with Mr Rowley on 2 August 2018. I address this meeting in detail below, but I note here that Mr Ostling's evidence about who said what at the meeting shifted in the course of his oral testimony. I reached the view that his evidence changed as he realised

that his initial answers might damage Uralkali's case. There were other passages in his notes about this meeting which did not sit well with Uralkali's case and where I concluded that he was following a party line rather than answering candidly.

(d) Mr Ostling overstated Deloitte's involvement in the bid process. He said that Deloitte were deployed on his instructions to immerse themselves in the data room created by the Administrators. In fact Deloitte was not formally engaged by Uralkali.

45. I have concluded that I should treat Mr Ostling's evidence with caution save where it was supported by the documents or other evidence.

46. Mr Rowley is Group CEO and a joint founder of FRP, which is listed on the London Stock Exchange. Mr Rowley is its largest non-institutional shareholder. He has worked in the insolvency field for about three decades and has taken many appointments as an office-holder. He was a measured and careful witness. He was not given to speculation or digression and when he could not recall events he said so.

47. There was one aspect of his evidence which I cannot accept. This concerns a conversation Mr Stubbs had with Mr Indaimo at about 16:00 on 6 August which suggested that Racing Point might be willing to increase its offer for the business and assets from £70m to £90m. Mr Rowley said that Mr Stubbs did not relay this to him. I have concluded that Mr Stubbs probably told Mr Rowley about this later on 6 August or early on 7 August.

48. I concluded that Mr Rowley had a faulty recollection of this episode but, apart from this, his evidence was reliable and accurate.

49. Uralkali submitted that Mr Rowley gave some untruthful evidence about his assessment of the first round bids on 3-4 August and, more generally, skewed his evidence to camouflage his preference for Racing Point. I reject these criticisms of his evidence (for reasons more fully set out below). I do not consider that he attempted to camouflage events.

50. Mr Stubbs is an experienced insolvency partner at MDR. He gave his evidence with care and engaged fully with the questions he was asked. He accepted that he should probably have taken fuller notes of some of the communications and events. Uralkali submitted that he was not candid, that he had deliberately omitted key events and had, indeed, tailored his evidence to create a false impression, particularly about the events of 6 and 7 August 2018. I do not agree: I considered that he was seeking to assist Court by giving a fair and balanced account. Uralkali also suggested to Mr Stubbs that he had deliberately created a paper trail. He rejected that allegation forcefully. I concluded that he was a balanced and reliable witness who did his best to assist the court.

51. Mr McCarthy is a corporate law partner at MDR. He was a straightforward witness. He had a reasonably good recollection of the main events including the meeting of 2 August 2018: he explained that he was not an insolvency specialist and was particularly interested in what was said at that meeting about the statutory scheme and hierarchy. It was suggested in the course of cross-examination that he had not been

open about the events of 6 and 7 August 2018. I reject that suggestion. I consider him to have given candid and credible evidence. Uralkali said that his evidence sat on the side lines of the dispute. I concluded that, though he had less involvement than Mr Stubbs, he was able to give relevant evidence on some of the key events.

52. Counsel for the Administrators drew attention to various missing witnesses. Uralkali had instructed lawyers from two firms, Ashurst and Debevoise & Plimpton, and several of them attended the key meetings, including on 2 August 2018 with Mr Rowley. The bid team included Mr Vishanenko and Mr Oakes who were also at the 2 August meeting. None of these potential witnesses was called to give evidence.

53. The Administrators submitted that the most important missing player was Mr Mazepin, the principal ultimate shareholder of the company. He was the key decision maker of Uralkali in relation to the bid for FI. Mr Ostling sought and obtained Mr Mazepin's express authority to make offers to the shareholders. Mr Ostling accepted in evidence that Uralkali's bid was made without any meeting of the board of Uralkali. Mr Mazepin had been interested in a possible bid for FI for (at least) some months before the administration. Mr Ostling was unable to provide the court with any evidence about that period. When asked in court he said he did not know anything about it.

54. Soon after the administration order was made Mr Mazepin started discussing a possible bid with Mr Oakes, who was experienced in the world of Formula One. The documents show that by 28 or 29 July Mr Mazepin had decided to make a bid. That was two or three days before Mr Ostling (who was in New York) was contacted. Mr Ostling could not answer questions about Mr Mazepin's views or discussions during that period. The documents also show that Mr Mazepin was the person to whom Mr Ostling looked when seeking to negotiate with the shareholders. Mr Mazepin was at the key meeting on 2 August. He had communications over the following days with various parties including Dr Mallya (on 3 to 5 August) and Mr Rowley. Mr Ostling was unable to give much evidence about Mr Mazepin's discussions with these parties.

55. Mr Ostling did not initiate any personal contact with FOM, the FIA or Mercedes after 3 August. Mr Mazepin claimed at various points in the history to have a good relationship with Mr Wolff of Mercedes. There was at least one call where he spoke to Mr Rowley and Mr Wolff. Mr Ostling was unable to say anything about those events.

56. There are therefore significant gaps in the evidence about the extent to which Uralkali might or might not have attempted to persuade FOM, the FIA or Mercedes to support it in certain events. Any decision about whether to involve Mercedes, the FIA or FOM is likely to have been taken by Mr Mazepin (in consultation with Mr Oakes). Mr Ostling had little first-hand knowledge of any of these parties. The Court would have been assisted by hearing the evidence of Mr Mazepin and Mr Oakes.

57. Uralkali advanced no reason for Mr Mazepin's absence as a witness. Counsel for Uralkali's only submission was that there is no point calling more than one witness to cover the same ground. That is unconvincing. Mr Mazepin was a more obvious witness for Uralkali than Mr Ostling. Mr Mazepin was the main decision-maker and was driving Uralkali's bid. It will also be seen in the narrative set out below that Mr Mazepin was centrally involved in events which Mr Ostling could not provide any

evidence about. To take a couple of examples, on 4 August 2018 he had WhatsApp exchanges with Mr Oakes about discussions one or other of them had had with Mr Szafnauer and (it seems) Mercedes. Mr Mazepin sent a message saying that if they had a binding letter of agreement with the shareholders they would exclude everyone else. Mr Ostling could not provide any useful evidence about this episode. Again, Mr Mazepin said in terms in an email to Mr Rowley early in the morning on 6 August (before the close of the bidding process) that he believed Mr Rowley was acting unfairly and was deliberately favouring Mr Stroll's bid. The email is obviously relevant to part of Uralkali's case on reliance and causation. Though Mr Ostling gave some evidence about the email, he was not directly involved, and it would have been far more helpful for the court to hear Mr Mazepin's account of what he would have done.

58. There are therefore serious gaps in the evidential record and when it comes to assessing Uralkali's evidence about Uralkali's decision to bid and about what would have happened in the counterfactual world, the relevance and cogency of Mr Ostling's evidence is limited. On points where Mr Mazepin could have given significant evidence I have decided that it is appropriate to reach an inference that he would have given evidence unhelpful to Uralkali's case.

59. The Administrators elected to waive legal professional privilege over documents which are directly relevant to their attempts to achieve the objective of administration in paragraph 3 of Schedule B1 to the Insolvency Act 1986 by way of a sale of the shares or a sale of the business and assets of the company, which were created in the period after the first contact between Mr Rowley and the company on or after 1 May 2018, but before the completion of the sale of the business and assets on 16 August 2018.

60. Uralkali maintained legal professional privilege, as was its right, and I draw no inference against it for doing so.

Administrations of companies: some general principles

61. Some of the events in the story only make sense against the backdrop of the law relating to administrations.

62. The administration of companies is a creation of statute.

63. The provisions about administration are found in Schedule B1 to the Insolvency Act 1986.

64. Paragraph 3 of Sch. B1 (headed "purpose of administration") states:

> "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) realising property in order to make a distribution to one or more secured or preferential creditors.
>
> (2) Subject to sub-paragraph (4), the administrator of a company must perform his functions in the interests of the company's creditors as a whole.
>
> (3) The administrator must perform his functions with the objective specified in sub-paragraph (1)(a) unless he thinks either:
>
> (a) that it is not reasonably practicable to achieve that objective, or
>
> (b) that the objective specified in sub-paragraph (1)(b) would achieve a better result for the company's creditors as a whole.
>
> (4) The administrator may perform his functions with the objective specified in sub-paragraph (1)(c) only if:
>
> (a) he thinks that it is not reasonably practicable to achieve either of the objectives specified in sub-paragraph 1(a) and (b), and
>
> (b) he does not unnecessarily harm the interests of the creditors of the company as a whole."

65. The administrator therefore has an overriding duty to act in the interests of the creditors as a whole. Paragraph 3 creates a hierarchy of objectives. The administrator has also to perform his functions with the objective of rescuing the company as a going concern unless he thinks that it is not reasonably practicable to achieve that objective or he thinks there would be a better result for the company's creditors as a whole by taking other steps.

66. A rescue of a company as a going concern means that the company itself is saved; not merely that its business and assets are kept together through a sale. This may involve a company voluntary arrangement or a scheme of arrangement or other restructuring of the company's liabilities. Or it may involve a sale of the shares and the injection of sufficient funds to meet the claims of creditors and foreseeable working capital requirements to enable the company to return to solvency and exit the administration.

67. Where a rescue involves a purchase of the shares and the injection of funds into the company, it is for the shareholders to decide whether to sell their shares. But the administrator will have to assess whether the claims of creditors are adequately protected and whether there is sufficient working capital to return the company to solvency. Unless these conditions are met the company will not be in a position to seek an exit from the administration.

68. In their dealings in August 2018 the parties referred to a rescue involving the purchase of the shares and return to solvency as a "plan A" offer or bid, and a purchase of the business and assets of the company as a "plan B" offer or bid. I shall use these terms (while noting that they are not statutory terms of art).

69. Paragraph 4 of Sch. B1 states that the administrator of a company must perform his functions as quickly and efficiently as is reasonably practicable.

70. Administrators may be appointed by order of the court or out of court. An order appointing an administrator (or equivalent notice of out of court appointment) does not stipulate the purposes of the administration. These are set out in paragraph 3 of Sch. B1. The administration order or notice keeps all options open. The administrator has to be able to adapt and be prepared to change tack. It may seem at one stage a sale of the undertaking is the best and only option but later a viable rescue plan may emerge, compelling the administrator to switch from one objective to another. The administrator has to exercise his judgment and may have to change strategy as circumstances develop (see *Key2Law Surrey LLP v De'Antiquis* [2011] EWCA Civ 1567).

71. By paragraph 5 of Sch. B1 an administrator is an officer of the court.

72. An administrator owes fiduciary duties to the company over which he is appointed.

73. Paragraph 69 says that in exercising his functions under Sch. B1 the administrator of a company acts as its agent.

74. Paragraph 74 provides for a creditor or member of a company in administration to apply to the court claiming that the administrator has acted or proposes to act so as unfairly to harm the interests of the applicant or other creditors or members.

75. By paragraph 75 a misfeasance application may be made to the court by the official receiver, the administrator of the company, the liquidator of the company, a creditor of the company or a contributory of the company.

76. Uralkali accepted that it would not have had standing to apply to the court for relief under these paragraphs, or under the supervisory jurisdiction of the court over its own office holders (including under the rule in *ex. p. James* (1874) LR 9 Ch. App 609).

Factual narrative

77. The facts set out below represent my findings of fact. I do not cover every argument or item of evidence advanced by the parties but address those parts of the story I judge to be material to the resolution of the legal issues between the parties. I have, though, considered the entirety of the evidence and argument relied on by the parties. While this section sets out most of the history I shall return to consider some of the disputed factual issues in further detail when analysing Uralkali's claims.

Events before the administration

78. As already explained, FI owned and operated a team which competed in the FIA Formula One World Championship.

79. FI was acquired in October 2007 by a consortium led by Dr Mallya and Mr Mol. In October 2011, the Sahara Group (an Indian conglomerate founded by Subrata Roy) acquired an interest in the company.

80. By 2018 FI was wholly owned by OIH. OIH was in turn owned as to 42.5% by the Sahara Group, 42.5% by companies controlled by Dr Mallya and 15% by companies controlled by Mr Mol.

81. Dr Mallya was in a serious financial and legal plight by 2017. He was subject to an extradition request issued by India in February 2017 based on criminal fraud charges, which led to his arrest in April 2017. He (together with OIH) was also subject to a worldwide freezing order in a sum in excess of £1 billion, which was granted on 24 November 2017 in proceedings brought by the consortium of thirteen Indian banks. The order prohibited dealings in the shares in FI owned by OIH.

82. The Force India team had a good record on the track. But the company made very large annual losses and was only kept afloat by funding from its (ultimate) shareholders. By early 2018 it was in severe financial problems.

83. Mercedes was the largest creditor of FI and by May 2018 was putting pressure on its management to demonstrate that it remained viable as a going concern.

84. There was press speculation in May 2018 that Mercedes was interested in developing a "B team" (i.e. a "shadow" team to which Mercedes would supply parts and allow it to test out new technology). The same press reports referred to the possibility that Mercedes would be interested in developing FI into its B team through a tie-up with Mr Stroll.

85. On 14 May 2018 Mercedes' head of legal, Oliver Rumsey, approached Mr Rowley about FI. Mr Rowley had worked on two previous administrations involving F1 teams (including one in which Mercedes was the engine supplier).

86. Mr Rowley spoke with Mr Rumsey on 14-15 May. On 15 May 2018 Mr Rowley explained in an email that: *"I am aware of parties looking to convince Laurence Stroll to buy Force India"*. I accept his evidence that he had picked this up from press reports.

87. Mr Rowley signed a non-disclosure agreement with Mercedes. Mr Rowley advised Mercedes in broad outline about how the administration worked and how it contrasted with liquidation and restructuring outside an insolvency process. Discussions between Mercedes and Mr Rowley then continued in the second half of May. Although Mr Rowley signed an engagement letter to work for Mercedes, it was not signed by Mercedes.

88. On 28 May 2018 Mr Rowley joined a conference call with Mr Rumsey and Mr Wolff (the team principal and CEO of the Mercedes racing team), who said that they had been speaking over the weekend with Bob Fernley and Otmar Szafnauer. They said that they wanted Mr Rowley to speak to Mr Fernley and others at FI the following day. Mr Rowley accepted in evidence that Mercedes was keen for Mr Rowley to become involved.

89. Mr Rowley then spent two days at FI's headquarters at Silverstone to get to grips with the finances of the company. He met Mr Fernley and Mr Szafnauer, and the other members of senior management, Margaret Sweeney and Leslie Ross. Of the four, only Mr Fernley was a statutory director of the company. Mr Rowley learnt that FI's board was made up of eight directors, four nominated by the Sahara Group and four by Dr Mallya. The board hardly met and was dysfunctional.

90. By late May 2018 FI's income was insufficient for it to break even. It had been making losses for several years and had only been able to continue trading with the capital injections from OIH. It had also had to agree to reschedule its debts with key suppliers and had received loans from BWT. FOM had also been releasing prize money to FI before it fell due to assist with cash flow. The statutory accounts showed that by December 2017 FI had made profits of £5.3m for the previous year but had accumulated losses of £270m.

91. Mr Rowley concluded at the end of May 2018 that FI was in severe financial distress. HMRC was threatening to petition to wind it up. A company called Brockstone Ltd ("Brockstone") owned by one of FI's drivers, Sergio Perez, had also served a statutory demand with a deadline of 13 June 2018.

92. FI's senior management explained to Mr Rowley that the shareholders had been in discussions for some time with Rich Energy but that the talks had not yet borne fruit. They said they did not have any visibility as to the progress of the discussions. They said they wanted to take advice from FRP to make sure they were taking the right steps and to understand better the options for FI, including administration. The senior management also explained that FI could find itself without operational bank accounts within days.

93. Mr Rowley concluded that there was a real prospect of FI entering a formal insolvency process. He told senior management that an administration would be likely to offer the best outcome for creditors and employees.

94. Mr Rowley contacted Mr Stubbs and Mr McCarthy of MDR on the evening of 29 May 2018 as he wanted them to act for him in the event he was appointed as an administrator of FI. Mr Rowley explained in an email to Mr Stubbs that he was "reasonably sure who the buyer will be" but did not put it in writing. Counsel for Uralkali suggested that he was being cryptic to hide what he knew. I reject this. This was an early approach to solicitors, there were no formal instructions, and it is unremarkable that his email did not give any details.

95. Mr Rowley was formally engaged by FI on 30 May 2018 to advise FI and, if appropriate, assist in putting the company into administration.

96. Over the next couple of weeks Mr Rowley continued to assist FI's senior management with issues arising from the company's financial difficulties.

97. At around this time he learnt that FI was in discussions with a number of interested parties: Castle Harlan, the Moorad Group, Rich Energy, and the Andretti Group. He gathered that these parties were interested in acquiring the shares in FI or its business and assets. FI's senior management did not mention either Mr Mazepin or Mr Stroll as potential buyers at that stage. Senior management also told Mr Rowley that Dr Mallya was still optimistic about agreeing a rescue with Rich Energy. Mr Rowley advised them that they should nonetheless make contingency plans.

98. Counsel for Uralkali argued that Mr Rowley's appointment as adviser to FI, and subsequently as administrator, was thanks to Mercedes. This was part of Uralkali's contention that Mr Rowley was unduly influenced in the bidding process by the preferences of Mercedes. I shall address that submission in more detail below. But I

find that after the initial introduction, Mr Rowley was providing specialist insolvency advice to FI's senior management about their options. He was working for them and not for Mercedes. There is nothing remarkable about an insolvency practitioner being introduced to a struggling company by a creditor. I accept Mr Rowley's evidence that Mr Fernley said that he was pleased to be getting some professional advice and that he welcomed the fact that Mercedes had made the introduction. It is also common for an insolvency professional who has studied a company and advised its management about the options to be appointed as the administrator. It means that the earlier work is not wasted, and the administrator can get on with the job without having educate himself from scratch.

99. As part of their discussions about a possible administration, FI's senior management and Mr Rowley covered the possibility of encouraging Brockstone or another creditor to apply for administration. They also discussed the appeal of someone making an application in August 2018 as there was a four week break between the Hungarian Grand Prix on 27 to 29 July and the Belgian Grand Prix on 31 August to 2 September 2018.

100. Mr Rowley liaised with a number of possible suitors for the company or its assets during June and July 2018. For instance, on 20 June, at Mr Fernley's request, he provided information to the Moorad Group about administration funding under English insolvency law. He also had a meeting with Moorad's lawyers, Debevoise & Plimpton, on 4 July 2018, and had numerous telephone calls with Moorad and its representatives. As explained in a moment he also met Mr Stroll in July.

101. On 28 June 2018 Mr Rowley sent an update email to FI's senior management. This had been prompted by some questions from Sacha Woodward Hill, the General Counsel of FOM, about the administration process. He outlined in general terms how the administration process works. He said that a number of interested parties had explored the opportunity to reach a deal with shareholders and that "*has resulted in a number of those parties advising that they would not wish to acquire the company but would be interested in acquiring the business and assets from an administrator*". Mr Rowley considered at that time that a shareholder deal was unlikely. At that stage he was anticipating that if there was an administration there would probably be a swift resolution by way of a sale of the business and assets.

102. On 29 June 2018 Mr Fernley emailed Mr Rowley saying that the shareholders were exploring two possible solutions: a sale to Rich Energy or a deal whereby Mr Stroll would provide a cash injection "supported by a Mercedes 'B' team arrangement". He also mentioned the interest of Moorad, Castle Harlan and BWT.

103. On 1 July 2018 BWT terminated its sponsorship agreement with FI, ending one of FI's main sources of income. On 3 July 2018 a creditor called Formtech indicated that it would be supporting HMRC's winding up petition. Mr Rowley continued to advise the senior management of FI about these developments.

104. Mr Szafnauer sent an email on 6 July 2018 to ask for a meeting between Mr Rowley and Mr Stroll on 9 July to discuss the administration process. Mr Rowley understood at that time that Mr Stroll was interested in providing finance for the company.

105. Mr Rowley met Mr Stroll as planned on 9 July, and again the next day. Mr Rowley was accompanied to the meetings by Mr Baggs of FRP. Mr Stroll had lawyers present. Mr Rowley regarded these meetings as similar to those he had had with other suitors, including Moorad and Castle Harlan. He was finding out information about interested parties and seeking to answer their questions.

106. Mr Stroll told Mr Rowley that his primary motivation for acquiring FI was to give his son, Lance, a chance to leave Williams and race in a more competitive car. He said that he had had discussions with Dr Mallya about providing a funding line to FI. He was aware of the possibility of FI entering administration and wanted to understand the process. Mr Rowley answered Mr Stroll's questions about a possible sale of the business and assets by administrators. Mr Stroll also wanted to discuss the idea of taking over ownership of FI. Mr Stroll told Mr Rowley that Dr Mallya was also in discussions with Mr Mazepin about funding or acquiring FI. This was the first time Mr Rowley had heard Mr Mazepin's name.

107. The meeting with Mr Stroll took place at the request of FI's senior management. Mr Rowley was there in his role as adviser to the company. Mr Stroll had shown an interest in funding the company and this was a routine meeting.

108. During July 2018 Mr Stroll continued his discussions with the shareholders of FI about a possible convertible loan facility (convertible in certain events into equity). The discussions between Mr Stroll and the shareholders broke down by 26 July because of issues arising from the freezing injunction. Mr Stroll's leading counsel had advised that it was impossible to proceed with the deal without breaching the terms of the freezing injunction; and this was communicated to Mr Rowley on 26 July.

109. Mr Rowley continued advising FI's senior management during July 2018 that they should be prepared for insolvency proceedings. On 11 July he sent an email to Mr Fernley and Mr Szafnauer advising that, without further funding, administration would become a necessity and that it would be sensible for them to liaise with Formtech or Brockstone about the appointment of administrators.

110. On 20 July 2018 Brockstone issued an application for an administration order. This was issued with Mr Rowley's involvement. Mr Rowley also confirmed in evidence that Mr Stroll was in dialogue with Brockstone and their lawyer; and a lawyer for Brockstone had also attended the meeting with Messrs Stroll and Rowley on 10 July.

111. Counsel for Uralkali suggested that there was some significance in both Mr Rowley being involved in the appointment process, and Mr Stroll knowing about this. I do not agree. There is nothing remarkable about the management of a distressed company which is facing winding up proceedings liaising with a creditor about seeking administration rather than winding up. Mr Rowley had advised FI in his email of 28 June 2018 that it was unlikely that the board of the Company would resolve to commence administration proceedings and that it was therefore likely that any administration would arise only through a creditor's application. Mr Rowley consistently advised FI that administration held out the best prospect for the company's creditors and employees. Mr Stroll as a potential bidder was naturally interested in the possible administration and there is nothing surprising about such a party talking in advance to the potential administrator.

112. Mr Rowley gave his consent to act as administrator on 20 July. Mr Rowley's statement to the court filed in connection with the application expressed his confidence that Objective B could be achieved. The application for administration was listed to be heard on 27 July 2018.

113. On 26 July Mr Rowley had a call with Mr Stubbs, Mr McCarthy, and others at MDR in anticipation of being appointed. Mr Rowley's understanding at that time was that there were four parties interested in purchasing FI all of which were credible and capable: Moorad, Mr Stroll, Andretti Group, and a consortium. He said that FOM and Mercedes would have a crucial, perhaps the crucial, say on which party would end up purchasing FI. Mercedes, as engine provider, had an agreement which would not automatically transfer to the new owner. Mr Rowley said that there were some potential complications with purchasing FI, including that the consent of all the teams was required. But it was also helpful that the owners of FOM (Liberty) did not want there to be only nine teams. Mr Rowley said he thought that Moorad were FI's likely preferred group. He also said that Mr Stroll's team believe that Mercedes want them to be the purchaser, but this was uncertain as it had not been confirmed by Mercedes.

114. On 27 July 2018 FI was placed into administration by Barling J, with Messrs Rowley and Baker appointed as Administrators. The application was supported by a number of creditors, including Mercedes.

115. I shall return to what happened in the administration below. Before that I should say something about the interest shown by Mr Mazepin and Uralkali in FI before the administration.

Involvement of Uralkali and Mr Mazepin in FI before the administration

116. Mr Mazepin was avidly interested in Formula One. Mr Mazepin's son, Nikita, was (and is) a driver. Mr Mazepin had arranged in January 2016 for Nikita to enter a driver development programme with FI. Payments were made by Uralkali to Hitech (in which Mr Oakes and Mr Mazepin were interested), which entered into a contract with FI and made payments to it pro rata to Nikita's training days. These amounted to some millions of pounds.

117. There was some media speculation from as early as May 2016 that Mr Mazepin might purchase FI. Between then and mid-2018 he kept himself informed about the financial troubles of FI and the possibility of buying the shares or the business and assets. Dr Mallya's problems were well known. Mr Oakes, who appears to have known a lot about the F1 world and had many useful contacts, kept his ear close to the ground and maintained close contact with Mr Mazepin.

118. The evidence (including numerous WhatsApp messages between Mr Mazepin and Mr Oakes) suggests that Mr Mazepin was enthusiastic about buying the FI team and that Mr Mazepin probably met Dr Mallya more than once in the summer of 2018. The same messages suggest that he also met Mr Carey of FOM at that time. Mr Oakes and Mr Mazepin were discussing the best way of securing a seat for Nikita Mazepin. Mr Oakes said that he did not know whether it would be better to do this by controlling the FI team or "simply [to] buy a seat". Mr Oakes also seems to have found out and relayed to Mr Mazepin that Dr Mallya had agreed to sell to Rich Energy for about £100m. Mr Oakes and Mr Mazepin also chatted about rumours that Mr Stroll might

be interested in buying the team. It is unclear how Mr Oakes obtained this information and Mr Ostling was unable to throw any light on it.

119. In the same series of messages Mr Oakes discussed with Mr Mazepin the need to take care with Dr Mallya, as there were rumours that he had used FI for money laundering. Mr Oakes volunteered in one message that Dr Mallya had done this through a company called Eden, to which some payments (ultimately funded by Uralkali) had been made by Hitech under the driver development programme for Nikita. Mr Ostling was unable to answer questions about these messages or the payments. Counsel for the Administrators submitted that this showed that Mr Mazepin and Mr Oakes may have been prepared to make payments to Dr Mallya's personal trusts. Counsel for Uralkali submitted that any wrongdoing by Uralkali was vigorously and entirely denied. I have concluded that this strand of the story did not assist in the determination of the issues in dispute, and I make no findings about these payments.

120. I find that Mr Mazepin and Uralkali knew by May 2018 (at the latest) of the opportunity to acquire the shares or the business and assets of FI. They were also aware of the activities of other potential suitors including Mr Stroll and Rich Energy.

The start of the administration

121. As already stated, FI entered administration on 27 July 2018.

122. Mr Rowley identified a number of immediate challenges. First, the cash position was dire: the company had almost no cash in its bank account, it had almost no immediate source of income, July salaries were overdue, and August salaries would fall due at the end of the month, along with other liabilities. Second, one of the company's main assets was its team of over 400 employees. Mr Rowley was concerned that competitors were already trying to poach them. Third, a rescue through a sale of the shares depended on the shareholders in OIH agreeing to sell their shares. That was something over which the Administrators had no control. Fourth, any sale by OIH was complicated by the freezing order obtained by the Indian banks against Dr Mallya and OIH. Fifth, the existing shareholders were under grave suspicion and were unpopular with staff: Mr Rowley believed that if Dr Mallya stayed employees would leave. Sixth, there was a short period, of about a month, in which to complete the sale before the Belgian Grand Prix on the weekend of 31 August. Seventh, if the team was going to be able to carry on competing it needed an engine. It also needed permission to race and (preferably) continued access to a share of the prize money. So Mercedes, FOM and the FIA all had to approve any buyer.

123. Mr Rowley thought at the time of the administration order that the most likely outcome was a sale of the business and assets. That was the basis on which the application was made to the Court on 27 July 2018.

124. Mr Rowley set out about addressing the challenges faced by the company:

(a) He contacted all the key stakeholders, including FOM (inter alia to explore securing the company's entitlement to prize money), the FIA (to explore the team's ability to continue racing), TLT (for the Indian banks), and Hogan Lovells (for Mercedes), and he continued to liaise with them thereafter.

(b) He arranged the necessary funding to ensure that salaries could be paid, and the team could be held together.

(c) He visited the company's premises the first working day after his appointment to assure staff that their salaries would be paid (which they were) and that no redundancies were planned.

(d) He liaised with the company's senior management in order to make sure that he had the information he needed, and they had the support they needed.

(e) He sought to ensure that the shareholders did not make disruptive public statements purportedly on behalf of the company.

(f) He established a data room to give interested parties access to such financial and contractual information as he was able to provide.

(g) He commissioned a financial review to ascertain the amount required to return the company to solvency in the event of a successful rescue offer. Mr Watkins of FRP took the lead on this stream of work, and he produced a succession of draft financial reviews.

(h) He instructed external advisers to value the fixed and other tangible assets of the company.

(i) He maintained a line of communication with the main sponsor, BWT, seeking to engage them with "a number of interested parties who we consider to be credible".

(j) He maintained a line of communication with DWF, the solicitors representing at least some of the shareholders in OIH.

125. The administration therefore generated a host of urgent tasks. The sales process was an important aspect of the administration, but not the only one. The times on the emails sent at this time show that Mr Rowley worked extremely long hours, including weekends. There was a great deal going on.

126. In arranging funding Mr Rowley ensured that he did not tie his hands by giving the funder exclusivity or a right of first refusal over a sale. He told Mr Stubbs on 26 July 2018 (before his appointment) that Mr Stroll said he would want exclusivity in return for funding and that he had refused. He arranged the initial funding line with the sponsor, BWT, which was unlikely to make a bid.

127. Mr Rowley also actively communicated with potential suitors. These included Rich Energy, Moorad, Castle Harlan, Mr Stroll, Andretti Group, and others. They were provided with access to the data room on request. Documents were added to the data room as they became available. Mr Rowley also provided further financial information on request where he was at liberty to do so.

128. Mr Rowley consulted his legal advisers throughout the administration. He was effectively working from the offices of MDR throughout the period covered by this dispute. He had put MDR on stand-by as soon as he knew that the administration was realistically in prospect. He took advice from them on all aspects of the process. There

was a large team at MDR and they, like Mr Rowley, worked very long hours, including at weekends.

Uralkali's response to the administration

129. Mr Mazepin knew about the impending administration in advance from Mr Oakes. They began to consider how best to progress Mr Mazepin's interest in buying the FI team. Dr Mallya contacted Mr Mazepin by WhatsApp late on the evening of 27 July or in the early hours of 28 July to tell him about the appointment. He said that "our holding company" (presumably OIH) would work with the administrator to take the team out of administration or sell the team at the best possible price. Mr Mazepin thanked him for the update. On 28 July Dr Mallya asked Mr Mazepin (by WhatsApp) for an offer from Uralkali as soon as possible. Also on 28 July Dr Mallya sent Mr Mazepin some financial information and suggested that they speak. Mr Mazepin forwarded this to Mr Vishanenko and Mr Oakes. Mr Ostling was unable to provide any real evidence about these exchanges.

130. On 29 July Mr Mazepin sent an email to Mr Vishanenko concerning what he would need for a meeting with the Administrator and on the same date Mr Mazepin, Mr Oakes and Mr Vishanenko discussed their approach to the Administrator, and how they could put forward a compelling bid (including in light of an anticipated rival bid from Mr Stroll). Mr Mazepin also had separate discussions with Mr Vishanenko on 28 and 29 July. I find that the chief protagonists concerning Uralkali's decision to put forward an offer were Mr Mazepin, Mr Vishanenko, and Mr Oakes.

131. On 29 July 2018 Mr Oakes emailed Mr Rowley to express Uralkali's interest in the purchase of FI. A meeting between Uralkali and Mr Rowley was arranged for 2 August.

132. Mr Mazepin decided that he wanted a spokesman to lead the bidding process. He was concerned that Russians were unpopular in the UK. He first turned to Sir Rob Margetts, a non-executive director of Uralkali, to act as spokesman. He declined and Mr Mazepin then turned to Mr Ostling, on 31 July. Mr Ostling agreed to become the bid spokesman and took a flight from New York to London the same day.

133. Mr Ostling said in his witness statement that he was first contacted about the bid on 30 July 2018. He repeated this in his oral evidence. The statement then said that he then read several years of accounts of OIH and did some background research about FI, before taking a flight from New York to London on 31 August. The statement said that he then attended a meeting in London on 1 August with Mr Mazepin, Mr Oakes, Mr Vishanenko, and various lawyers, where the decision was taken to make a bid.

134. This evidence was not correct. Mr Ostling was first contacted about the bid by Mr Vishanenko on 31 July 2018 in the morning (local time). He caught a flight that afternoon. He did not read several sets of accounts of OIH; he in fact read one year's worth of accounts of FI. He had little time for research. His notes of the meeting of 1 August show that his knowledge about FI was rudimentary. He misspelt the name of Dr Mallya. As noted earlier, I consider that Mr Ostling's witness statement overstated the extent of his involvement in the decision to make a bid. Mr Mazepin was not called to give evidence about the decision to make a bid and Mr Ostling was unable to answer any questions about the period before his own involvement.

135. Mr Ostling was initially asked to be the spokesman for the Uralkali bid. At some point on 1 August 2018 Mr Mazepin asked Mr Ostling to lead the formulation and development of the bid. Counsel for Uralkali submitted that in substance the goal of executing and winning the bid was delegated to Mr Ostling. But that is an overstatement. The communications after 1 August show that Mr Mazepin remained the key decision maker. Mr Ostling looked to him personally (not the board of Uralkali) for authority. Mr Ostling did take a leading (though not exclusive) role in conducting the negotiations with the shareholders, but he did not initiate contacts with Mercedes, FOM or the FIA and (apart from the meeting on 2 August) did not have any discussions with Mr Rowley.

136. Uralkali created a bid team comprising Mr Mazepin, Mr Kartashkin, Mr Vishanenko, Mr Ostling and Mr Oakes. They met on the morning of 1 August 2018 in a London hotel to discuss strategy. Mr Boothman and Mr Sainsbury of Ashurst also attended. The bid team decided at the meeting that Uralkali should submit both plan A and plan B offers.

137. Mr Wormleighton of Deloitte attended the meeting of 1 August. Deloitte were not formally engaged by Uralkali in relation to the acquisition. In his evidence Mr Ostling suggested that a team from Deloitte had been involved in conducting due diligence on his instructions. I find that Mr Ostling overstated their involvement to bolster the impression that a standard, commercial, bidding process was followed by Uralkali. In fact Uralkali appears to have undertaken no analysis or evaluation of the possible commercial benefits it might generate from owning FI. Deloitte did not, contrary to Mr Ostling's evidence, undertake a due diligence process.

Meeting of 1 August 2018 between Mr Rowley and MDR and Mr Stroll and Withers

138. On 1 August 2018 Mr Rowley, Mr Stubbs, Mr McCarthy and others from MDR met Mr Stroll and his lawyers from Withers. Mr Szafnauer was also present.

139. Mr Rowley thought at that time that Mr Stroll was planning to make a plan B offer and was not contemplating any form of plan A offer.

140. My findings about this meeting are based on an MDR attendance note, handwritten notes made by Mr Spencer, another solicitor, the evidence of Mr Rowley, Mr Stubbs and Mr McCarthy, the known context, and the inherent probabilities.

141. Mr Rowley summarised what had happened over the past few days. He said that the FIA's consent to any sale would be needed. He said that he had the backing of seven of the nine teams to an assignment of the prize money and that Mercedes was reserving the right to approve any solution. He said he was fully engaged with all interested parties but had to work under a short timetable because of the cashflow needs of the business. He said that the shareholders still believed that they could deliver a solution but were being diverted by the extradition proceedings. He said that he wanted initial bids by the end of the week (3 August). His plan was then to take the bids, provided they were acceptable, to FOM for the racing teams' approval, after which he would seek the assent of Mercedes and the FIA. He hoped to close the transaction by 10 August 2018.

142. Mr Stroll said that he wanted to complete by the following Friday noon at the latest. He said he was ready to make a binding offer. He said he would pay for the assets and the value of trade creditors in full. He wanted to keep the 400 employees. He said that he was driven by the passion of his son and was a suitable person to run the business. He said that he had already placed £50m in Withers' account.

143. Mr Stroll said that he had a letter from Mr Wolff stating that he was Mercedes' preferred bidder, and he presented a letter from Mercedes which he said reflected this. Mr Rowley read the letter and pointed out that one of its clauses said that the agreement could be terminated with immediate effect if Mercedes received a better offer which Mr Stroll failed to beat. Mr Stubbs described Mr Stroll's position as a very compelling offer. He must have understood that Mr Stroll was prepared to pay £50m.

144. I find that Mr Stroll had come to the meeting hoping to secure an immediate deal to buy the assets for that amount.

145. Mr Rowley said that he would have to give other interested parties a reasonable opportunity and that if he did not do this he could be sued. He also said that he had to allow the shareholders an opportunity to make representations or he could face an injunction.

146. Counsel for Uralkali submitted that this revealed that Mr Rowley was doing little more than going through the motions and had already decided to favour Mr Stroll. Counsel called the bidding process a rigmarole. I reject these submissions. I find that Mr Rowley was seeking to answer, as tactfully as possible, Mr Stroll's insistence that he had been anointed by Mercedes and that there could be nobody else seriously in the running. Mr Stroll was a self-confident, even overbearing, businessman, used to getting his own way. Mr Rowley concluded that Mercedes had not committed itself to support Mr Stroll. He was not willing to enter an immediate deal at the meeting. He referred to being sued to explain why he could not deal exclusively with Mr Stroll. I conclude that the sales process was a genuine one and was undertaken to seek to elicit offers.

147. Counsel for Uralkali also relied on a passage in Mr Spencer's notes which recorded Mr Rowley saying that he had no issue with issuing a sale contract to Mr Stroll that day. But that part of the notes cannot be squared with Mr Rowley saying that he needed to consider other bidders; it is at any rate clear from the outcome of the meeting that Mr Rowley was not prepared to enter an immediate deal with Mr Stroll. I find that Mr Rowley probably conveyed that he would have been happy to enter a contract with Mr Stroll had it been clear that Mercedes had committed to deal with Mr Stroll and nobody else. But since the Mercedes letter did not say that, he could not conclude an immediate deal with Mr Stroll.

148. Mr Stroll said at the meeting that he had assumed that all nine teams would sign up to an agreement that the prize money could be assigned with the business and assets but that it now looked as though McLaren and Williams would not. He said that he was very disappointed. Renault had also given a qualified approval. Mr Stroll said that he would be prepared to sign without the signatures. Mr Rowley said that this could be a big problem for a sale. He had not yet heard from Ms Woodward Hill that there was no prospect of getting all nine signatures. He would have to ask the other interested

parties if they would proceed without this. He thought they would require the consent to the assignment of the prize money as a condition of any offer.

149. Counsel for Uralkali relied on some passages in Mr Spencer's notes about this part of the meeting to submit that Mr Stroll and Mr Rowley had devised a scheme to put off other bidders and clear the way for Mr Stroll's bid, while at the same time maintaining the appearance of a proper process. The passages said: "*need Sasha [Woodward Hill] to email him to say that no chance of having 9 signatures. Others bidders won't want to acquire w/out all signatures*," and "*[n]eed an email from Sasha that there will not be 9 signatures. Geoff will then ask other bidders if they are willing to proceed without all signatures*."

150. I reject the submission that Mr Rowley and Mr Stroll were devising a means of clearing the field for Mr Stroll:

(a) Mr Rowley was responding to Mr Stroll's assertion that the administrators would not get all nine signatures, which took him by surprise. He said that he had thought from his discussions with Ms Woodward Hill that everyone would sign up and that before he could be sure he would need to see this in writing from FOM.

(b) The attendance note of the meeting records (and I find) that Mr Stroll was disappointed by the refusal of some teams to sign up; though he went on to say that he would proceed with his bid nonetheless. I find that Mr Stroll, as a potential bidder for FI, would have preferred to see all of the teams agreeing to a transfer of the prize money.

(c) Mr Rowley wanted to achieve a sale as quickly as possible and at that time thought that the most likely route was via a plan B. If it had quickly become clear that none of the other potential bidders would be interested in buying the business and assets without a transfer of the prize money that would have simplified matters and speeded things up. But that does not mean that Mr Rowley was seeking to assist Mr Stroll in his bid and clear the field. The willingness of the other teams to agree a transfer was outside the control of Mr Rowley or Mr Stroll.

(d) It is telling that at the meeting of 2 August with Uralkali (addressed below) Mr Rowley explained that seven of the nine teams had already signed and that FOM was working on the other two but there were politics involved. There was still hope at that stage that the other two teams would sign up. This weighs against Uralkali's submission that Mr Rowley and Mr Stroll devised a scheme on 1 August to put off other bidders: had there been such a scheme Mr Rowley would probably have told Uralkali on 2 August that there was no prospect of doing a deal with all nine teams.

(e) Uralkali's allegation is that Mr Rowley devised a scheme to clear the field for Mr Stroll. Mr Rowley was a professional man with a reputation to protect. It is inherently improbable that he would act unprofessionally and put his reputation at risk.

(f) The meeting of 1 August was attended by experienced solicitors from MDR and Withers. It is hard to conceive that Mr Rowley and Mr Stroll could have devised a scheme to clear the way for Mr Stroll while pretending to have an open bidding competition without that being obvious to the solicitors present. They were experienced professionals and would not have stood by.

151. For these reasons I find that Mr Rowley wanted to know what the nine teams' position was. This would be highly relevant to the sale process. Their consent was a matter for them. If their consent could not be obtained and Mr Stroll was the only buyer, so be it. But I reject the submission that Mr Rowley and Mr Stroll were parties to a scheme to clear the field for Mr Stroll.

152. Towards the end of the meeting Mr Rowley said that the next stage for Mr Stroll was to provide an offer letter. He reiterated that he had to continue seeking other potential buyers as the Mercedes letter showed that Mercedes was open to accepting other offers.

153. After the meeting, at 12:41 on 1 August 2018, Mr Rowley emailed Ms Woodward Hill, asking whether the other teams would consent to the assignment of the prize money rights. Ms Woodward Hill responded by explaining that Mr Stroll had spoken to Mansour Ojjeh (a shareholder in McLaren) and "made things worse" in terms of obtaining McLaren's consent. Uralkali submitted that this was part of the plan reached by Mr Stroll and Mr Rowley at the earlier meeting. I have already rejected the submission that there was such a plan. At any rate any discussion between Mr Stroll and Mr Ojjeh probably happened before the meeting, and at the meeting Mr Stroll explained that McLaren was unlikely to consent. He also said that he was disappointed about this. There was good reason for that: any buyer would have preferred to have the benefit of the FOM prize money (which potentially ran to tens of millions of pounds). I reject Uralkali's submission that Mr Stroll deliberately sought to scupper the chances of obtaining the consent of the other teams so as to discourage other bidders and leave him with a clear run. I find that he had tried to persuade McLaren to consent but had failed.

Meeting of 1 August 2018 between Uralkali and Dr Mallya

154. On the evening of 1 August 2018 Uralkali's bid team met Dr Mallya and his legal team. Uralkali was hoping to pin down a deal with Dr Mallya to buy the shares. Dr Mallya gave the impression of favouring a deal with Uralkali; Mr Ostling considered that an agreement was possible although the meeting was inconclusive.

Uralkali's meeting with Administrators on 2 August

155. At about 10:00 on 2 August 2018 Uralkali's bid team met Mr Rowley and his solicitors. The Uralkali attendees were Mr Mazepin, Mr Ostling, Mr Oakes, Mr Kartashkin, Mr Boothman and Mr Sainsbury. Mr Wormleighton of Deloitte also attended. Mr Rowley was accompanied by Mr Stubbs, Mr McCarthy, Mr Khan, Mr Spencer, Ms Girven and Ms Dwyer (a work experience student) of MDR.

156. Ms Dwyer prepared an attendance note. There are also eight sets of notes of the meetings from various attendees' notebooks. My findings about the meeting are based

on these various notes, the witness evidence, the known context and the inherent probabilities.

157. My findings about the meeting are these:

(a) There was an introductory section. Mr Rowley opened the meeting by thanking the Uralkali team for coming. Mr Ostling said that they were there to introduce themselves and answer any questions. They wanted to understand Mr Rowley's vision and explain their own. Mr Ostling explained that they would be meeting FOM at 13:00.

(b) Mr Ostling then provided background about Uralkali and its business and Mr Mazepin. He said that Uralkali was ready, willing and able to make the purchase. He said that Uralkali wanted to get the right deal and were looking for guidance from Mr Rowley. Mr Ostling introduced the bid team. He explained that Uralkali had retained Debevoise and Ashurst. Mr Ostling said that the Uralkali team had done their own research into FI. He asked Mr Rowley for his vision.

(c) Mr Rowley said that he considered the Uralkali bid team was first class.

(d) He said that he had no predetermined view as to the solution. He said he was agnostic.

(e) Mr Rowley explained that the company was insolvent and had been unable to pay its debts for some time. He said that FI had been underinvested.

(f) Mr Rowley explained that there was a statutory hierarchy in an administration and went through the three statutory objectives. He said that while most companies in administration are not rescued it was doable. Mr Ostling recorded in his notebook: "most not rescued, few come out as rescued, no cram down, but doable". As explained earlier, I found his oral evidence on this part of his note troubling. He accepted early in his evidence that Mr Rowley had said this. He later said that Mr Rowley had said "no cram down" but that the word "doable" was his own. He then said he was not sure. I reached the view that he changed his evidence because he thought it was unhelpful to Uralkali's case if Mr Rowley had said that a rescue was doable. I find that Mr Rowley did say this but also said that rescues were rarely achieved.

(g) Mr Rowley also said that a rescue would be challenging, and that there had been no successful rescue in Formula One history.

(h) He then explained that the right to participate in F1 derives from two things. The first was being entered in the FIA championship and the second was the contract rights to share in prize money under the agreement with FOM. Mr Rowley said that the prize money was the main source of money for FI. He explained that neither of these things was assignable. He explained that though a rescue would be difficult to achieve, FI was a good team. FI had had success on the track and had very good employees.

(i) Mr Rowley explained that the commercial rights owner (i.e. Liberty) had spent large amounts and wanted there to be ten teams. It was therefore motivated to find a solution.

(j) Mr Rowley explained that FOM had tried to seek the consent of the other nine teams for the benefits under the contract with FOM (the rights to prize money) to be assigned or transferred. He said that FOM itself would also have to consent to a transfer. He said that so far seven of the nine teams had approved and that FOM was working on the other two but that there were politics in play. He explained that this was important as it could mean that there would be a shortfall in the funding of about £60m-£70m.

(k) Mr Rowley explained that the FIA was happy for a purchaser of the business to enter an entry form for the F1 championship. He explained that the FIA had three criteria for entry: financial wherewithal, long term commitment and reputation. The FIA would take a holistic view of each buyer.

(l) Mr Rowley turned to the position of Mercedes. He said that there could be no team without an engine and that the fact of the administration gave Mercedes the right to terminate its supply contract. Mercedes had so far reserved its position. He explained that it would be important for a buyer to convince Mercedes, whether the offer was for a rescue or to purchase the business and assets. He said that Mercedes was very unhappy as they had not been paid by FI for years. He said that he assumed that Mercedes had the same criteria for an acceptable buyer as did the FIA/FOM.

(m) Ms Dwyer's attendance note records that someone at Uralkali said that while there was talk of Mercedes having made agreements, they believed that Mercedes would toe the line and do what FOM wanted. Mr Mazepin said that he knew Mr Carey and Mr Wolff well. The other notes do not contain this point, but it is probable that it is an accurate record.

(n) Mr Ostling asked about the position of the employees and whether they would tolerate Dr Mallya still being involved. Mr Rowley said that if the existing shareholders were to continue to be involved there might be a problem with senior members of staff. Mr Rowley said that there was anyway a problem of key management departing the team and that other teams were making them offers.

(o) Mr Ostling asked Mr Rowley whether he had any power over the shareholders and Mr Rowley said that he could not force them to sell or dilute their shares.

(p) There was then a discussion about what would be required to restore the company to solvency. Mr Rowley explained that he would need evidence that the company could pay its creditors, not including the alleged shareholder loans. Mr Rowley explained that his current valuation of the creditors (excluding shareholder loans) was in the order of £40-£50m. Mr Rowley also explained that for a return to solvency he would need to be satisfied that the company had sufficient working capital for twelve months. A little later they came back to this subject and Mr Rowley said that he estimated that at total of

£75m-£80m was required to pay the debts and fund the business and restore it to solvency.

(q) There was then discussion about the principal sponsor, BWT. Mr Rowley explained that BWT had terminated the sponsorship agreement, which had been worth £15m a year. He said that BWT were fed up with the shareholders but were open to discuss possible reinstatement with a new buyer. Mr Rowley provided some information about the claims of HMRC (which were over £4m).

(r) Mr Rowley turned to timing. He said that he was keen to proceed quickly for a number of reasons. He explained that he had been given a £5m funding line by BWT. The company had a net funding requirement of £10m for August. It would have to pay two payrolls, for July and August, of about £2.5m each. He estimated that the net asset base of the company was worth about £15m-£20m and that if he had spent £10m without finding a solution he would have lost half its value.

(s) Uralkali then invited Mr Rowley to explain how a rescue would work. He said that if there was a rescue deal on the table he would need to return to the court and explain that he was satisfied that the company had sufficient funding such that it could be returned to the shareholders.

(t) Mr Rowley then turned to the position of the Indian banks' freezing order. He explained that Dr Mallya and OIH were subject to a freezing order which affected the shares in FI. The banks' consent would be required for a transfer of the shares. Mr Rowley said he had spoken to the banks' lawyers, TLT, who were unable to give an estimate of how long it would take to obtain their consent. He said that Dr Mallya's shares had also been pledged to Diageo. He said that he did not understand the relationship between the shareholders and did not know whether the banks would consent.

(u) Mr Rowley explained that a rescue would take several weeks as it would require the approval of the Indian banks, FIA, FOM and Mercedes. An application to exit administration could be prepared in a few days. He said that in these circumstances he would need any rescue bidder to provide a non-refundable commitment fee of £10m. Mr Rowley said that a rescue of the company would play well, but not with the existing owners remaining involved.

(v) Mr Rowley said that there were four very credible parties interested in buying the business and assets. He said that those parties had explored a rescue before the administration and had decided it was not feasible as they could not get a deal with the shareholders.

(w) Mr Ostling asked about timing for offers and Mr Rowley said the deadline was on the afternoon of 3 August. Mr Rowley then said that if someone put in a rescue offer he would have to consider whether it was deliverable and, if not, would then look at the options for a sale of the business and assets.

(x) Mr Rowley said that once he had gone through the bids he would go to FOM, the FIA and Mercedes to get their thoughts. Mr Rowley said that there was no simple way of deciding who would be accepted. He said that he had been in regular contact with everyone and that there was a level playing field for the bidders. Mr Ostling raised this point because of Uralkali's concern that the Administrators might be biased in favour of Mr Stroll.

(y) The Uralkali team then had a short break-out meeting. They returned and set out the broad terms of Uralkali's proposal. Mr Ostling began by saying that they would provide £10m funding as a subordinated loan. Mr Ostling then outlined a plan A and a plan B. Plan A was to seek to make a deal with the shareholders to acquire the equity. If they could reach such an agreement they would meet the claims of creditors in full. Mr Ostling said that Uralkali wanted an exclusivity period of two weeks to engage with the banks and shareholders in an attempt to acquire 90% of the shares. However, if that failed they would move to plan B, to buy the business and assets. Mr Ostling raised a concern about timing and said that Uralkali would have to show that they had reached a binding agreement with the shareholders by the following day. This would have to be evidenced in writing from the shareholders or their solicitors, DWF. Mr Rowley said that if Uralkali had a binding agreement with the shareholders he would be prepared to give them a two week exclusivity period in relation to plan A only, and in return for this he would require the non-refundable fee of £10m so that he would not be depleting the asset base.

158. Mr Ostling gave evidence that Mr Rowley said at the meeting that a rescue was not practically achievable. I find that Mr Rowley did not say that:

(a) As the findings above show, Mr Rowley said a number of things which only made sense if he was regarding a rescue as potentially achievable. He referred expressly to the statutory hierarchy, which puts a rescue first. He did not say, when going through the hierarchy, that the administrators had determined that a rescue was not achievable. He said that there was no predetermined outcome and that he was agnostic. He said that, through rare, a rescue was doable. He said that a buyer would have to convince Mercedes regardless of whether the offer was to rescue or to purchase the business and assets. There was a discussion about restoring the company to solvency, which would only have applied in the case of a rescue bid and not in the case of a business and asset purchase. Uralkali asked Mr Rowley to explain how a rescue would work and he did so.

(b) There was also discussion of the non-refundable commitment fee of £10m, which only related to a rescue and not a purchase of the business and assets. Again had Mr Rowley said that a rescue was not viable this part of the discussion would have been redundant. After discussing the timing of offers, Mr Rowley reiterated that he would first have to consider the viability of a rescue offer, before considering a sale of the business and assets.

(c) If Mr Rowley had said that he had already concluded that a rescue was not practicable it is improbable that Uralkali would have said (after taking a short break) that it was intending to make to a plan A offer.

(d) The email written by Mr Rowley to Ms Fogarty at 17:22 on 2 August is only consistent with him believing a rescue (though challenging) was a realistic possibility (see [164] below).

(e) In an email of 3 August Mr Stubbs said to Mr Boothman that Mr Rowley *"made specifically clear yesterday that a return to solvency is objective 1 of any administration (if very rarely achieved)"*. I find that that statement was accurate. Mr Boothman did not take issue with it or suggest that Mr Rowley had already said that a rescue was not practically achievable.

(f) I have already recorded that I found Mr Ostling's evidence about various parts of the notes to be unreliable. I have already referred to his evidence the word "doable" in his own notes. His notes contained other passages which were clearly referring to a possible rescue. When taken to these he maintained his position that Mr Rowley had in fact said that a rescue was unachievable but was unable to provide any cogent explanation of what he had written.

159. Uralkali's pleaded case is that:

> "[a]t this meeting Mr Rowley explained that the successful bidder would be selected on the basis of the most favourable business and asset purchase offer and that a party would only be offered the chance to pursue a rescue if it submitted the most favourable business and assets purchase offer".

160. This plea was not included when the case was commenced in September 2018 (a few weeks after the meeting), though it was alleged that something similar was represented by Mr Rowley's unspecified "conduct" at the meeting. The plea that Mr Rowley made this representation by words was only introduced by amendment in July 2020.

161. I find that Mr Rowley did not make this statement at the 2 August meeting:

(a) As I have found above, he explained the statutory hierarchy and discussed the priority of a rescue bid. He also said in terms that the administrators would have to consider first whether there was a viable rescue plan and then, if there was not, consider any offers for the business and assets.

(b) A statement to the effect pleaded would have been an arresting one, at least to the insolvency specialists present, as Mr Rowley would have been saying that he would act at odds with the statutory hierarchy, by making the most favourable plan B offer even if there was a viable rescue offer.

(c) If said, it would also have been an important piece of information, as it would have contained key criteria for the assessment of the bids. Someone would therefore have written it down. There are nine sets of notes, four from Uralkali's side. None of the notes contains any record of the alleged representation. As explained above, the notes in fact record the opposite (see subparagraph (a) above).

(d) As already recorded, Mr Stubbs wrote an email the following day saying that priority would be given to a rescue under the statute. There was no suggestion that this was wrong.

(e) There were eight representatives of Uralkali at the 2 August meeting. No explanation has been offered for the fact that Uralkali did not plead this in September 2018 and only raised the plea by amendment in July 2020.

(f) I prefer the evidence of Mr Rowley, Mr Stubbs, and Mr McCarthy to that of Mr Ostling (both generally and specifically concerning this meeting). They each said that there was no such representation.

162. Mr Ostling said in the course of his oral evidence that, at the meeting, Mr Rowley explained that, while he was prepared to give a bidder a window to see if it could pull off a rescue deal, he would need to have the security of a winning plan B deal in hand to fall-back upon if the rescue could not proceed. I do not accept that he said that at the meeting. He said at the meeting that he would assess a rescue offer first to determine its viability and that if there was no viable offer, he would turn to plan B offers. He also said that for a plan A offer to be considered he would require evidence of a binding agreement with the shareholders and a non-refundable fee of £10m. He did not say that he required the security of a "winning plan B deal" in hand. I prefer the evidence of Mr Rowley, Mr Stubbs, and Mr McCarthy (which is corroborated by the notes) to that of Mr Ostling on this point. I concluded that was another example of Mr Ostling giving evidence that he thought would assist Uralkali's case rather than giving his best recollection of events.

Mr Rowley and MDR's meeting of 2 August 2018 with FOM

163. On the afternoon of 2 August Mr Rowley, Mr Stubbs and Mr McCarthy met Mr Carey and Ms Woodward Hill of FOM. Mr Carey said that FOM wanted to see a new financially stable team emerge out of the current uncertainty and wanted this to happen quickly. Mr Carey pointed out the risk inherent in accepting a rescue offer in circumstances where it was uncertain that it would ever complete. He suggested that the Administrators should insist that any bidder making a rescue offer should be required also to make a fall-back offer for the business and assets, so that the Administrators could move seamlessly to the latter if the rescue unravelled for any reason. Mr Rowley liked and endorsed this suggestion. He saw it as consistent with the statutory hierarchy since it gave priority to a rescue but would speed up a plan B deal if the rescue failed. Mr Stubbs and Mr McCarthy were also happy with the approach.

164. At 17:22 on 2 August Mr Rowley sent an email to Finella Fogarty of DWF. They were acting for the Sahara Group of shareholders, but Ms Fogarty also seems at times to have talked to Dr Mallya. In his email Mr Rowley referred to his meeting earlier that day with Mr Mazepin and his advisers. He said that it had been constructive. He said that Mr Mazepin's team had said that they wished to explore a return to solvency (i.e. a rescue) and that all present agreed that there were a good number of challenges that would need to be addressed to do this. He explained that he had agreed to consider providing a period of time to seek an exit from administration subject to some conditions, including a subordinated funding agreement, confirmation that

binding terms had been agreed with the only condition being consent from the Indian banks.

Email of 18:45 on 2 August 2018 (the 2/8 email)

165. Mr McCarthy emailed Ashurst at 18.45 on 2 August ("the 2/8 email"). The email was approved by Mr Rowley in draft before it was sent. As this is a key document, I set it out in full:

> "Giles
>
> Thanks for calling back - I was principally calling to clarify our earlier discussions. The email below sets out the position therefore no need for us to speak further unless any of the below is unclear.
>
> The Administrator has agreed that he will consider providing a period of time to seek an exit from administration (likely maximum 2 weeks) subject to a number of key matters, including:
>
> 1. A subordinated funding agreement between Mr Mazepin and the Company on terms to be agreed;
>
> 2. Written confirmation from Debevoise/Ashurst that binding terms have been agreed with OIH and its shareholders for a wider transaction to be completed that provides sufficient funding (to the satisfaction of the Administrator) for the Company to exit from administration. The only outstanding condition that can exist between Mr Mazepin and OIH and its shareholders will be consent from TLT acting for the Indian banks who have the freezing order in place.
>
> 3. A similar letter from DWF confirming that binding terms have been agreed with the only outstanding condition being consent from the Indian banks.
>
> Two further points which were clarified in discussions with F1 this afternoon:
>
> i. For Mr Mazepin's bid to proceed on the basis of the above (Plan A) structure, it will essentially have to be the preferred option on the basis of the Plan B structure (acquisition of business and assets). If selected on the basis of your Plan B, Mr Mazepin will be afforded the two week period to seek to deliver on his Plan A, failing which, he will already have been selected, and undertaken to deliver, on the basis of his Plan B. Neither the Administrators nor Fl can be in the position whereby Plan A fails and there requires to be a reassessment of the other options (and, potentially, a change of preferred bidder at that stage).
>
> ii. We understand that Mr Mazepin's bid is being made as part of a consortium (something we had not previously been aware of). We would flag only that all consortium members will require to be satisfactory to the relevant stakeholders from a reputational (KYC and source of funds) perspective.
>
> Mr Mazepin's wider proposals and the above confirmations will need to be received by the Administrators by no later than 5pm tomorrow (Friday 3 August 2018) which they shall assess alongside any offers they receive from interested parties seeking to purchase the business and assets of the Company."

166. The first half of the email confirmed what had been said at the meeting that morning. It spelt out more fully what the Administrators would require as evidence that there was a binding deal. Mr Ostling said in evidence that he considered that Mr Rowley was seeking to impose further conditions on Uralkali in order to make a rescue more difficult for Uralkali. That was wrong and I reject it. Mr Rowley had said that morning that he would require evidence of a binding agreement with the shareholders.

167. The second half of the email was prompted by the afternoon meeting between Mr Rowley (and MDR) and FOM.

168. There are a number of disputed issues about the interpretation of this email, the parties' respective understandings, and reliance and causation. I shall set out my findings on these points when analysing Uralkali's claims.

169. At this stage I find as a fact that the point about the need for a fall-back plan B offer (set out subparagraph i.) was not made at the meeting with Uralkali that morning but arose from Mr Carey's suggestion made later that day. At the morning meeting the parties had been assuming that the Administrators might permit Uralkali two weeks to pursue a rescue plan and then, if that failed, return to the various bidders to seek their plan B bids. The email said that, if it wanted to make a rescue bid, Uralkali would have also to make a plan B bid to which it would be committed if the rescue failed. I find this was a novel idea, not discussed at the meeting of 2 August. I reject the evidence of Mr Ostling that this part of the email reflected what had been said at the meeting and prefer the evidence of Mr Rowley, Mr McCarthy, and Mr Stubbs that that this part of the email arose out of a meeting with FOM. The email says that in terms. I concluded that Mr Ostling was again saying what he thought would assist Uralkali's case rather than giving his genuine recollection.

170. At 23:25 on 2 August Mr Boothman replied by email to the 2/8 email. He said that Uralkali were surprised and disappointed by the conditions set out in Mr McCarthy's email. He said that this went beyond what had been discussed at the meeting that morning. I do not accept that Uralkali thought this as Mr Rowley had said at the meeting (as recorded in several of the handwritten notes) that there would have to be a binding agreement with the shareholders. Mr Boothman went on to say that Uralkali had put forward a proposal to rescue the company. He said, "*[g]iven that on their assessment there is a surplus available for equity, the administrators will not be acting in accordance with their duties if they do not allow a proper chance for an offer of this nature to be implemented*". He said that Uralkali had made a proposal to the equity owners and awaited their response. He said that Uralkali was concerned that the equity holders had been told about its proposal and that, "*we are concerned that the administrators have not been running a level playing field to bidders which may deprive creditors, employees and equity holders of the best opportunity reasonably available which may also achieve the survival of the company*." He requested written confirmation that the bidders were being treated equally.

2 August: Uralkali's discussions with shareholders

171. Uralkali continued to pursue a rescue bid for FI. That was its preferred option. Mr Ostling explained in evidence (and I find) that Uralkali was very keen, if possible, to achieve a rescue.

172. Uralkali had further discussions with OIH's shareholders, primarily through Ms Fogarty of DWF solicitors. Uralkali made an offer by phone for the purchase of 90% of OIH's shares in FI on the evening of 2 August. On 3 August 2018 at 13:20, Ms Fogarty emailed Mr Ostling, saying that Dr Mallya and Mr Mol were minded to accept his verbal offer but that she was having difficulty in obtaining final instructions. The email said that the offer was for 90% of the shares with all current shareholders to be removed from the board and day-to-day management. Mr Ostling said in evidence that he was further aware that Ms Fogarty had agreed to write to the Administrators encouraging them to give careful consideration to Uralkali's bid. He said that Uralkali therefore considered that it had reached agreement in principle with OIH's shareholders. But Mr Ostling knew that the email from Ms Fogarty did not say that Sahara had agreed. There was a further email at 13:24 on 3 August by which Ms Fogarty told Mr Ostling by email that she did not have final instructions on acceptance (see [179] below).

173. At 08:00 on 3 August 2018 Mr Stubbs responded to Mr Boothman's email of 23:25 the previous evening. He expressed surprise. He said that the conditions of any offer had been explained at the meeting of 2 August. He said that Uralkali's proposals had not been provided to equity holders; rather they had outlined what the requirements were. He said that the Administrators were running a level playing field, but that this meant putting creditors first. He said that Mr Rowley, "*made specifically clear yesterday that a return to solvency is objective 1 of any administration (if very rarely achieved). This is the key matter to resolve between yourselves and the shareholders*." He offered to do their best to help in any way they properly could.

174. Mr Boothman also spoke to Mr McCarthy on 3 August. Mr Boothman reported to his team after the call. He had said that Uralkali was putting forward a bid that achieves survival of the company. Mr McCarthy had acknowledged this and said that Uralkali was being taken seriously but that "*they are sceptical about deliverability of the equity and don't want to lose their plan B offers*". Mr Boothman had repeated to Mr McCarthy that Uralkali had a concern that the Administrators were favouring another bidder and there was concern that it was not a level playing field. He said that the Administrators could not ignore the offer Uralkali had made to the shareholders.

Discussions with FOM, the FIA and Mercedes on 2-3 August

175. Uralkali knew that it needed the approval of FOM, the FIA and Mercedes and it had a number of discussions with them.

176. Uralkali met with FOM on 2 August. The meeting was encouraging and led Uralkali to understand that the requisite consent had been obtained. Consent had also been obtained from the FIA. Discussions also continued with Mercedes (through its lawyers, Hogan Lovells), which did not result in an agreement before the bid deadline on 3 August. At 14:45 on 3 August Ms Gregory of Hogan Lovells said that Uralkali was welcome to submit the terms on which they would be prepared to enter an agreement with Mercedes but recorded that Mercedes had understood that Uralkali would prefer to wait to see if it was accepted as the preferred bidder.

The afternoon of 3 August 2018

177. At 12:45 on 3 August Mr Rowley reported to MDR that he had just spoken to Mr Reddy of Charles Russell who acted for a company called Seca Sports. He said that Seca had met with Dr Mallya the previous day and that they may now have three parties (and likely rising) who would be making rescue bids in the belief that they had a deal with the shareholders.

178. Mr Rowley spoke to Mr Stroll at around 13:00 on 3 August. The only note of the call is uninformative and Mr Rowley was unable to remember it.

179. Uralkali was still chasing Ms Fogarty for confirmation that Uralkali's bid was acceptable. At 13:24 on 3 August Mr Fogarty told Mr Ostling by email that she did not have final instructions on acceptance. Mr Ostling replied at 15:05 asking Mr Fogarty to revert if she could "nail down" the third shareholder before 17:00. Mr Ostling did not think at that stage that Sahara Group had agreed to accept Uralkali's offer.

Uralkali's indicative offer of 3 August 2018

180. At 16:58 on 3 August Uralkali submitted an indicative offer letter. It included a plan A and a plan B offer.

181. The plan A offer involved returning FI to solvency by paying 100% of the valid claims of its creditors, and deferred consideration to OIH which would have resulted in the dilution of OIH's shareholding in FI to 10%. Uralkali said that it had received confirmation from counsel to OIH that *"majority shareholders of Orange India are prepared to enter into binding documentation on the terms described above"*. Uralkali also offered to make available a £10m subordinated funding line in return for a 14-day exclusivity period.

182. Part of Uralkali's plan A was that, if it could not achieve definitive documentation and the consents needed for a rescue within that period, it would immediately proceed with the plan B offer. However the letter also said that the plan A and plan B offers were independent of one another and that the Administrators could choose between them in the interests of the stakeholders in the company.

183. The plan B offer was to purchase the business and assets. The letter said:

> "The purchase price that we would pay will be equal to an aggregate of:
>
> - 100% of the Joint Administrators' estimated amount due to all valid creditors of the Company (other than the Invalid Claims). We would be happy to structure this as an assumption of such liabilities (subject to mitigating VAT irrevocability issues);
>
> - the Administration Costs; plus
>
> - an additional amount of £25 million which would then be available for distribution to any remaining stakeholders of the Company once all valid and known debts had been discharged.

> Based on the above breakdown, we propose to pay an amount of £75 million (net of the Administration Costs)."

184. The bid also included a ratchet mechanism which would increase the offer in the event of a higher competing bid, capped at £102m.

185. The offer also included ongoing funding to FI in the form of at least £20m for working capital and at least £150m to fund capital expenditures over five years.

186. The representation in the letter that the majority shareholders were prepared to enter into binding documentation suggested that things were more advanced than they actually were. Ms Fogarty (acting for Sahara) had told Mr Ostling that Dr Mallya and Mr Mol were minded to accept Uralkali's offer but that she did not have final instructions. At any rate, Uralkali was unable to provide evidence that it had reached binding terms with the shareholders.

Other bids made on 3 August 2018

187. Mr Stroll delivered Racing Point's bid at MDR's offices by hand, probably reflecting his domineering character and optimism that he would win the bidding process. Mr Rowley did not recall spending any time with him. Mr Stubbs chatted to him for a few minutes.

188. Racing Point made a plan B bid only, with a purchase offer of £55m, calculated by reference to the company's trade creditors.

189. There were two other bidders. Rich Energy made a rescue offer and claimed to have reached agreement with the shareholders. The Andretti Group made a plan B bid worth around £28.5m.

Assessment of the 3 August bids

190. At about 19:45 Mr Rowley forwarded the bids (and a summary schedule) to the FIA, FOM and Mercedes' solicitors, Hogan Lovells. In the covering email to FOM Mr Rowley noted that both Uralkali and Rich Energy referred to terms having been agreed with OIH albeit neither have signed agreements, and it would make sense that only one of them could do so.

191. The Administrators and their lawyers struggled to interpret Uralkali's plan B offer. They decided to consult Mr Collings QC. At 19:31 Mr Stubbs sent an email to Mr Collings to set up a call the following morning to discuss the terms of Uralkali's plan B bid. Mr Stubbs sent this on to Mr Rowley saying this would be the core of the discussion with Mr Collings. At 19:52, Mr Stubbs emailed a colleague at MDR (Mr Davis) saying "*F me Work this out!*", referring specifically to Uralkali's plan B bid.

192. Counsel for Uralkali suggested to Mr Stubbs in cross-examination that these messages showed that Uralkali's plan B bid was Mr Rowley's focus at the time. I do not think this is what the emails mean. They show merely that the lawyers were trying to work out the meaning of Uralkali's offer. There were two elements of uncertainty: the reference to the "estimated amount due to all valid creditors of the Company" and the ratchet mechanism which tied Uralkali's offer to other plan B offers.

193. At 21:56 on 3 August Mr Stubbs emailed the MDR team, explaining that Messrs Rowley and Baker wanted full consideration to be given to the bids.

194. At 22:47, another MDR solicitor, Mr Sinha, emailed Mr McCarthy in response to Mr Stubbs' email saying he was not clear what Mr Stubbs meant, and asking: *"Are we saying that [Mr Stroll] is not the favoured bidder anymore?"*. He had had some involvement that day working on a draft exclusivity agreement which (if entered) would have given Mr Stroll exclusivity; he asked how this change of approach (i.e. looking at all the bids) would affect their work over the weekend. Mr McCarthy explained in oral evidence that Mr Sinha had a peripheral role. I accept this: the documents too show that Mr Sinha had comparatively limited input. I also accept Mr McCarthy's evidence that Mr Sinha was an avid reader of the autocar press and probably picked the idea up about Mr Stroll being the favoured bidder from the press.

195. Uralkali submitted that, on its true interpretation, its plan B offer was a fixed offer for £75m. It submitted that the three bullet-points explained how it was calculated but that a fixed purchase price was offered. It also said that the ratchet mechanism by which Uralkali offered to beat any other bid that exceeded £75m makes sense only if the purchase price offered by Uralkali was a fixed sum of £75m.

196. There are though pointers the other way. The letter spoke of paying a purchase price equal to (inter alia) "the Joint Administrators' estimated amount due to all valid creditors of the Company." It also said, "based on the above breakdown, we propose to pay the purchase price (net of the Administration Costs) of £75m". That could reasonably be read as saying that the figure is "based on" the amount due to "valid creditors" of the company.

197. Hence there were textual pointers each way. In any case the interpretation of the letter is not a question that requires resolution. What matters is how Mr Rowley and his lawyers understood it at the time. I find that they thought that Uralkali's offer was tied to the valid claims of creditors and was not a fixed offer, and that that was not an unreasonable reading.

198. Counsel for Uralkali submitted that, in his evidence, Mr Rowley wrongly sought to recast Uralkali's plan B offer as an offer for £55m rather than £75m. I do not accept that he sought to do this. I find that he probably misunderstood one element of the plan B offer at the time it was made. He thought that Uralkali was offering to meet the claims of trade creditors (as Racing Point had done) rather than the claims of all valid creditors (other than the disputed shareholder debt). This appears to have been a view shared by Mr Collings QC in a call of 4 August 2018 (see further below). The same error is repeated in an email Mr Rowley sent to Uralkali at about 14:30 on 4 August 2018 concerning the first round bids (see further below).

199. I also find that the focus of Mr Rowley's concern at the time was (as explained above) that the offer contained a formula rather than a fixed price. The actual number was of less importance.

200. Counsel for Uralkali also submitted that Mr Rowley was caught out telling a lie about this point. He referred to a passage in the oral evidence where Mr Rowley said that the level of creditors had fallen from about £50m to about £28m between 2 and 3 August. In fact the work being undertaken by Mr Watkins at the time showed that the

estimate of total creditors remained at about £50m and the level of trade creditors remained at about £28m from 1 to 3 August. I do not think that the answer Mr Rowley gave on this point had the significance Counsel sought to put on it. His evidence, read in context, is explained by his apparent confusion about the nature of the offer from Uralkali: he thought that it was offering to meet the claims of valid trade creditors rather than all creditors. I consider that he was confused about the numbers and do not accept that he lied in evidence.

201. At about 18:15 on 3 August Mr Rowley discussed the bids with Mr Wolff of Mercedes. Mr Wolff told Mr Rowley that he had spoken to Mr Mazepin and told him that he was too late to the party. He said that he had been involved in advanced discussions with Mr Stroll for the last ten days and that he would only back Lawrence Stroll's bid.

202. Later that evening Mr Wolff rang Mr Rowley again. Mr Wolff explained that he had received texts from all the bidders including Mr Mazepin. He said that Mercedes could not make a choice as they had to remain neutral and deal with whoever was the winning bidder. The note of the call says that Mr Wolff said that Mr Stroll "*was much more advanced than anyone else including [Mr Mazepin] and that for [Mr Mazepin] he would have the challenge of dealing with compliance requirements for Daimler and therefore did I want to keep the auction open for another week whilst we found out if such issues could be addressed. He again said that Mercedes needed to remain neutral*".

203. Counsel for Uralkali submitted that in this conversation Mr Wolff was saying Mercedes was formally neutral but also that his clear preference was Mr Stroll. I reject that. Whatever he may have said previously, by this stage the message was that Mercedes would be neutral. Mr Wolff indeed suggested that the auction should be kept open for a further week (until 10 August) to give Uralkali the chance to address Daimler's compliance requirements. At any rate, whatever may have been in the mind of Mr Wolff, I find that Mr Rowley believed by this stage that Mercedes would stand neutral and leave the decision to him.

4 August: the decision to be made

204. Mr Rowley sent an internal email to the FRP team at 09:35 on 4 August. He wrote "we are now in a place of effectively assessing whether we can achieve a rescue with Dmitri Mazepin (via his Uralkali group) or whether we have a business and asset sale where the front runners will be Dmitri Mazepin and Lawrence Stroll. Both are highly motivated to be the successful party." Mr Rowley had not made any decision by that stage. He and the lawyers assessed the offers that morning.

205. At 09:51 the same morning he sent an email to Ms Fogarty of DWF asking whether there was any update on whether the shareholders were going to proceed with Rich Energy or Mr Mazepin. He said that it was very important for him to know which one so that he could proceed with his decision making.

Discussions within Mr Rowley's team in the morning of 4 August 2018

206. Mr Stubbs emailed Mr Collings, Mr Rowley and the MDR team at 10:27. The email stated that "perhaps unexpectedly, the administrators would appear to be thrust to

pole". Counsel for Uralkali submitted that the surprise was that Mr Stroll had not won. I do not agree. It is clear from the context in the email that Mr Stubbs was commenting on the "perhaps unexpected" neutrality of the stakeholders (FOM, FIA and Mercedes).

207. Mr Stubbs' email went on to list a series of questions he wanted to discuss with Mr Collings. These were about whether to reopen the bidding process.

208. Mr Stubbs said that: "*Our principal focus needs to be on the Mazepin bid, particularly Route 2. (Re Route 1 a call from Ashursts at 7 pm indicated that we would shortly hear from DWF. See below. Though if Mazepin win on Route 2 its always possible they may exhume Route 1 later").*

209. Mr Stubbs raised four questions arising from the wording of Uralkali's plan B bid. He then listed five further questions about how the Administrators should proceed. These included how to deal with the other bidders. Question E was whether, if they asked Uralkali to rebid, they should give Mr Stroll the same opportunity. Question G referred back to the plan A bids and pointed out that there were two parties each of which purported to have a deal with the shareholders and that evidently discussions were ongoing.

210. Counsel for Uralkali said that the passage I have quoted from the email shows that the Administrators were operating on the basis that the bids would be selected by reference to the plan B bids and that, if selected, Uralkali would be able to resurrect the plan A. Counsel also relied on the reference to the principal focus being and the words "if Mazepin win on Route 2". In my judgment this submission misreads the email. Its purpose was to set out a series of questions for the meeting with counsel. Mr Stubbs wanted to focus the discussion during the conference on the wording of the plan B bid because he was struggling to understand it. That is all he meant by "our principal focus". It is also why he raised questions (a) to (d), which concerned that bid.

211. The passage about Uralkali possibly winning on plan B and then resurrecting plan A does not, in my judgment, provide any support for Uralkali's submission. Mr Stubbs was saying that the position under plan A was uncertain (since there were two parties each claiming to have reached agreement with the shareholders), and reiterated this at question G. I read the email as saying that if there was no viable plan A (which needed to be determined as events unfolded) and Uralkali had the best plan B, Uralkali might still be able to "resurrect" a plan A thereafter. He did not say or suggest that the Administrators would accept the best plan B bid even if there was a viable rescue plan on the table.

212. As I have said, the email set out a series of nine questions about the bids, whether to reopen the bidding process and, if so, whether to reopen it for all bidders, or to seek clarification. I find that Mr Rowley, Mr Stubbs, and the rest of the MDR team were seeking to determine how they should react to the first round of bids. They had not decided at that stage how to proceed and wished to obtain leading counsel's views.

213. Mr McCarthy added his thoughts in the email chain at 11.22. He raised the possibility of asking Uralkali and Racing Point to submit best and final bids on the basis of plan B; he explained that any revision should be "invited only on the narrow ground of

extracting what (if any) price might be offered on the basis of a sale of the business and assets…". Counsel for Uralkali argued that this was consistent with the idea that the bids would be assessed on the basis of the best plan B offer. I regard the email as neutral. Mr McCarthy was commenting on Mr Stubbs's email, which stated in terms that the position of the plan A bids was uncertain but that further information was likely to emerge in the course of the day. Everything said about plan B was subject to that.

Other emails on the morning of 4 August 2018

214. Mr Boothman of Ashurst sent an email to Mr Stubbs and others at MDR at 10:45 on 4 August. He said that Uralkali was in dialogue with Mercedes and a call or meeting was being arranged for later that day and he would give an update later in the day. He said that, given that the Uralkali bid provides full repayment of all creditors and a return to equity which has been accepted by the owners, it was difficult to see how the Administrators could proceed with other bidders. He asked to know about the next steps.

215. At 11:12 on 4 August DWF (on behalf of the OIH shareholders) informed the Administrators that the shareholders' "*discussions are at an advanced stage with both parties [i.e. Uralkali and Rich Energy] and they are prepared to partner with either party to achieve a deal that would restore the Company on terms acceptable to the Joint Administrators*."

216. This confirmed the summary given by Mr Rowley's email the previous evening to FOM, the FIA and Mercedes.

11:30 call with Mr Collings QC

217. At 11:30 on 4 August 2018 Mr Rowley and MDR held a telephone conference with Mr Collings. There is no formal note of his advice. Mr Rowley and Mr Stubbs both made manuscript notes of the call. It is probable that the discussion addressed each of the nine questions raised in Mr Stubbs' email sent earlier that morning.

218. The notes show that the parties to the call understood Mr Stroll's bid as being for the amount of trade creditors plus £25m while the Uralkali bid was for trade creditors (assessed or assumed at) £50m plus £25m and costs. Mr Collings went on to say that in practice the bids were for £25m on top of trade creditors. This suggests that the lawyers thought that the Uralkali plan B bid was tied to trade creditors. As already explained, this was erroneous, but what matters for present purposes is that the lawyers read the offer in that way. Mr Collings also noted that the Uralkali bid did not contain any conditions precedent but the Racing Point one did. Mr Collings said that the alleged claim by shareholders would also have to go if there was to be a return to solvency, even if the Administrators did not think it had any merit.

Decision to invite further bids

219. During this call Mr Rowley decided to invite further bids. Counsel for Uralkali submitted that this was consistent with the idea that Mr Wolff had floated the night before. But Mr Wolff had suggested a further week in order (the following Friday) to allow Uralkali to meet Daimler's requirements. Mr Rowley decided to set a much

shorter deadline, of Monday afternoon. I find that this was Mr Rowley's own decision (and not that of Mercedes): it was based on a consideration of the questions set out in the email of instructions from Mr Stubbs to Mr Collings and others of 3 August and the advice of Mr Collings.

220. Counsel for Uralkali submitted that it was surprising and significant that there was no formal record of the decision and he criticised Mr Rowley in that regard. It would no doubt have been sensible for MDR to have produced an attendance note. However I do not consider that any inference can be drawn from the absence of such a note. I find that Mr Rowley sought and acted on legal advice in making the decision to reopen the bidding.

221. I also accept Mr Rowley's evidence that there were three reasons behind the decision to invite further offers: (i) the lack of evidence of binding terms with OIH for a share sale from Uralkali or from Rich Energy; (ii) the lack of evidence that OIH had agreed to waive its claim against FI (said to be some £159m); and (iii) aspects of the plan B offers, in particular the supposed linkage of Uralkali's offer to valid creditor claims, were seen as unclear.

222. Counsel for Uralkali submitted that none of these reasons justified the decision to invite further bids. I find the reasons were genuine ones and were based on the advice that was provided to Mr Rowley. The first reason arose from the lack of any evidence of either of the putative rescuers agreeing binding terms with the shareholders. The position remained unclear when DWF said on the morning of 4 August 2018 that discussions were at an advanced stage with both Uralkali and Rich Energy. The second reason was something that was discussed with Mr Collings in the meeting of 4 August 2018. He said that, to exit from administration, the Administrators needed assurance that the shareholder debt claims had gone, even if they thought the claims were spurious. The third reason was a formulation of Uralkali's plan B offer. Mr Stubbs' email of 3 August shows that the lawyers considered that the clause contained a formula rather than a fixed number, as well as a ratchet. The note of the call with Mr Collings shows that he thought it contained a formula (trade creditors plus £25m plus costs).

223. On the third point Uralkali criticised Mr Rowley for not asking Uralkali for clarification of its offer letter. This was not however the only reason for the decision to rebid. There were two other reasons. Moreover, the question whether to ask for clarification rather than reopening the bidding was specifically raised by Mr Stubbs in his questions for Mr Collings. It is probable that it was discussed with Mr Collings on the call.

224. Counsel for Uralkali also submitted that Mr Rowley seized upon a supposed ambiguity in Uralkali's plan B offer as a reason to reopen the bids and that this was opportunistic. He said that Mr Rowley invited further bids to give Mr Stroll a second run at the race and avoid declaring Uralkali as the winner. I reject this description of events. As already explained, one of the reasons for inviting further offers was that there were two suitors each claiming to have reached a deal with the shareholders (and both could not be right). There was nothing to clarify about that – what was needed was evidence of a binding deal. But even as regards Uralkali's plan B, one of the questions the lawyers considered was whether to seek clarification. The decision (taken on advice) was to invite further bids rather than to seek clarification. More

generally there is nothing in Mr Stubbs' questions or the advice to suggest that Mr Rowley reopened the process to give Mr Stroll a second run or to avoid declaring Uralkali as the winner. Indeed one of the questions was whether Mr Stroll should be given a second chance at all. I find that Mr Rowley gave genuine consideration whether to reopen the bid process and took and acted on advice on that question from MDR and Mr Collings.

225. I also find that in making that decision he was not activated by a wish to favour Mr Stroll. The only motivation Uralkali advances for this allegation is that Mercedes privately if not officially favoured Mr Stroll. I shall address this point further when assessing Uralkali's claims. However I note here that I have found that Mr Rowley believed as a result of the discussion with Mr Wolff late in the evening of 3 August 2018 that Mercedes was neutral. I have set out my findings about this above. It is also inherently unlikely that Mr Rowley, an experienced professional with a good reputation to protect, would have acted in that unprofessional (and risky) manner. He was being advised by a team of experienced and reputable lawyers of high reputation. It is also inherently unlikely that they would have allowed their advice to be used as a cover for a decision to advance Mr Stroll's interests at the expense of Uralkali.

Update given to bidders about further bids

226. Mr Rowley told the bidders of his decision to invite further bids by emails sent at about 14:30 on 4 August 2018. In his email to Uralkali Mr Rowley commented separately on its plan A and plan B offers.

(a) As to the plan A offer, he referred to the requirement discussed and confirmed on 2 August that he could only progress the plan A offer once he had evidence of binding terms with OIH to acquire the shares. He said that he needed such evidence by no later than 16:00 on 6 August. The only acceptable condition would be the consent of the Indian banks in relation to the freezing order, which would have to be obtained by 17 August, thereby allowing time to apply to the Court for an exit before the Belgian Grand Prix. He noted that DWF had told the Administrators that their client (the Sahara element of OIH) was still considering its options. They had also advised of OIH being a creditor for £159m and said that he would need evidence that OIH had waived such claims. He said that this would be essential when making an application to the court to seek an exit from administration. (This passage reflects the discussions with Mr Collings that morning.)

(b) As to the plan B offer, Mr Rowley said that Uralkali would have to resubmit the offer as the Administrators could not opine on what might constitute valid or invalid creditors. What he needed was a defined sum Uralkali was prepared to pay for the business, assets, and goodwill of the company. He went on to say that it was too early to conclude that the creditor base for the company was limited to trade creditors and OIH and that there was a prospect of other creditor claims arising. (This sentence again shows that Mr Rowley and his lawyers had probably understood that Uralkali's plan B offer was tied to trade creditors.)

(c) Mr Rowley invited Uralkali to re-submit its offer. He asked for its best and final offer by 16:00 on 6 August. He said that he would disregard any element

that sought to link itself to other offers. He said that if Uralkali was selected it would have until 17 August to progress its plan A but, if that did not eventuate, the parties would enter a sale and purchase agreement on the basis of its plan B offer. Mr Rowley said that he and MDR would be available over the weekend to clarify any matters Uralkali wished to discuss.

227. Uralkali submitted that the statement in the email that DWF's client (i.e. the Sahara Group) "was still considering its options" was not a fair reflection of what DWF had actually said. I disagree. DWF had told Mr Rowley that discussions were at an advanced stage with two parties and were prepared to reach an agreement with either party. His email stated fairly and accurately that Sahara was still considering its options.

228. Mr Rowley also wrote to Withers requiring Racing Point's best and final offer by 16:00 on 6 August. He said that he needed to understand the amount Racing Point wished to pay specifically for the business, assets, and goodwill of the company. He made the point that the creditors of the company might extend beyond trade creditors. He said that its offer would be assessed strictly on the terms set out in the offer letter.

229. Later on 4 August 2018 (at 22:57) Mr Sainsbury (of Ashurst) emailed Mr Rowley and MDR in response to Mr Rowley's email. He described Uralkali's continued efforts to finalise a plan A agreement with the shareholders. He asked for the plan B bidding process to be conducted by way of sealed best and final bids, opened in front of appointed representatives of the interested parties. He also asked for confirmation that all remaining bidders have been or will be asked to submit their plan B bids on the same basis.

230. Mr Rowley responded to this by email at 06:51 on 5 August. He said that the use of sealed bids was not how the process works in the UK. The assessment of offers received would be undertaken by the Administrators and their advisers. He confirmed that all plan bidders had been invited to bid on the same basis.

The afternoon of 4 August 2018

231. At 14:43 on 4 August Mr Rowley spoke again with Mr Wolff. Mr Wolff said he had been bombarded by Mr Stroll and Mr Mazepin. He said that Daimler would not make the choice and it was for the Administrator to make the choice. Mr Rowley's note of the call went on to say, "Lawrence is the preferred bidder but Mercedes will supply an engine". I find that Mr Rowley understood that Mr Wolff preferred Mr Stroll, but that Mercedes would remain neutral and would supply an engine to the winning bidder.

232. Mr Rowley then emailed Mr Wolff and Hogan Lovells (Mercedes' lawyers) with a short summary of their call. He noted that the bidders had to make revised proposals by 16:00 on 6 August. He confirmed that the Administrators would make a choice as to which bidder they wished to proceed with having regard to the best interests of the creditors of the company and that the choice would remain with the Administrators. Counsel for Uralkali said it was striking that Mr Rowley did not record that Mr Wolff had said he preferred Mr Stroll. I do not think there is anything significant in this. I find that what the message he took from the call was that Mercedes would supply an engine to the winning bidder and that the decision was for the Administrators, not Mercedes. That is what he then set out in the summary of the call.

233. A further call took place at about 16:00 on 4 August between Mr Wolff and Mr Rowley. Mr Rowley recorded this in an email shortly afterwards to MDR and Mr Collings. I find this to be an accurate record. During the call Mr Wolff told Mr Rowley that Mr Mazepin has called him to explain that the Administrators had said at the meeting on 2 August that it was unlikely that Mercedes would ever agree to support him and therefore he did not think he was being given a proper chance to bid. Mr Rowley told Mr Wolff that this was rubbish (and suggested in his email report to MDR that it may be necessary to contact Ashurst to explain his unhappiness at being so badly misrepresented). I find that Mr Rowley did not say at the meeting of 2 August that it was unlikely that Mercedes would ever support Uralkali.

234. Mr Mazepin was then patched into the call. Mr Wolff explained to him that he had been in discussion with a number of other parties over the last couple of months, including Moorad, the Andretti Group and Mr Stroll which had led Mercedes to sign a very advantageous agreement with Mr Stroll and he was therefore their preferred bidder. Mr Wolff said however that the Administrator would choose the bid to proceed with and Mercedes would engage with whoever that might be. He said that Mercedes would progress discussions with Mr Mazepin's lawyers over the weekend. Mr Mazepin confirmed that they were working to achieve an MOU.

235. Later on 4 August Hogan Lovells wrote to Mr Rowley stating Mercedes' condition that, in order to continue its contracts (for engine supply) with FI in the event of a rescue, no existing shareholder/UBO was permitted to remain involved either in management or as shareholder. A rescue would therefore require the existing shareholders to be bought out completely. Mr Rowley immediately passed on this information to the bidders.

236. On the afternoon of 4 August Mr Mazepin and Mr Oakes exchanged WhatsApp messages which show that Mr Oakes had probably been talking to Mr Szafnauer and possibly others. Mr Mazepin told Mr Oakes that the Administrator expected a new offer at 16:00 on Monday. He said "We need binding letter signed before then for option one – then we may exclude everyone else. We have time to push Mercedes before then".

237. The natural reading of this message is that Mr Mazepin thought that if they could achieve a rescue it would exclude all other bidders. I draw the inference that if he had been called to give evidence Mr Mazepin would have confirmed this.

238. On the evening of 4 August Mr Stroll called Mr Rowley and asked for a meeting with lawyers the following day. Mr Rowley agreed.

239. The same evening, 4 August, Mr Stubbs spoke to Mr Indaimo of Withers. Mr Stubbs emailed Mr Rowley, explaining that Mr Indaimo "sounded near panic mode" and that Mr Stroll had been "more than a handful today". Mr Rowley responded, saying that Mr Indaimo "will be struggling for a strategy" and "I am sure [Mr Stroll] will be raging inside". Mr Stubbs added: "steam from every orifice" and "Reflecting, he is right". It is likely that Mr Stroll was "raging inside" because he had hoped to win the first bid.

Other steps taken by Mr Rowley after inviting further bids

240. After the invitation to submit revised bids, Mr Rowley continued to take steps to promote a possible rescue of the company or a sale of its business and assets:

(a) He liaised with FOM and the FIA to keep them informed and to do his best to preserve the team's ability to continue racing and receive prize money.

(b) He continued dealing with DWF to see if the share purchase and rescue route was viable.

(c) He liaised with TLT about obtaining the Indian banks' consent to vary the freezing order.

(d) He liaised with Macfarlanes, who were instructed by Dr Mallya, and Fladgates who were instructed by OIH, in relation to the freezing order.

(e) As already explained, he was speaking to Mercedes and Hogan Lovells to seek to ensure that the team would have an engine to keep them racing.

(f) He maintained contact with the sponsor, BWT, as before.

(g) He continued (working with Mr Watkins) to assess the value of the company and the amounts needed to enable it to continue trading as a going concern for the next twelve months, with advice from external valuers. That work was needed to allow an exit from administration pursuant to a rescue plan.

(h) He continued liaising with senior management, partly to ensure that he understood their own position, and also to stay abreast of their interactions with the interested parties.

(i) Mr Rowley also continued to take legal advice from his lawyers concerning the offers; the validity of the OIH shareholders' claims as creditors; and his communications with TLT and the Indian banks about the freezing order.

5 August 2018

241. Mr Rowley believed at the start of 5 August that Uralkali was the party closest to gaining control of the company.

Uralkali's continuing discussions with the shareholders

242. During 4 and 5 August 2018 Uralkali carried on its negotiations with OIH's shareholders to seek to finalise a binding purchase of the shares. Mr Ostling communicated by WhatsApp with Dr Mallya in an effort to tie down a final agreement. Mr Sainsbury, Mr Kartashkin and Mr Ostling all corresponded with Ms Fogarty in an effort to reach binding terms. At the same time Uralkali made preparations to seek the consent of the Indian banks to a rescue.

243. There were also WhatsApp messages between Dr Mallya and Mr Mazepin on 4 and 5 August. These show that there were some matters which Dr Mallya wanted to be put in a side letter and not the main agreement. When he was cross-examined about this Mr Ostling could not say what they were. As Mr Mazepin was not called as a witness there is a gap in the evidence. It is not clear what Dr Mallya was seeking. Nor was

there any evidence about Mr Mazepin's reaction to Dr Mallya's requests or demands. These messages also suggest that there were periods when Mr Ostling was not contactable.

244. Mr Ostling had left London on the evening of 3 August 2018 to travel to Hawaii via New York for a family holiday. He said he had access to electronic devices throughout, but there were some periods when he did not have access to Wifi.

Mr Stroll and Mr Rowley's lunch on 5 August

245. Mr Stroll called Mr Rowley on the morning of 5 August and asked him to have lunch before their planned meeting with lawyers. Mr Stroll said he wanted to meet to discuss where matters were. Counsel for Uralkali made some play of Mr Rowley agreeing to meet with Mr Stroll one-to-one. I do not think there is any significance in this. I find that Mr Rowley would have met or talked one-to-one with Mr Mazepin (or any other representative of Uralkali). His saw his task as promoting a rescue or sale and if that could be facilitated by meeting potential bidders he would have met any of them. Mr Rowley was an experienced professional and did not need lawyers with him at all times. I also note that Mr Wormleighton, with the encouragement of Uralkali, spoke to Mr Rowley one-to-one to seek to find out more about where things stood. There was also the conversation I have referred to above between Mr Rowley, Mr Wolff, and Mr Mazepin, which took place in the absence of lawyers.

246. More generally I find that Mr Rowley and MDR were happy to provide guidance and information to any bidder to assist them in making offers. They did so at the meeting of 2 August with Uralkali and again in the email to Uralkali of 4 August.

247. I find as follows in relation to the lunch between Mr Rowley and Mr Stroll:

(a) Mr Stroll explained that he expected that the Administrators would have been moving forward with him after his first bid. He wanted to know why that was not progressing as he expected. Mr Rowley explained that they had to deal with all parties, and it had been made clear to them that neither Mercedes nor FOM would be advising them of any preferences if there was more than one party acceptable to them. He confirmed that there was more than one party acceptable to Mercedes and FOM.

(b) The discussion turned to Mr Stroll's lawyers. Mr Rowley asked why Mr Stroll had changed his lawyers. They discussed Withers' apparent lack of strategic thought.

(c) On the issue of strategy they discussed the acquisition of the equity and Mr Rowley explained that other bidders were exploring the rescue option via a purchase of shares. He did not name them. Mr Stroll said that he had discounted that route because of the problem of obtaining consent from the Indian banks in relation to the freezing injunction.

(d) Mr Rowley said he was surprised. He explained that it would be possible to have a structure where the team was funded in the interim period through to consent and also to have a pre-agreed business and asset sale if consent was not forthcoming. They also discussed paying a large sum for the business and

assets and then seeking to agree terms with the shareholder. Mr Rowley said that while they could discuss hypothetical scenarios Mr Stroll needed to take his own advice.

(e) Mr Stroll said that he would speak to Dr Mallya again to see if he could agree terms to buy the shares.

Follow-up meeting with Withers

248. Mr Stroll and Mr Rowley then went to a meeting at Mr Stroll's offices with Mr Stubbs and his lawyers. It lasted about 20 minutes. In response to a question Mr Rowley said that the focus of the Administrators' consideration had to be whether a rescue could be achieved, and he explained that some of the bidders were looking to rescue the company. Mr Rowley said again that he was surprised that Mr Stroll had not pursued a rescue option.

249. Mr Rowley also said that if consent was not forthcoming from the Indian banks, it should be possible to go to court in short order to vary the terms of the freezing order to allow a sale to proceed.

250. Counsel for Uralkali submitted that this contrasted with the discussion with Uralkali on 2 August. He submitted that the freezing injunction had been presented to Uralkali on 2 August as a potential obstacle in the way of a rescue. Mr Rowley's evidence is that, following the 2 August meeting, he had then learned of a possible workaround to this problem. He mentioned this to Withers on 5 August. He did not revert to Uralkali to update it as to how the issue could be overcome. Counsel for Uralkali criticised him not reverting to Uralkali. But, as Mr Rowley explained when challenged on this point, Uralkali had its own legal representation. The workaround was anyway pretty basic: it involved an application to the court to vary the freezing order in the absence of the banks' consent. Mr Rowley could not be expected to keep tabs on the advice the various bidders were or were not receiving.

251. After the short meeting with lawyers Mr Stroll approached Dr Mallya to seek a share purchase.

252. Mr Stubbs relayed to Mr Collings at 15:35 that "[n]ow 3 parties courting the shareholders". Later that afternoon he emailed Mr Collings saying, "we get the impression [Mr Stroll] may now also be thinking of engaging with Vijay; if so probably just about now". Later that evening Mr Stubbs put DWF and Withers in touch with each other.

253. At 17:20 on 5 August Mr Stroll texted Mr Rowley asking him to call and saying that he needed to ask him one question. It is likely that Mr Rowley then called Mr Stroll, but he does not recall Mr Stroll's question.

254. At 18:10 Mr Stubbs emailed Mr Rowley, explaining that Mr Indaimo had called to "discuss another option. Which needs thought". Mr Stubbs explained that Mr Collings was probably not available until the morning. Mr Stubbs and Mr Rowley then joined a call with Withers at 18:30. Mr Rowley's evidence was that the call was probably about achieving a rescue, and I so find.

Suggested collaboration between Mr Stroll and Mr Mazepin

255. At about 19:00 on 5 August Mr Szafnauer spoke to Mr Rowley seeking an update. Mr Szafnauer raised the idea of Mr Mazepin and Mr Stroll collaborating. The proposal was that Mr Mazepin would acquire the team (by rescue or purchase) with Mr Stroll agreeing terms for his son, Lance, to drive for two years. At just before 20:00 Mr Rowley spoke to Mr Wolff to discuss this. He thought it was very sensible and in line with a collaboration proposal he had suggested earlier in the day which Mr Stroll said he would consider, and which Mr Mazepin had rejected.

256. Mr Rowley then spoke to Mr Mazepin and outlined the idea of a tie up as proposed by Mr Szafnauer. I find that the proposal he suggested was that Uralkali should acquire the team but agree terms with Racing Point for Lance Stroll to race for two years. Mr Mazepin responded frostily. He accused Mr Rowley of seeking to secure a seat for Mr Stroll's son. Mr Rowley said he was not doing this but was trying to find a solution which did not involve either party overpaying. Mr Mazepin said his focus was on a rescue. He said there were two seats and four potential drivers including his son and Mr Stroll's son. He confirmed he would make his bid on Monday. The call lasted a few minutes.

257. Mr Rowley reported to Mr Wolff that Mr Mazepin had rejected the idea of any solution with Mr Stroll and wished to bid as much as possible. Mr Wolff said he thought it was irrational.

258. There was also a call at about the same time between Mr Stroll and Mr Ostling in which Mr Stroll suggested a tie-up. It led nowhere.

259. Mr Mazepin sent an email on 6 August at 07:41 in which he complained about the call and said that Mr Rowley was failing to obtain the maximum return for FI and its stakeholders. Mr Mazepin said that following the call *"it is obvious to me that my company will not be able to compete in a fair and transparent competition for the rescue of F1, or the purchase of its business."* He said that recent events had caused Uralkali to question the veracity of Mr Rowley's assurances about the bid process and said that Mr Rowley had taken steps "*aimed to favor one party*". He said that call of the previous evening had validated his concerns that Mr Rowley was aimed to achieve a result for one bidder (i.e. Mr Stroll).

260. Counsel for Uralkali said that it was likely that Mr Stroll was the genesis of the collaboration proposal. But as far as Mr Rowley was concerned the idea was first raised with him by Mr Szafnauer. When he spoke to Mr Wolff he learnt that Mr Wolff had had the same idea earlier in the day.

261. Counsel for Uralkali criticised Mr Rowley for seeking to justify the tie-up proposal to Mr Mazepin by saying that he did not want to see a party significantly overpay and said that that was what lay behind his proposal that the two frontrunners might join forces. I do not think that is an accurate description. There were competing bidders for the shares. The first round of bidders had led to two parties both claiming to have a done a deal. It was possible that the same thing would happen again and there be another stalemate. Mr Rowley thought that there was merit in exploring the idea that the two principal suitors could co-operate. If they could it would enhance the prospects of a deal. Mr Rowley also expected by this stage that the creditors to be

fully covered. If the parties co-operated it might expedite an outcome. He told Mr Mazepin that he could avoid overpaying to explain why co-operation might be attractive. I reject the contention that Mr Rowley was attempting to keep down the price. His aim was that a deal should be consummated, and he thought this was more likely if Mr Mazepin and Mr Stroll co-operated.

Continuing negotiations between Uralkali and Dr Mallya

262. As I have said, Uralkali was trying actively during 4 and 5 August to reach a binding agreement with the shareholders in FI. This continued into the evening of 5 August and morning of 6 August.

263. Mr Ostling spoke to Dr Mallya by phone at approximately 21:45 on 5 August, followed up by text messages. On the call Dr Mallya said that he had reached a deal with Mr Stroll, who had bid "substantially" higher than Uralkali. Dr Mallya said that he wanted to give Uralkali an opportunity to match it. The news that Dr Mallya had reached a deal with Mr Stroll was obviously very troubling for Uralkali. Dr Mallya also said that Mr Stroll's bid would allow Dr Mallya an "honourable exit" without explaining what this meant. Mr Ostling said in his evidence that by this time he was concerned that Dr Mallya was seeking some kind of bribe or backhander. He was unable to provide any solid basis for this other than the reference to an honourable exit and the refusal of Dr Mallya to tell him how much he needed to bid.

264. Uralkali has claimed that at about 22:00 on 5 August Mr Ostling, Mr Boothman and Mr Kartashkin held a call in which they decided to drop the plan A bid and make a plan B bid only. Uralkali alleges that there was a discussion shortly afterwards with Mr Mazepin at about 23:00 in which he agreed this strategy. It relies on the evidence of Mr Ostling to this effect. I shall set out my findings about this allegation and evidence when dealing with Uralkali's claims.

265. There were further WhatsApp messages after that time between Mr Ostling and Dr Mallya. Dr Mallya sent a WhatsApp message saying that Mr Stroll's offer was made up of heads of terms, indemnities, and an honourable exit.

266. In a further message Mr Ostling sought to find out "in confidence" the amount that Mr Stroll had offered to the shareholders.

267. Mr Ostling sent an email to Ms Fogarty of DWF early in the morning of 6 August. He referred to the discussions he had had with Dr Mallya in which Dr Mallya had said that there may be a deal with Mr Stroll and that Mr Stroll had offered substantially more. Mr Ostling said he had tried to find out what this meant but Dr Mallya had not given a number or a range. Mr Ostling said that he had found the conversation bizarre in terms of voice and manner. He said that if there was a competition Uralkali wanted to be in on it. He wanted to know what "substantial" meant. They were prepared to do a straight up, honest, and transparent deal.

268. Ms Fogarty responded, saying that she was totally out of the loop on discussions with Mr Stroll. She had passed on Uralkali's desire to have a proper discussion and was seeking a conference call to understand her instructions that morning.

269. I find that the email from Mr Ostling shows that Uralkali remained eager on 6 August 2018 to conclude a deal with the shareholders.

270. Dr Mallya continued sending Mr Ostling WhatsApps into the afternoon of 6 August. Mr Ostling said that they went unreturned because Uralkali had by this time lost faith in Dr Mallya. At 14:25 on 6 August, Dr Mallya messaged Mr Ostling as follows: "Paul we are running out of time. Stroll has sadly pocketed Sahara with an attractive offer. As I messaged you this morning is there a revised offer you can give me?" Mr Ostling responded at 15:12: "sadly we are out of time". Dr Mallya subsequently deleted these messages, but Mr Ostling had taken screenshots of them.

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271. Mr Rowley spent 6 August at MDR's offices, from the early morning onwards.

272. At 09:40 Mr Stubbs spoke with Mr Indaimo about some of the matters they had discussed the previous evening. Mr Stubbs could not recall this. I find it probably concerned a possible rescue bid.

273. At about 10:00 Mr Rowley and MDR held a conference call with Mr Collings. The purpose of the call was to discuss the approach to the assessment the offers which were expected later that day. Mr Rowley's note of the call recorded that "Purpose A should take precedence". Counsel for Uralkali said that the fact that there was discussion about this suggests that this had not always been the case in this matter. I disagree. It was reiterating the statutory requirements under paragraph 3 of Sch. B1.

274. Mr Rowley spoke with Mr Stroll shortly after the call with Mr Collings but there is no record of what was said.

275. Mr Rowley spoke with Withers and Mr Stroll's leading counsel (Mr Marshall QC) at 11:00. It was put to Mr Rowley in cross-examination that that was to help them get their bid in order. Mr Rowley said that he was happy to assist them in their discussions and understanding of where matters were. I find that the discussion amounted to no more than that.

Communications between Withers and Mr Rowley/MDR during 6 August

276. Between around 14:00 and 16:00 on 6 August Withers sent Mr Rowley and MDR multiple drafts of a term sheet for a putative deal with the shareholders and of an offer letter. These were directed at a possible rescue deal. MDR commented on these drafts and pointed out where they were deficient. Counsel for Uralkali said that Mr Rowley's team was providing guidance and assistance on the structuring of Mr Stroll's bid, both by email and telephone and said this was remarkable. He also said that it was remarkable that Mr Rowley's statement did not explain the responses given by MDR to Withers' communications. I agree with the observation of Counsel for Uralkali that Mr Rowley's witness statement should have said more about this to provide a fuller and fairer picture. I shall return to the significance to be attached to these communications when addressing the causes of action.

277. In an email at 14:56 on 6 August Withers indicated that Dr Mallya was on his way to their offices which strongly suggested that a deal was close.

The second deadline: 16:00 on 6 August 2018

278. Uralkali's second round offer was sent and received at 15:49. The bid was in the form of a plan B offer only, for a fixed consideration of a minimum of £101.5m (though with a ratchet mechanism increasing the offer in the event of a higher offer from a competing party up to a maximum of £122m).

279. At 15:56 Racing Point sent a bid document. It was signed but was marked "Draft". The deal structure was based on a plan A deal with a fallback (automatic) plan B deal. It had been wrongly scanned so that half of its pages were missing so there was no plan B purchase price identified. Mr Rowley accepted in evidence that the Racing Point bid of 15:56 was a draft. Racing Point's offer said that "our agreement with OIH will follow shortly" and a term sheet was sent through at 16:01 under an email saying it had been "signed by [Racing Point] and is currently with [Dr Mallya] for execution on behalf of [OIH] – signatures available shortly". DWF confirmed at 16:17 that it was working on the same rescue transaction alongside Withers. So both OIH's lawyers and Withers confirmed soon after 16:00 that they were working towards completion of a rescue deal.

280. Mr Stubbs' evidence is that he spoke to Mr Indaimo shortly after 16:00 on 6 August. His note of the call records the following:

> "4pm – call from [Mr Indaimo]
>
> MS – don't want draft. gone 4pm!
>
> We know you're waiting for clarifications from DWF & we will give limited time for that if this does achieve a rescue. Tech points. For them not us. Will determine.
>
> Final by hand leaving now. LS has ↑ !"

281. Mr Stubbs' evidence was that he told Withers that the Administrators could not accept the draft (and incomplete) document sent at 15:56 as Racing Point's final bid. As his note records, he pointed out that the 16:00 deadline had come and gone. His evidence was that Withers explained that a final version was going to be hand-delivered. Mr Stubbs says he heard Mr Stroll in the background calling out instructions for the plan B figure to be increased to £90m – hence the upward arrow in his note. I accept this account of events.

282. Mr Rowley's evidence is that he was not present on the call and was not told about it then or afterwards. Counsel for Uralkali submitted that this evidence should be rejected. He pointed out that Mr Rowley and Mr Stubbs spent that day together and there are emails placing them together at around 16:00. Mr Rowley's evidence was that he would have expected this call to be relayed to him and Mr Stubbs struggled to explain why he would not have done this.

283. I find that Mr Stubbs probably told Mr Rowley at some point on the afternoon or evening of 6 August or early on 7 August that he had heard Mr Stroll calling out an instruction to increase the number to £90m. I shall return to the significance of this point below.

284. At 16:13 on 6 August Withers emailed Mr Rowley and MDR a properly-scanned version of the earlier draft sent at 15:56. This showed that the fallback plan B offer was £70m. There was still no firm evidence that a plan A deal had been consummated with shareholders. But Mr Rowley and Mr Stubbs explained in evidence (and I find) that they thought at about 16:00 that Racing Point was close to reaching agreement with the shareholders.

Conference with Ms Hilliard QC

285. At about 17:30 on 6 August the Administrators had a conference with Ms Hilliard QC at MDR's offices. Mr Collings QC also joined by telephone.

286. The upshot of Ms Hilliard's advice is that the Administrators were entitled to accept Mr Stroll's bid in preference to Uralkali's bid. She later recorded her advice in an email and (a few days later) in a written opinion.

287. I find that it is probable that Ms Hilliard was given hard copies of the bids at the meeting. She and Mr Collings were sent soft copies later that evening. Ms Hilliard was not given copies of the emails of 2 August (from Mr McCarthy) or 4 August (inviting further bids). Her attention was not specifically drawn to the fact that Racing Point's document was a draft, but since it said that on its face I find that she would have seen that when reading the bids. Nobody said specifically that a deal with shareholders had yet to be confirmed, but it seems to me that this would have been self-evident from the terms of the offer letter.

288. Ms Hilliard advised on the understanding that Racing Point's plan B fallback bid was for £70m. This was confirmed in the written note of advice she provided a few days later. She advised that there would be no basis for any person to challenge the decision to accept Racing Point's rescue offer even though the price under the fallback plan B was lower than Uralkali's plan B bid. Her advice was that it was clear that a rescue must be prioritised if reasonably achievable. Mr Collings agreed with Ms Hilliard.

289. Counsel for Uralkali submitted that the issue on which Ms Hilliard was asked to advise was whether the Administrators were "entitled to accept" Racing Point's offer and that this was a skewed question. I reject this submission. It involved misreading the opening line of her subsequent opinion which said "*I have been asked by the [Administrators] to confirm the advice that I gave to them orally on 6 August 2018 to the effect that they were entitled to accept the offer then being made by [Racing Point] in relation to [FI] in preference to other offers that were made at the same time, including an indicative offer by [Uralkali]*". The words "entitled to accept" were part of her summary of her advice, not of the question she was asked.

290. In any case Ms Hilliard was a senior and experienced silk. She would not have been influenced by the form of the question. The purpose of the meeting was to provide legal advice to Mr Rowley as to the proper approach to the bids and she was not being asked to endorse the course that Mr Rowley wanted to take.

291. Mr Rowley already knew of the statutory hierarchy and he had already formed the view before the meeting that he would probably pursue the Racing Point rescue proposal. But there was no attempt to skew Mr Hilliard's advice.

292. Mr Rowley's evidence is that Ms Hilliard advised that he was entitled to accept Racing Point's offer provided that the Administrators "*had stress-tested Racing Point's business plan and were satisfied that the proposed funding would be available and would take Force India through the next 12 months at least*".

293. I read this as meaning that the Administrators had to be properly satisfied that the plan being proposed by Racing Point would provide the company with sufficient resources to meet its working capital requirements for a period of at least twelve months (in addition to meeting the claims of creditors). Counsel for Uralkali submitted that no such stress testing was actually undertaken. It may be correct that no bespoke process was specifically undertaken in response to Ms Hilliard's advice, but that is unremarkable. Mr Rowley understood that, for there to be a rescue and an exit from administration, the Court would have to be satisfied not only that the claims of creditors would be met but also that the company would be able to trade for a reasonably foreseeable period. Indeed, he mentioned this requirement at the meeting with Uralkali on 2 August.

294. From early in the administration there had been a separate workstream conducted by Mr Watkins of FRP which considered, among other things, the cashflow requirements of the company on various assumptions. This work was prepared in contemplation of a possible application to the court for an exit from administration. Mr Watkins produced a number of versions of these projections. The version current on 6 August showed that the level of funds in Racing Point's plan A offer would comfortably cover the company's working capital requirements for the following twelve months.

295. Racing Point and the shareholders entered binding terms for a share sale at 19:29 on 6 August. This was communicated to Mr Rowley at 19:47.

296. Mr Rowley decided at some point on the evening of 6 August (after the meeting with Ms Hilliard) to proceed with Racing Point's rescue offer and give them exclusivity. At that stage Racing Point had put in the offer marked draft, with the plan B offer of £70m. But Mr Rowley was concentrating by that stage on the rescue proposal and a fall-back offer of £70m would have been sufficient to meet the claims of creditors.

Email exchange with Ms Hilliard on the morning of 7 August 2018

297. At 06:07 on 7 August 2018 Mr Rowley emailed Ms Hilliard and Mr Collings raising the question whether Uralkali's plan B offer should be treated as being £101.5m or (if the ratchet applied) £122m. He said that his primary aim was to achieve a rescue, but he did want to ensure that the price agreed with Racing Point for the business and assets was justifiable if subsequently challenged. He explained that the point was quite urgent as they were meeting the Racing Point team later this morning and said "*I wish to be clear as to my requirements on what I need their offer to be for the business and assets given that will be a precondition for my agree to pursue a rescue of the Company given the conditionality that applies to the share purchase*". Mr Rowley's evidence was that he was concerned that he might be "subject to criticism" on account of the "price differential" between the two offers in the event that a rescue did not proceed, and a plan B deal then eventuated.

298. Ms Hilliard responded at 06:44. She advised against reverting to Racing Point in relation to its bid by reference to Uralkali's offer, since this may give Uralkali cause for complaint on grounds of unfairness.

299. At 09:15 on 7 August Mr Stubbs and Mr Rowley held a catch-up meeting. Simon Baggs, a colleague of Mr Rowley at FRP also attended. Following that meeting, at 10:12, Mr Baggs emailed a firm of accountants (Blick Rothenberg), explaining that there was a fall-back sale of business and assets and asking "*what the tax position would be on a sale of business at £70, £80m, £90m and £100m. There is substantial urgency in relation to this*". Mr Rowley accepted that, based on this email, there must have been discussion of Racing Point's plan B figure at the 09:15 meeting he attended. However he had no recollection of the discussion and said that Mr Stubbs had not told him about the call with Withers shortly after 16:00 the previous day.

300. I find that by the time of this meeting with Mr Baggs, Mr Stubbs had told Mr Rowley about what he had heard in the call with Withers the previous day, and that Mr Rowley's recollection about this was wrong. That explains why there were discussions on the morning of 7 August about the amount of Racing Point's plan B bid. The discussions assumed that there might still be some room for movement.

301. Mr Stubbs spoke with Mr Collings at 10:25 on 7 August and again at around midday. Mr Stubbs then emailed Messrs Khan, Davis, Leibowitz, and McCarthy (all of MDR) at 12:27, asking them to join a call with Mr Collings at 12:30. Mr Stubbs and Mr Rowley could not join as they had a meeting at Racing Point's offices at 13:00. Mr Stubbs added: "If anything urgent or spiky comes up ie different from where we think we are, please call or e mail straight away".

302. Mr Leibowitz and Mr Khan joined the call with Mr Collings as planned. A manuscript note of the call was taken by Mr Leibowitz. Mr Collings said that plan A was the top of the waterfall and that if it was reasonably deliverable that was the route to take. They also discussed the amount of the plan B offers. This was because the plan A rescue might fail. I find that there was a discussion of the figure of £90m. It therefore seems probable that Mr Stubbs had mentioned this figure to the MDR team or to Mr Collings by this stage.

303. There are two passages in the notes which are particularly relied on by Uralkali. The first said that it *"can't be wrong for Geoff to ask for more. … Get more on route B. 'Can you do a bit better?' If it gets up to £90 million then not much to choose."* The second noted that Ms Hilliard had said "don't go back", but Mr Collings said "go back". However he is also recorded as having said *"Can't say 'make a better offer'. Bank needs to talk to TLT to satisfy him"*. This point appears in a section of the note concerned with possible discussions between Mr Stroll and the Indian banks and TLT. That is not entirely easy to follow since it would have to do with the plan A offer rather than the plan B offer. The notes (like many such jottings) are not easy to decipher but (on the balance of probabilities) I find that Mr Collings suggested at an early stage in the discussion that the Administrators could go back to Racing Point and seek more money, but on further reflection changed his mind, and said that the Administrators could not ask for a better offer. He seems then to have suggested that the numbers could change in the discussions with the Indian banks. I do not think that the notes establish (as Counsel for Uralkali submitted) that by the end of the call there

was any substantial disagreement between the advice of Mr Collings and that of Ms Hilliard.

304. Mr Rowley's evidence is that he was not told about the call or any disagreement between Mr Collings and Ms Hilliard. I accept this evidence. At the time of the call he was on his way to Racing Point's offices. He was focused on the rescue plan and the exclusivity agreement. While at Racing Point's offices a signed version of Racing Point's offer with the figure of £90m was provided. I find that that increase in the figure arose out of the discussion between Mr Stubbs and Mr Indaimo at the meeting (see further below). In any event as I have said, I do not think there was in fact a substantial difference between the views of the two QCs.

Meeting with Racing Point at 13:00 on 7 August

305. Mr Rowley and Mr Stubbs met Racing Point at Mr Stroll's offices at 13:00. Mr Rowley was mainly focused on the rescue and agreeing the terms of the exclusivity arrangements. There were many people at the meeting. Mr Stubbs says that he spoke to Mr Indaimo and alluded to the £90m figure mentioned on the call shortly after 16:00 the previous day. Mr Stubbs was then given a final offer letter in hard copy which removed the word "draft" and increased the plan B offer to £90m. I accept the evidence of Mr Rowley that he was not involved in this process and did not ask for an increase in the plan B offer number to £90m. Mr Stubbs drew his attention to the increase during the meeting. Mr Rowley was not surprised as (on my findings above) Mr Stubbs had already told him about the discussion he had overheard at about 16:00 the previous day.

306. Mr Stubbs and Mr Rowley both said in their witness statements that the 13:00 meeting had taken place in the morning. This was wrong. Counsel for Uralkali submitted that this was because they were trying to conceal the fact that the meeting was after the call from Mr Collings. Uralkali invited the Court to conclude that the results of the call with Mr Collings were relayed to Mr Stubbs before (or during) the 13:00 meeting and that he then told Mr Rowley, who then negotiated an increase with Racing Point. I reject this submission. I find that the mistake in the witness statements was inadvertent and was not to camouflage what had happened. I do not think that the call with Mr Collings had anything like the significance Uralkali now attributes to it. As I have already found Mr Collings appears to have ended up saying that Mr Rowley could not ask Racing Point to make a better offer. I conclude that Mr Rowley did not ask Racing Point to increase the number and that it came about in the way described by Mr Stubbs.

307. At 14:30, Mr Stubbs emailed Messrs Leibowitz, Khan, Davis in connection with Mr Collings' call (subject: "Ref Matthews point"). Mr Stubbs explained: "Fallback already privately agreed". I find that this was probably a reference to the fallback plan B figure having been raised to £90m by this stage.

308. Counsel for Uralkali devoted a good deal of attention to the circumstances of the Racing Point plan B offer increasing from £70m to £90m. He said that the reason for the increase was that the Administrators were concerned that, if Racing Point's plan A fell through, the gap between Uralkali's offer of £101.5m and Racing Point's offer of £70m would very substantial. If Racing Point offered £90m the gap would be less striking. He submitted that Mr Rowley's evidence deliberately camouflaged the truth

and that this threw light on his credibility. He said that it was also evidence of preferential treatment of Mr Stroll.

309. I have concluded that Mr Stubbs probably did tell Mr Rowley about the conversation shortly after 16:00 on 6 August and that, on the morning of 7 August, Mr Rowley probably thought that the price might move. But I do not think the point has any greater relevance. First, as to credibility, I was satisfied that Mr Rowley was otherwise a reliable and straightforward witness and that he had misremembered this episode. Second, as to substance, I consider that Counsel for Uralkali has overstated the significance of the increase from £70m to £90m. The decision to accept Racing Point's offer was made when the plan B offer was stated as £70m. The reason for accepting its offer, on which two leading counsel had advised, was a belief that the rescue was viable. Provided that it was enough to cover the claims of creditors, the amount of the fallback did not much matter.

310. Moreover, while £90m was of course closer to £101.5m, it was still £11.5m short, so looking only at the plan B bids, Uralkali would easily have won the race. If there had really been an attempt to manipulate the process, Racing Point would doubtless have been persuaded to overtop Uralkali's number.

311. On 8 August Mr Stubbs explained that, prompted by Mr Leibowitz, he was planning "to prepare a detailed note of our joint reasoning" as to the decision to accept Mr Stroll's bid. He said again on 10 August that "I am preparing a detailed note of our reasoning in reaching a decision in the bid process and will finish this on Monday". In the event no such note was prepared. I do not find this has any significance. It would have been better to have such a note, but the reasons for the decision are adequately explained by the evidence, including the emails and the subsequent opinion of Ms Hilliard. Mr Rowley was satisfied that Racing Point's rescue bid was viable and likely to proceed; and it was also coupled with a back-up plan B bid which was more than sufficient to meet the claims of his estimate of the company's valid debts. He therefore decided that Objective A would probably be achieved and decided to give Racing Point a period of exclusivity, with the guarantee of a satisfactory plan B offer.

312. Counsel for Uralkali submitted that the failure to produce such a note was a breach of Regulation 13 of Insolvency Practitioners Regulations 2005/524, which requires the administrator to maintain records sufficient to show and explain any decision he makes which materially affects the case. I do not think that there was such a breach. I consider that the records of the administration are sufficient to explain the decision. This trial has involved an intense forensic examination of events and it is fair to say that the records do not set out all the minutiae. But the regulations require a sufficient record of material decisions and I consider that the emails, letters, and opinions of counsel show and explain why Mr Rowley made his decision. I reject the submission of Counsel for Uralkali that there was a deliberate decision that Mr Rowley and MDR would be better off without a separate document recording what had happened.

The eventual failure of Racing Point's rescue plan

313. After Mr Rowley had decided to accept Racing Point's rescue offer, Mr Rowley and his legal advisers worked towards facilitating taking the company out of administration. This involved a number of workstreams. MDR and counsel prepared the necessary legal documents for an application to the court to exit from the

administration. That overlapped with the work being undertaken by Mr Watkins and his team to clarify the amount needed for FI to continue trading as a going concern for the next twelve months. There was drafting work on the transactional documents and formal records of the rescue transaction. A loan agreement was needed to cover the costs of the administration pending the exit application. An exclusivity agreement was needed to give Racing Point a window in which to complete the share purchase. Legal advice was taken in relation to: the ability of the Indian banks to block the rescue; the OIH shareholders' £159m creditor claim; the creditor claim of BWT; and to the correct handling of the proceeds, in light of the freezing order. Mr Rowley continued to liaise as before with TLT for the Indian banks, with FOM and the FIA, with Hogan Lovells and Mercedes and with senior management at FI. He also liaised with Santander. Mr Rowley and MDR were continuing to work long hours, day after day.

314. On 9 August the Indian banks indicated their agreement in principle to a variation of the freezing order, but their consent was not formalised at that stage.

315. Mr Rowley and his team were working in parallel on a contingency plan for completing a business and asset sale in the event that the share sale collapsed for any reason. But the principal efforts were towards preparing the application to exit from the administration.

316. It therefore came as a surprise to Mr Rowley when, on 15 August, Mr Stroll informed him that he no longer wished to proceed with the plan A share purchase. Mr Stroll gave "reputational risk" as the reason for his decision and said that he was not prepared to provide a statutory declaration as a condition of the Indian banks giving their consent. He was concerned that the latter would be equivalent to a personal guarantee which he was not prepared to provide. The Indian banks were putting Mr Stroll under pressure to sign the declaration and Mr Stroll said he had become "fed up with attempting to prove himself" to the banks. Mr Leibowitz's notes record that Mr Stroll "didn't like [the Indian banks'] requirements re backhanders".

317. Mr Rowley took advice from MDR and Ms Hilliard and concluded that the Administrators were committed to proceeding with Racing Point's fallback plan B bid. Ms Hilliard said that she was in no doubt whatsoever that the Administrators should proceed to the sale of the assets to Racing Point. The lawyers present from MDR agreed. That is what then happened. The sale of FI's business and assets to Racing Point completed on 16 August 2018, for a purchase price of £90m.

318. The team remains owned by Mr Stroll and races under the name Racing Point F1.

Uralkali's claims

The negligence claims

319. There are four requirements for any claim in negligence: the defendant owes the claimant a duty of care; there is a breach of the duty of care; there is a causal connection between the defendant's careless conduct and the damage; and the damage to the claimant must not be too remote.

320. The principles concerning liability in negligence for statements were recently reviewed by the Lord Wilson in *Steel v NRAM Ltd* [2018] UKSC 13. He said at [24],

after reviewing a series of cases at the highest level, including *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 and *Williams v Natural Life Health Foods Ltd* [1998] 1 WLR 830 ("*Williams*"), that there was no better rationalisation for liability in tort for negligent misrepresentation than the concept of assumption of responsibility. He concluded that it had "become clear that, although it may require cautious incremental development in order to fit cases to which it does not readily apply, this concept remains the foundation of the liability."

321. Lord Wilson cited Lord Devlin in *Hedley Byrne v Heller* [1964] AC 465 at p.529 where he said that a duty of care arose in making a representation only if the representor had assumed responsibility for it to the representee. The assumption of responsibility could be express or implied from all the circumstances. Lord Wilson commented at [19] that the *Hedley Byrne* decision had emphasised the need for the representee reasonably to have relied on the representation and for the representor to have foreseen that he would do so.

322. In *Williams* the question was whether a director of a small company was liable for misstatement in pre-contract information including projections which had been provided to a potential franchisee. Those documents had specifically referred to the expertise and experience of the director and the evidence showed that the director had had a central role in preparing them. Lord Steyn said that the test of assumption of responsibility is objective, rather than turning on the state of mind of the defendant. He said that the impact of what the defendant says or does must be judged in the light of the relevant contextual scene but subject to this the primary focus is on exchanges (statement and conduct) which cross the line between the defendant and the plaintiff.

323. Lord Steyn explained that, where the question is whether a director of a company is liable, the inquiry is whether the director or anybody on his behalf conveyed to the claimant that the director assumed personal responsibility to the claimant. His survey of the authorities showed that it is not sufficient that the claimant relies on the expertise or knowledge of the director. It is also necessary for the claimant to show that its reliance on the assumption of personal responsibility for the task (such as the making of the statement or provision of a service) was reasonable. In one of the passages he cited (from *Trevor Ivory Ltd v Anderson Ltd* [1992] NZLR 517) the judge had described the director's actions as "routine involvement for and through his company" and that said that there was "no singular feature" which would justify the belief that the director was accepting a personal commitment.

324. *Williams* concerned a claim against a director. In *Fraser Turner Ltd v PricewaterhouseCoopers LLP* [2019] ECA Civ 1290 the Court of Appeal applied the same principles to administrators, another form of agent of a company. The case concerned a claim by a particular creditor of a company which said that his interests had not been properly protected in an asset sale. At [41] Sir Geoffrey Vos C. recorded that the judge below had held that there was nothing that the administrator had said or done to indicate that he was prepared to act in any other way than as an administrator who was protecting the interests of the creditors generally. The judge below had also commented that it would have been surprising if any assumption or responsibility or special relationship had arisen since the claimant's interests were potentially adverse to those of the remaining creditors and would potentially have caused significant difficulties for the administration. At [70] the Chancellor said that the question whether a director or other agent was liable in tort for economic loss has been well

rehearsed. He referred to the assumption of responsibility test in *Williams*. At [71] he said that, for the purposes of that test, the position of an administrator is the same as that of a director. The question is therefore whether there was an assumption of responsibility. At [72]-[74] the Chancellor said that there was no such assumption. In analysing this issue, he pointed out that the administrators had a duty to the general body of creditors. It would not have been open to them to prefer the claims of the claimant to the interests of the others.

325. Uralkali also claims that the administrators are liable under what they call the "extended *Hedley Byrne* principle". They rely in this regard on *Henderson v Merrett*. That case established that the *Hedley Byrne* principles may apply to the provision of a service. That is how *Henderson* was characterised in Williams by Lord Steyn (with whom Lord Goff, who gave the lead speech in *Henderson*, agreed).

The Rescue Offer Representations claim

326. This is the first way Uralkali claims in negligence. It pleads that:

> "By what Mr Rowley said in the 2 August 2018 meeting and their subsequent email the Defendants represented to the Claimant that the bid process would be determined by reference to the most favourable purchase offer, even if a rescue offer were also to be made (the "Rescue Offer Representations")."

327. Uralkali pleads that these representations continued until the second round deadline of 16:00 on 6 August 2018.

328. It is necessary to scrutinise that allegation and appreciate what it entails. Uralkali alleges that the representation was untrue when made and thereafter because Mr Rowley had decided that he would accept a viable plan A coupled with a plan B even if the plan B bid was not the highest. Uralkali's case is therefore that the Administrators would accept the highest plan B offer whether or not that party also made a rescue offer.

329. Uralkali pleads that this representation was made on two occasions. The first is the 2 August 2018 meeting. Uralkali pleads that "*[a]t this meeting, Mr Rowley explained that the successful bidder would be selected on the basis of the most favourable business and asset purchase offer and that a party would only be offered the chance to pursue a rescue if it submitted the most favourable business and asset purchase offer*."

330. The second occasion is the 2/8 email.

Did Mr Rowley make the Rescue Offer Representations?

331. The first question is whether Mr Rowley made the Rescue Offer Representations.

332. I have already found on the facts that Mr Rowley did not make the representation at the meeting on 2 August 2018 (see the analysis at [161] above).

333. I turn then to the 2/8 email. It is common ground that the court should ask how it would have been understood by a reasonable person in the position of the claimant

having the claimant's knowledge and understanding. This is an objective, contextual, exercise.

334. The allegation is that the representation continued until 6 August, so it will be necessary to look also at subsequent emails and calls. But it is convenient to start by analysing the 2/8 email itself.

335. The context of the 2/8 email includes the statutory rules governing administration, about which a reasonable commercial party in the position of Uralkali (with expert legal advice) would have been properly informed. Indeed Mr Ostling said in evidence that Uralkali was actually aware of the statutory hierarchy under Sch. B1 and the Administrators' obligation to seek to achieve those objects. Uralkali therefore knew that the Administrators were bound to act in accordance with the statutory hierarchy.

336. The 2/8 email has also to be read in the light of what was said at the 2 August meeting. At the meeting Mr Rowley said the Administrators would act in accordance with the statutory hierarchy and that a rescue, while challenging, was doable.

337. Turning to the text of the 2/8 email, the relevant passage (subparagraph i.) was predicated upon Uralkali putting forward alternative plan A and plan B offers. That had been discussed at the meeting earlier in the day. The passage was concerned with such a case. It was not saying (at least in terms) how the Administrators would assess a case where Uralkali (or another bidder) submitted only a plan B offer and no rescue offer.

338. The purpose of that part of the 2/8 email was to report on the discussions between the Administrators and FOM on the afternoon of 2 August. It explained that any proposals to rescue the company would have to be coupled with a plan B bid; if selected Uralkali would have two weeks to carry out the rescue; but, as the winning bidder, it would be bound to carry out the plan B if the rescue did not proceed. As it was put in evidence the plan B bid would be "baked in". The Administrators and FOM did not want to be in a position where they would have to start from scratch. This was a new idea, which had not been discussed at the meeting that morning. The purpose of this part of the email was therefore to relay the need for the automatic fallback structure.

339. Uralkali's most powerful point about the text is that the relevant passage of the email refers to the plan B bid being the "preferred option" and to selection "on the basis of your plan B".

340. Counsel for the Administrators accepted that the email could have been better worded. He pointed out that the email referred to a "plan B structure" and did not use the concepts of highest or even best offer and did not refer to price. He submitted that, read in context, the passage could not have had the meaning Uralkali now contends for.

341. In my judgment, a reasonable recipient of the 2/8 email, reading it in context, would not have thought the Administrators were representing that they would judge the offers on the basis of the best plan B offer even if another bidder made a viable rescue offer (with an acceptable fallback plan B offer). My reasons are these.

(a) A reasonable recipient with the contextual appreciation available to the parties would have understood that the message given by the relevant part of the 2/8 email was the need for an automatic fall-back plan B structure. It was intended to convey that if Uralkali wanted to offer a rescue and sought a two week period of exclusivity to perfect it, Uralkali would also have to make an acceptable plan B bid which would kick in automatically if the rescue plan failed.

(b) I do not think that the passage contained a representation that the Administrators would accept the best plan B bid in isolation. More specifically, I do not think the email represented that the Administrators would accept the highest plan B bid even if (at the time bids fell to be assessed) Uralkali had not made a rescue offer, but there was a viable rescue bid from another bidder coupled with an acceptable plan B fallback bid.

(c) The recipient would have appreciated that that reading would have subverted the Administrators' statutory duties.

342. As to the last point, Counsel for Uralkali argued that a reasonable reader would not have perceived any such conflict with the Administrators' statutory duties as Mr Rowley had already made clear to Uralkali that he did not think there could be a viable rescue. I reject that submission for two reasons:

(a) In the first place I have found as a fact that Mr Rowley did not say or suggest on 2 August that a rescue was not viable. He discussed the possibility of a rescue and emphasised that he would follow the statutory hierarchy.

(b) In any event, for its case to succeed Uralkali has to say that Mr Rowley stated in the email that he would accept the best plan B offer even if, by the time the offers fell to be judged, there was a viable rescue bid from another suitor. As already explained administrators have to be prepared to adapt as circumstances change. They have to be ready to change tack. Mr Rowley could not properly have committed himself to judging bids only by reference to a plan B bid whether or not there was a viable rescue at the time for judging bid. That would have subverted the statute.

343. As I have said, the 2/8 email is not the end of the story. Uralkali's case is that the Rescue Offer Representations continued until 16:00 on 6 August. The 2/8 email was part of a chain of communications, and the frame therefore cannot be frozen at the moment it was received. The chain included the following:

(a) The same day, at 23:25, Mr Boothman replied to the 2/8 email. He said that Uralkali would make a rescue offer and that "*[g]iven that on their assessment there is a surplus available for equity, the administrators will not be acting in accordance with their duties if they do not allow a proper chance for an offer of this nature to be implemented*". By this email Mr Boothman was highlighting the statutory hierarchy.

(b) Mr Stubbs responded to Mr Boothman's email at 8:00 on 3 August. He said that Mr Rowley "*made specifically clear yesterday that a return to solvency is objective 1 of any administration (if very rarely achieved). This is the key*

matter to resolve between yourselves and the shareholders". In other words he was saying that Mr Rowley would observe the statutory hierarchy.

(c) Mr Boothman also spoke to Mr McCarthy on 3 August. Mr Boothman said that they were putting forward a bid that would achieve the survival of the company. Mr McCarthy said that Uralkali was being taken seriously but that "*they are sceptical about deliverability of the equity and don't want to lose their plan B offers*". This was again consistent with the message conveyed by the 2/8 email: that any rescue bid would require an acceptable back-up plan B offer.

(d) Uralkali made alternative plan A and plan B offers in its offer letter of 3 August. On 4 August at 10:45 (before any decision had been made on the first round offers) Mr Boothman said in an email that since the Uralkali bid provided full repayment of all creditors and a return to equity which had been accepted by the owners, it was difficult to see how the administrators could proceed with other bidders. Again Mr Boothman was highlighting the Administrators' obligations to pursue the statutory hierarchy.

(e) Later on 4 August Mr Rowley informed the suitors of his decision to invite further bids. In his email to Uralkali he addressed its plan A and plan B offers separately. He explained that he could only progress the plan A offer once he had evidence of binding terms. He said that DWF had told him that the Sahara Group was considering its options. He said that the only acceptable precondition to a plan A offer was the need for consent from the Indian banks and that this would have to be provided by 17 August so as to allow an exit from administration before the Belgian Grand Prix. He then addressed the plan B offer and said that he needed a clear offer for the business, assets, and goodwill. He stated that if Uralkali was selected it would have until 17 August to progress its plan A but, if that did not happen, the parties would enter a sale and purchase agreement on the basis of its plan B offer. By this email Mr Rowley was guiding Uralkali about his requirements for the renewed bidding process. The email did not suggest that he would make a decision based only on the level of the bidders' plan B offers.

344. I have already concluded that the 2/8 email did not contain the representation alleged by Uralkali. The chain of communications set out above reinforces that conclusion.

345. Indeed in my judgment the subsequent chain would operate to undermine any suggestion that there was a continuing representation even if (contrary to my conclusion) the 2/8 contained the alleged representation. In the emails and conversations of 2 to 4 August, Uralkali's solicitors highlighted the priority of a rescue under the statutory scheme and Mr Rowley and his solicitors agreed, while reiterating the requirement for a fall-back plan B offer.

346. Specifically, Mr Rowley's email of 4 August invited further bids and addressed plan A and plan B separately. It explained the requirements for the further round of bidding. The message conveyed by that email was that if a suitor could provide evidence of binding terms with the shareholders it would be allowed time to perfect a rescue, and that the Administrators would work towards an exit before the next Grand

Prix. The email also required bidders to address the disputed shareholder claims of £159m (this was not a point raised in the earlier emails).

347. There is nothing in the email showing that Mr Rowley regarded a rescue as impracticable; on the contrary the assumption of the email was that there might well be a workable rescue (and a period of exclusivity to put that into place). What he did require was that the fall-back offer would kick in automatically if the rescue failed.

348. The email of 4 August was a fuller and more comprehensive statement of what Mr Rowley required from Uralkali than the compressed passage in the 2/8 email. It contained further requirements. I consider that a reasonable recipient would have taken it to supersede the 2/8 email and to say what was required for the second round of bidding.

349. I do not think that a reader of this email (and the 2/8 email) would have supposed that Mr Rowley intended to assess the bids only by reference to the winning plan B bid.

350. In my judgment, therefore, Uralkali's case that Mr Rowley made the Rescue Offer Representations on 2 August fails.

351. In case I am wrong about that, I also conclude that no such representations were still continuing on 6 August, the date when Uralkali claims it relied on them.

Did Mr Rowley owe a duty of care to Uralkali in respect of the Rescue Offer Representations?

352. In case I am wrong this far, and the Rescue Offer Representations were made, the next question is whether Mr Rowley owed Uralkali a personal duty of care.

353. Counsel for Uralkali submitted that Mr Rowley assumed a personal responsibility to Uralkali. He advanced (in summary) the following points. Mr Rowley represented the criteria that he would adopt in the bidding process and this was peculiarly within his knowledge; the representation concerned how the Administrators themselves would act rather than being information about the company of which they were administrators and agents; Mr Rowley knew that Uralkali would rely on the representation and would potentially suffer loss if the representations were untrue; the position of the administrators was therefore akin to pre-contractual cases such as *Esso v Mardon* [1976] QB 801 (where Esso was held to be under a duty to a prospective tenant of a garage in relation to projections of sales); there was also a close analogy with the position of an auctioneer; and the fact that the Administrators were acting as agents could not immunise them from liability.

354. I have concluded that Mr Rowley did not assume a personal responsibility to Uralkali in respect of the Rescue Offer Representations. My reasons follow.

355. The first reason arises from the status of administrators of companies as agents. The cases of *Williams* and *Fraser Turner* show that Uralkali has to establish that Mr Rowley is to be treated in law as having assumed a personal responsibility to them for a representation. There is nothing in the general relationship of the parties to give rise to an assumption of responsibility. Administrators are appointed to manage and administer a company's affairs in order to achieve the statutory purposes. Under the

statute, they are expressly appointed as agents of the company. *Fraser Turner* shows that they do not owe a duty of care in tort to particular creditors simply by virtue of their office, or by knowing that those creditors might be adversely affected by their actions, and that something more is required. The position must be *a fortiori* where the putative claimant is not even a creditor of the company.

356. I do not think that administrators are to be taken to assume a personal responsibility to bidders by undertaking a sales process, without more. That is an entirely routine function, and to the extent they are engaged in stimulating a sale of the company's assets, or promoting a rescue, they are acting as agents. Again the analogy with a director is apt; a director in charge of a sales process of a company's assets would not be taken, without more, to have assumed a personal responsibly to potential bidders.

357. Counsel for Uralkali referred to a passage in *Fraser Turner* at [71] where Sir Geoffrey Vos C. referred (when addressing the facts) to "the absence of a specific representations being relied upon". Counsel submitted that in the present case the administrator had made specific representations to the claimant and that the *Fraser Turner* case therefore assisted Uralkali. I disagree. The Chancellor was not suggesting that if an administrator made *any* representation to a claimant he would thereby have assumed a duty of care in respect thereof. He was merely pointing out, on the facts of that case, the administrator had not made a representation by which he could be taken to have assumed a responsibility to the claimant. *Fraser Turner* applies *Williams* to administrators and *Williams* shows that something more than a representation by a director is required to create a duty of care.

358. Counsel for Uralkali submitted that there is a good analogy between an administrator running a sale process and an auctioneer. I think the analogy fails at several points. In the first place it sidesteps the present point, which arises from the status of the Administrators as agents of a corporate body. To complete the analogy accurately one would have to ask whether a director or other agent of a corporate auction house had personally assumed a responsibility to bidders merely by conducting the auction. On the authority of *Williams* that seems very improbable. That case and *Fraser Turner* establish that some special circumstance or factor is required to place a directors or administrator of a company under a duty of care.

359. There are other reasons why the analogy with auctioneers is unconvincing. The second is that the sales process carried out in the present case was not an auction. Uralkali asked whether the Administrators would undertake a sealed bid process and were told that they would not. As already explained Mr Rowley was considering both a rescue and a plan B sale and in assessing the offers he had also to consider the views of other stakeholders. There was never anything resembling an auction. The third reason why the analogy is inapt is that there may be contractual relationships between auctioneers and bidders (arising for instance from the buyer's premium) such that the legal context is different from the present one. Fourth, it is in any event very far from clear whether an auctioneer owes a duty of care to bidders and if so, what duty. In the main case relied on by Uralkali (*Thompson v Christie's* [2005] EWCA Civ 555) the defendant auction house conceded that it owed a duty of care to the buyer, but this arose from unusual facts (she was a "special client" and the auction house had advised her). Fifth, even if an auctioneer might in some cases owe a duty of care to the successful bidder in respect of its description of lots, that does not establish that the

auctioneer owes a duty of care to a losing bidder concerning the conduct of the auction.

360. For similar reasons the suggested analogy with cases such as *Esso v Mardon* is unpersuasive. It again sidesteps the status of administrators as agents of the company. To complete the analogy, one would need to show (on the facts of *Esso*) not just that Esso had assumed a duty of care, but that a director or other agent of Esso had assumed a personal duty to Mr Mardon. That was the very point considered by the House of Lords in *Williams*. It is not enough to show that a director was intimately involved in providing information or that he has superior knowledge or expertise or that he knows that the claimant will rely on his statements in making its decisions. Something more is needed.

361. I do not think there is any substance in Uralkali's proposed distinction between statements about the company and statements about the conduct of the administrator. Such a distinction is unreal and unworkable. One cannot sever or dissect statements about the administration from those about the company. An administrator is required, in carrying out his task, to make commercial decisions about all aspects of its business and affairs. In carrying out his functions, he will make countless statements to an array of different parties. These will cover a wide array of subjects, but all in the end will be connected in some way to the administration of the company. In providing information and guidance about the bidding process Mr Rowley was acting as an administrator and therefore as the agent of the company.

362. In the present case Mr Rowley acted as one would expect any administrator to act after his appointment. He communicated with an array of parties including potential buyers, shareholders, and other stakeholders about a possible rescue or sale of the business and assets. He met with potential suitors to guide and assist them in formulating their offers. He provided information. He set deadlines for the submission of offers. He told potential suitors (accurately) that their bids would have to be acceptable to various stakeholders (FOM, the FIA and Mercedes). He liaised between the suitors and those various stakeholders. I consider that in doing those things he acted routinely as an administrator, in pursuance of his statutory functions and duties. There was nothing singular or unusual which might have suggested to them that he was undertaking a personal responsibility to Uralkali for his statements.

363. Since Uralkali claims that the Rescue Offer Representations were made at the meeting of 2 August and in the 2/8 email I should also consider specifically whether there was anything in those communications or in the surrounding circumstances which amounted to an assumption of responsibility.

364. As to the 2 August meeting, Uralkali asked to meet Mr Rowley to discuss its bid. It wanted information and guidance about a potential rescue or plan B bid and Mr Rowley, acting as administrator, willingly agreed to provide this. He was also meeting other bidders at around the same time. At the meeting with Uralkali, Mr Rowley discussed the financial position of the company, the amount of its creditors and a potential structure for a rescue or sale of the business and assets. He told Uralkali that there were a number of bidders and set a deadline for the submission of bids. I consider that that was routine conduct of an administrator.

365. The 2/8 email confirmed some of discussion at the meeting and updated Uralkali about Mr Rowley's discussions with FOM, one of the key stakeholders, and described what the administrators now required. It was a routine update by the solicitors for an administrator and there is nothing in it to suggest a personal assumption of responsibility.

366. Mr Rowley did not purport to advise Uralkali about how it should conduct itself. Uralkali knew too that Mr Rowley was also meeting and communicating with other potential bidders. They would have expected him to be talking to those other bidders about the company and its creditors and giving them similar guidance about what they would need to do to submit bids.

367. I conclude that the Administrators did nothing, at the meeting or in the email or more generally, to assume or undertake a personal responsibility to Uralkali. Mr Rowley acted routinely as the administrator, providing information to potential bidders, including Uralkali, about the company's financial position and what the potential rescuer or buyer might need to do.

368. Counsel for Uralkali argued that the status of an administrator as an agent cannot immunise him from liability in tort. That may be so, but the argument assumes the very thing it seeks to establish (namely personal liability) and is therefore question-begging. To be liable in negligence, the defendant must be under a duty of care. If he has not assumed responsibility, the defendant is not liable in tort for his statement. The status of the defendant as agent is not deployed as a shield or immunity from liability; it affects the prior question whether there is a duty of care at all.

369. Counsel for Uralkali also submitted that if an administrator running a sales process does not assume personal responsibility to prospective buyers there will be potential for injustice since companies in administration are insolvent. But that does not justify imposing a duty of care on an administrator who accepts his appointment as an agent. Moreover, the same reasoning logically applies to a director of a company which happens not to have the resources to meet a claim. The cases do not suggest that a company director of an insolvent company will generally be held to assume a personal responsibility because the company is not in a position to meet any claim.

370. My second reason for concluding that Mr Rowley did not assume a personal duty of care arises from Lord Steyn's observation in *Williams* that the claimant has to show that it reasonably relied on the defendant's assumption of responsibility. Lord Wilson emphasised this point in *Steel v NRAM* as one of the touchstones of liability.

371. I am again assuming at this point in the analysis (contrary to my factual findings) that Mr Rowley made or repeated the Rescue Offer Representations in the 2/8 email.

372. As already explained, Uralkali's case is that Mr Rowley represented that he would accept the highest plan B bid. Uralkali was being advised by specialist insolvency lawyers and was aware of the requirements of paragraph 3 of Sch. B1.

373. Any reasonable representee knowing of those requirements would have reverted to Mr Rowley or MDR for clarification of the effect of the 2/8 email and sought confirmation that Mr Rowley would indeed determine bids by reference only to plan B offers. The relevant part of the 2/8 email was expressed shortly and rather clumsily.

Its apparent purpose was to explain (following the meeting with FOM) that if a rescue failed a fall-back plan B offer would automatically take effect. Ashurst could easily have reverted to Mr McCarthy to seek clarification and confirmation.

374. I conclude that it would not have been reasonable for a recipient of the 2/8 email to reach a decision not to pursue a rescue offer based on the terms of sub-para (i) of the email.

375. In case I am wrong about that, I need to consider the position in the period up to 6 August 2018. As I have explained, Uralkali's case is that the relevant representations continued until 6 August and the question of reasonable reliance must be assessed in the light of events up to that date. The relevant communications are listed in paragraph [343] above. Uralkali's solicitors highlighted the priority of a rescue under the statutory scheme and Mr Rowley and his solicitors agreed, while reiterating the requirement for a fall-back plan B offer. Mr Rowley's email of 4 August said that if a suitor could provide evidence of binding terms with the shareholders it would be allowed time to perfect a rescue, and that the Administrators would work towards an exit before the Belgian Grand Prix. Mr Rowley did not suggest that he regarded a rescue as impracticable. He required a fall-back offer to kick in automatically if the rescue failed.

376. In the light of those communications it would not have been reasonable for Uralkali to rely on the 2/8 email as saying that the Administrators would accept the highest plan B even if another bidder had made a viable rescue plan coupled with an acceptable plan B bid.

377. My third reason for holding that Mr Rowley was not under a personal duty to Uralkali is that, if such a duty were owed to Uralkali, it would also have been owed to a broad and indeterminate group of claimants. The cases following *Hedley Byrne* have shown that the courts lean against finding a duty in such cases: e.g. *Playboy Club v Banca Nazionale del Lavoro* [2018] UKSC 43 at [7] and [8]. After his appointment Mr Rowley communicated with an array of parties about the bidding process. If his statements to Uralkali (which were routine statements made in the course of conducting the administration) were to be treated as giving rise to an assumption of personal responsibility I can see no logical reason why an administrator's statements to many other parties would not equally have given rise to such a duty.

378. Even looking at the bidding process, Mr Rowley communicated about the bidding process with several potential bidders and also with Mercedes, the FIA and FOM. He discussed the stakeholders' requirements. He passed information about the bids to them. All these parties were interested in the outcome of the sales process and each stood in varying ways to be adversely affected by his decisions. I can see no basis for saying that Mr Rowley fell under a personal duty to Uralkali but not to the other bidders and the other stakeholders. This would lead to finding a duty in respect of a broad and uncontrolled class of potential claimants.

379. There is a fourth reason for deciding that Mr Rowley did not assume a personal responsibility to Uralkali in respect of the Rescue Offer Representations. The imposition of a duty in any given situation must be considered in the context of the broader legal rules applicable to the situation and the courts seek where possible to promote legal coherence. I consider that the court should be very slow to impose on

an administrator a duty of care which might fetter his discretion to make decisions in accordance with the statutory purposes of the administration under para 3 of Sch. B1; still less a duty that would operate to subvert the statutory purpose of the administration. Courts are reluctant to impose a duty of care which would (or might well) cut across the duties (or interests) of the defendant (see for instance *Fraser Turner*).

380. As already explained, administrators owe overriding duties to the creditors and are required to seek to achieve the purposes set out in para 3 of Sch. B1. They have a broad discretion in how to perform their functions. They need to be adaptable quickly to events as they develop. Companies often go into administration because they are distressed, and steps have to be taken urgently. Administrators are required to communicate with many stakeholders, including creditors, suppliers, employees, pension trustees, regulators, and others. Where there is a possible sale or rescue they may have to work with shareholders, potential bidders, valuers, and other advisers. Administrators need to adapt to the circumstances and change tack as the conditions change. They need to make commercial judgments about the best way of achieving the statutory purpose and serving the interests of creditors; and need to be able to revise their thinking to fit the changing circumstances.

381. To impose a personal duty of care sounding in tort in cases such as the present would to my mind severely constrain the ability of administrators to perform their functions single-mindedly in the interests of creditors. It would inhibit the ability of administrators to act and respond quickly and decisively if they anticipated being held personally responsible for routine communications like those pleaded by Uralkali in the present case. It is easy to anticipate that administrators subject to a tort duty would become unduly cautious, insisting on passing every word in front of their lawyers for vetting. They would be less forthcoming at meetings for fear of being sued for their words.

382. Moreover, in any substantial administration there is a torrent of emails covering a wide range of issues. In the present case Uralkali relies on a few sentences in one email as the main basis of its case. If they were under a personal duty in tort administrators and their teams would need to have in mind all they had said to third parties in the course of the administration to avoid the possibility of saying something inconsistent with some earlier utterance.

383. Moreover, administrators conducting sales process often have to deal with determined and well-funded suitors. If a duty of care was owed by Mr Rowley in the present case it is hard to see why it should not be owed to bidders in most administrations. There is nothing special that marks this case out from other sales processes. It is easy to anticipate that determined bidders would wield the threat of personal liability as a stick to persuade the office-holder to find in its favour. Indeed were administrators to be subject to a duty of care it is likely that they would routinely find themselves in the crossfire of threats of personal liability while the bidding process was in play.

384. This is not a theoretical point. On 4 August 2018 Mr Boothman of Ashurst wrote an internal email to the Uralkali team recording a call he had had with Ms Fogarty. He recorded that she had written to the administrators saying that Uralkali had made a rescue bid. He went to on record that he had told Ms Fogarty (Sahara Group's lawyer) that "*she needed to make the point that Geoff would be personally liable if he*

accepted another offer that deprived them of equity value. He would probably have to sell his house to meet the claim! She noted the point but said that she is struggling to get proper instructions". Mr Boothman seems to have thought that this (graphic) threat was better coming by proxy. But it gives a flavour of the kind of leverage that would be applied to administrators by bidders and their lawyers if administrators owed a personal duty of care.

385. Counsel for Uralkali sought to meet these points by saying that the duty is only one to take care and that administrators should be expected to take care in any event. But that does not meet the concern that administrators would be likely adopt a more cautious, defensive, stance to their communications, with everything being carefully lawyered, or address the impact this will have on the speed and openness of the process. Nor does it address the fact that well-funded bidders would be likely to threaten the office-holder with personal liability even while the sales process was running.

386. It is relevant when considering legal coherence that the legislature and the courts have considered the class of person who may apply to court to enforce the duties of administrators. As explained above, paragraph 74 of Sch. B1 provides for a creditor or member of a company in administration to apply to the court claiming that the administrator has acted or proposes to act so as unfairly to harm the interests of the applicant or other creditors or members. By paragraph 75 a misfeasance application may be made to the court by the official receiver, the administrator of the company, the liquidator of the company, a creditor of the company or a contributory of the company. The Court of Appeal confirmed in *Brake v Lowes* [2020] EWCA Civ 1491 at [63] that a bidder in a bidding process does not have standing to apply to the court under its supervisory jurisdiction over its own officers. The same must apply to administrations. While this point is not determinative, it is relevant that Parliament and the courts have drawn this line and that aggrieved bidders fall outside it.

387. Administrators are required to act single-mindedly in the interests of the company and its creditors. They are also obliged under the statute to carry out their functions as quickly and efficiently as is reasonably practicable. The task of administrators is demanding and exacting enough without requiring them to have to look over their shoulders for personal claims by bidders. I consider that the imposition of a personal duty of care on the administrators on facts such as the present would be inimical to the single-minded duty placed on administrators to act in the interests of the company's creditors. One can never say never, and there may be exceptional cases where administrators will be found to have taken on a personal responsibility to third parties. But there is nothing in the present situation to justify a personal duty of care.

388. For these reasons I conclude that Mr Rowley did not assume a personal duty of care to Uralkali in respect of the Rescue Offer Representations (had he made them).

Were the Rescue Offer Representations untrue?

389. This point does not arise but in case I am wrong on the earlier issues, I turn to the questions whether the Rescue Offer Representations were false. Mr Rowley's position is that never intended to make his decision by reference only to the winning plan B bid. It therefore follows that, if they were made, the representations were false.

Was Mr Rowley negligent in relation to the Rescue Offer Representations?

390. This point again does not arise, but in case I am wrong on the earlier issues, the next question is whether in making the representations Mr Rowley fell below the standard expected of a reasonable administrator in his position.

391. In this regard, I should consider the two occasions on which the representation was said to be made separately.

392. I have found as a fact that Mr Rowley did not make the representation at the 2 August meeting. I have to assume at this stage in the analysis that he did make the representation at the meeting. Making that assumption, since he did not intend to assess the bids in that way, he must have acted without proper care in making the representation.

393. The position in relation to the 2/8 email is more nuanced. I assume that the email contained the Rescue Offer Representations (but that Mr Rowley had not made the same representation earlier).

394. The email was written by McCarthy but approved in advance by Mr Rowley. I find as a fact that Mr Rowley did not think that the email contained the representation. I have also found as a fact that Mr Rowley did not intend to assess the offers by reference only to the winning plan B bid. The question is therefore whether Mr Rowley failed to exercise due care in failing to understand that the email contained the representation. In my judgement the answer is "no". Before the email was written Mr Rowley and MDR had been at the meeting with FOM where Mr Carey had raised the potential timing problem and suggested that anyone offering a rescue had to make a plan B offer which would take effect automatically if the rescue failed. Mr Rowley agreed with that suggestion. Mr McCarthy then wrote the email. Mr Rowley reasonably thought that the relevant part of the email was intended to convey that message and was entitled to suppose that Mr McCarthy's email did that. I do not think that Mr Rowley was negligent in failing to understand that the email contained the Rescue Offer Representations.

395. But the matter does not stop there, as Uralkali's case is that the Rescue Offer Representations continued until 6 August at 16:00 and that Mr Rowley was negligent in failing to explain to Uralkali before then that he would not be judging bids only on the basis of a winning plan B bid. I have already listed the communications that followed the 2/8 email. I find in the light of those communications that Mr Rowley had no reasonable cause to suppose that Uralkali thought that he would assess bids only on the basis of the winning plan B. I therefore find that there was no want of care on his part in failing to explain to Uralkali that he would not assess the bids in that way. I think the position is particularly clear after Mr Rowley's email of 4 August to Uralkali inviting further bids. He explained his requirements in relation to any revised plan A and plan B offers and also explained that, if it wished to make a plan A offer and have a period of exclusivity to perfect it, Uralkali would have to make a fall-back plan B offer which would automatically apply in the event that the rescue failed. He also set out the requirement that an offer would have to address the (disputed) shareholder claims of £159m. The email showed that he was clearly prepared to entertain a viable plan A bid (provided it was coupled with an acceptable plan B bid). He did not suggest anywhere in the email that he would assess the revised offers by reference to the winning plan B bid; still less that he would prefer one party's plan B bid over a rescue bid made by another party. I do not think there was any negligence

on the part of Mr Rowley in not reverting to Uralkali about the terms of the 2/8 email, which had clearly been superseded by his much fuller 4 August one.

Did Uralkali rely on the Rescue Offer Representations?

396. This point arises only if I am wrong on the earlier issues.

397. Uralkali says that a rescue was its preferred route, for public relations and other reasons. Mr Ostling said in evidence that Uralkali was keen to achieve a recue. Uralkali also accepts that it attempted to persuade the shareholders to sell their shares to Uralkali. It says however that by the night of 5 August the bid team had concluded that Dr Mallya might be seeking a bribe or other illicit arrangement. It says that the bid team made a decision at about 22:00 to pursue only a plan B bid and that it made this decision in the belief that Mr Rowley would assess the bids by reference only to the plan B bids. This decision was reflected in its second round bid letter.

398. The assumption of this part of the judgment is that Mr Rowley made the Rescue Offer Representations.

399. Uralkali has not satisfied me that it relied on the Rescue Offer Representations in deciding not to pursue a rescue. My reasons are these.

400. First, in my judgment Uralkali understood by the night of 5 August 2018 that Mr Rowley was intending to assess the bids having regard to his email of 4 August inviting further offers. That showed that a plan A bidder who could provide evidence of binding terms with the shareholders would potentially be given a period of exclusivity (but would also have had to make an acceptable fall-back plan B offer). I find that by that stage (at the latest) nobody on the Uralkali team had the 2/8 email in mind or thought that Mr Rowley was intending to assess bids by reference only to the plan B bids.

401. Second, I find that even before this email Uralkali and its solicitors thought that Mr Rowley would have to give effect to the statutory hierarchy under para. 3 of Sch. B1. Uralkali understood the hierarchy and indeed repeatedly emphasised Mr Rowley's obligation to give effect to it in their emails and other communications following the 2/8 email. Uralkali must have known that Mr Rowley could not properly ignore a viable rescue.

402. Counsel for Uralkali submitted that it believed that Mr Rowley had concluded that a rescue was not viable so that it did not think there was any conflict with the statutory hierarchy. I have addressed already variants of that argument above. I have found that Mr Rowley did not think (or say that he thought) that a rescue was not practicably viable. But assuming for a moment (contrary to my findings) that Mr Rowley had thought and said on 2 August that a rescue was not viable, Uralkali's argument is unpersuasive. Circumstances changed after 2 August. By 3 August 2018 two bidders, Uralkali and Rich Energy, both appeared close to achieving a deal with the shareholders. Mr Rowley's email of 4 August clearly assumed that a rescue bid would be a realistic possibility. That is why he spelt out in some detail what he would require for such a bid to succeed. Nobody in Uralkali's team could have thought by the evening of 5 August that Mr Rowley was dismissing the practicability of a rescue

bid. I find as a fact that Uralkali believed by 4 August (at the latest) that Mr Rowley thought a rescue bid was a real possibility and that he would seriously entertain it.

403. Uralkali therefore needs to argue that on 5 August 2018 it expected Mr Rowley to choose the best plan B bid over a rival rescue bid (even if coupled by an acceptable plan B bid). It therefore needs to say that it believed Mr Rowley would act against the requirements of the statutory hierarchy. I find as a fact that Uralkali did not believe that.

404. I specifically reject the evidence of Mr Ostling that he and the remainder of the Uralkali bid team had that belief. I consider that this was one of the parts of his evidence where he was prepared to say whatever he thought would assist Uralkali's case.

405. I also consider it telling that on the afternoon of 4 August Mr Mazepin and Mr Oakes exchanged WhatsApp messages in which Mr Mazepin told Mr Oakes that the Administrator expected a new offer at 16:00 on 6 August. He said "We need binding letter signed before then for option one – then we may exclude everyone else. We have time to push Mercedes before then". It appears that Mr Mazepin thought that a rescue offer would be the trump card. Mr Mazepin was not called as a witness at the trial and I draw the inference from his absence that he would have given evidence confirming the most obvious meaning of the email. I find that he thought that a rescue bid would exclude everyone else.

406. Third, Uralkali did not cease its attempts to secure a deal with the shareholders. As I have found above, Mr Ostling continued to communicate with Dr Mallya. He also wrote to Ms Fogarty on the morning of 6 August making it clear that Uralkali was still keen to do a deal with the shareholders.

407. In short, Uralkali did not make a decision on the night of 5 August not to put forward a rescue bid. It continued to do all it could to seek to reach agreement. The reason it did not make a rescue bid is that the shareholders reached agreement with Racing Point instead.

408. I consider that the position was accurately set out in Uralkali's second-round bid letter of 6 August when it said "*[d]espite our best efforts in trying to reach an agreement with [OIH] and its stakeholders*". It had done what it could to reach agreement with shareholders.

409. This was echoed in an email sent by Mr Sainsbury of Ashurst on 10 August 2018 in which he said that "*we considered that, despite our best efforts it was not realistic to meet certain of these conditions [for a rescue] and accordingly we proposed to proceed solely on the basis of … Route 2*". I find that that was an accurate contemporaneous comment.

410. Mr Ostling accepted that Uralkali indeed continued to pursue a rescue after 22:00 on 5 August but said that it would have done still more had it not been for a belief that the bids would be assessed on the basis of the plan B offers alone. I do not accept that evidence. The communications thereafter show that Uralkali remained very keen to do a rescue deal and did everything it could to secure one. I shall return to this point when considering causation.

411. Fourth, even if Uralkali had decided on the night of 5 August not to make a rescue bid, I do not accept that the Rescue Offer Representations played any part in its decision. According to Mr Ostling the reason it ultimately stopped answering Dr Mallya's messages (at some point on 6 August) was a concern that Dr Mallya was seeking some kind of backhander. The evidence for that concern is inconclusive (see below), but if that was Uralkali's thought process it was self-sufficient to explain its decision. I find as a fact that Uralkali wanted to agree a rescue and did all it could to achieve it; but that if it did at some stage decide to cease the process, its decision was not influenced by anything said on 2 August or in the 2/8 email.

412. Fifth, Uralkali's reaction to the news that Racing Point had won is telling. Mr Rowley's email to the Uralkali bid team said that "*there is a ranking of statutory purposes … with the primary objective of rescuing the Company as a going concern*" and although the Administrators had received "*a number of very credible bids to purchase the business and assets of the Company*" they had received one proposal "*that following careful consideration has allowed us to conclude that we can cause for the Company [sic] to be rescued and exit from administration*". Mr Rowley then said this "*We are therefore not in a position to proceed with your offer to purchase the business and assets*". Uralkali did not query this approach or ask whether Racing Point had made the highest plan B bid. Uralkali submitted that this was because it assumed that Racing Point must have bid the most. But that is unconvincing: there was nothing in Mr Rowley's email to suggest that.

Did the Rescue Offer Representations cause loss to Uralkali?

413. In case I am wrong on the earlier issues I turn to causation. One has to assume at this stage (contrary to my earlier decisions) that Mr Rowley made the Rescue Offer Representations and that Uralkali relied on them in deciding on the night of 5 August to submit only a plan B bid.

414. Uralkali accepts that it has to establish on the balance of probabilities that it would have acted differently had the representations not been made. It says that if it can establish this, its loss is to be assessed on the basis of a lost chance or opportunity.

415. Uralkali advances two counterfactuals. The first is that, if the representations had not been made, it "would have continued to pursue negotiations with OIH with a view to making a rescue bid". The second is that, if Uralkali had known that a rescue would not be achievable without a bribe being paid to Dr Mallya, it would have taken steps to prevent a rescue bid being accepted.

416. As to the first counterfactual, I find that Uralkali would have pursued the rescue bid exactly as it did even if the representation had not been made. Uralkali was very keen to achieve a rescue and continued pressing for it with the shareholders up to 6 August. It did everything it could to achieve it. The reason it did not submit a rescue bid was that it failed to agree terms with the shareholders. I find on the balance of probabilities that Uralkali would have done the same thing in the absence of the Rescue Offer Representations. Counsel for Uralkali accepted that Uralkali always wanted to achieve a rescue but submitted that it would have done still more had it not been for the representations. I do not accept that it is realistic to weigh Uralkali's efforts in ounces in that way. Mr Mazepin had told Mr Ostling to do what he could to win the process and Mr Ostling did just that. He found Dr Mallya baffling and frustrating. But

he did his best (as the bid letter itself said). Uralkali did not persuade me (on the balance of probabilities) that it would have acted any differently in this regard had the representations not been made.

417. This is another part of the case on which I consider it right to draw an adverse inference from Mr Mazepin's absence. He was the person who made Uralkali's decisions in relation to the bidding process. Mr Ostling acted on his instructions but was not the decision maker. I conclude that Mr Mazepin would have been unable to provide any support for Uralkali's case on this point.

418. The second counterfactual involves two limbs: that Dr Mallya was seeking a bribe; and that, had the representations not been made, Uralkali would have raised its concerns about bribery to stop the deal going ahead.

419. As to the first limb, I am not satisfied on the evidence before me that Dr Mallya was in fact seeking a bribe. Mr Ostling was concerned that Dr Mallya was refusing on 5/6 August to name a price. He was also troubled by Dr Mallya apparently asking for an "honourable exit". The latter seems to me at least as consistent with Dr Mallya maintaining some role with FI (perhaps through a consultancy agreement). Uralkali has not satisfied me that any bribe or illicit arrangement was sought or agreed.

420. The second limb of the counterfactual is that, in light of those concerns, but for the Rescue Offer Representations Uralkali would have taken steps to seek to prevent Mr Rowley accepting the Racing Point offer. Uralkali said that (but for the representations) it would have expressed its concerns to the Administrators or to FIA, FOM or Mercedes or would have applied to the Court for an injunction.

421. Uralkali has not satisfied me on the balance of probabilities that the (assumed) fact that the Rescue Offer Representations were made would have made any difference to its conduct in these respects. I do not think Uralkali would have acted any differently.

422. Uralkali was determined to achieve a rescue deal and did what it legitimately could to achieve it. Mr Ostling's evidence was that (in the actual world) Uralkali suspected that Dr Mallya was seeking a bribe or other illicit arrangement and that Uralkali was not prepared to do that. In the real world Uralkali wrote to DWF on 6 August alluding obliquely to possible impropriety.

423. Uralkali must therefore have concluded that it lacked sufficient evidence of bribery to raise with the Administrators or the stakeholders or the Court. In the counterfactual world it would have had precisely the same sense of unease, and the same lack of concrete evidence. I consider that it would have acted in the same way.

424. Counsel for Uralkali contended that in the counterfactual world Uralkali would have done more to pursue the issue of bribery because it would not have had the assurance that Mr Rowley would assess bids on the basis of the winning plan B bid. But this turns on unrealistically subtle gradations. Uralkali would still have lacked the evidence to accuse Dr Mallya of fraud. It would have been in just the same position in the counterfactual world.

425. Uralkali has therefore failed to persuade me on the balance of probabilities that the Rescue Offer Representations would have caused it any loss.

426. In case I am wrong about this, I would have concluded that Uralkali lost a real or substantial opportunity (of acquiring the business and assets of FI).

427. I agree with Counsel for the Administrators that the percentage probability of Uralkali succeeding would have fallen to be addressed as an aspect of the assessment of damages, which was to be considered at the second part of the trial.

The Level Playing Field Representations

428. Uralkali pleads four occasions between 2 and 6 August when Mr Rowley or MDR on his behalf stated that the Administrators were running a level playing field or a fair process.

429. Mr Rowley accepts that he or MDR on his behalf said that there would be a level playing field or would be running a fair process. The statements did not come out of the blue. They were made in response to questions from Uralkali. Mr Rowley and MDR were saying that the Administrators would seek to do what administrators always seek to do: act fairly and without bias. Mr Rowley was asked whether he would act fairly and effectively said "of course".

Did Mr Rowley owe a duty of care to Uralkali in respect of the Level Playing Field Representations?

430. I have concluded for the reasons set out below that Mr Rowley did not assume a personal responsibility in respect of these representations.

431. The first reason arises from Mr Rowley's status as agent of the company and the principles derived from the *Williams* and *Fraser Turner* cases. I have addressed the application of these principles to the Rescue Offer Representations in some detail above, and the same analysis applies here. When he said that he was running a level playing field Mr Rowley was acting routinely as an administrator (he was answering queries about the sales process). He described how he would conduct part of his functions as administrator. The usual incidents of conducting an administration do not include undertaking personal responsibility to bidders and there was nothing and he said or did nothing to suggest that he was assuming a personal responsibility to Uralkali.

432. The second reason arises from the concern about imposing liability in favour of a broad and uncontrolled class. My reasoning about this factor in the context of the Rescue Offer Representations applies with equal force to the Level Playing Field Representations.

433. The third reason arises from considerations of legal coherence and the framework of legal rights and duties relating to administrations. I have addressed this factor at some length above and the same reasoning applies here. As I noted there, administrators have an overriding statutory duty to creditors and a fiduciary duty to the company in administration. They have to make commercial decisions and reach judgements. They often have to act urgently and have a statutory duty to perform their functions as quickly and efficiently as possible. Administrators are also officers of the court and they are required to maintain commensurate standards of conduct. But Parliament and the courts have defined the class of parties who complain about administrators'

conduct or apply to the court to supervise their actions. That class does not include potential bidders in a sales process. In my view the court should hesitate before imposing on an administrator a personal duty in tort in respect of the conduct of a sales process in an administration.

434. Sales processes are the bread and butter of administrations. If a tortious duty of care were found to arise in the present case it is hard to see why a similar personal duty would not apply to most if not all sales processes. Any bidder would be likely to ask the administrator for assurance that he was acting fairly and independently, and the answer would be "of course".

435. Counsel for Uralkali submitted that to recognise and give effect to a duty to act fairly would not conflict with or cut across the existing obligation of administrators to act towards buyers independently and without improper preference. That submission fails to grapple with the practical implications of imposing a tortious duty. A tortious duty, if recognised, would in practice be owed to all potential bidders (as explained above). It is easy to anticipate well-resourced, determined, bidders using the duty of care to pressurise an administrator. Faced with potential personal liability administrators would become more defensive and the process would become over-formalised, with careful vetting by lawyers. Administrators would feel inhibited from meeting without lawyers present. This is not mere conjecture: one of the alleged indicia of favouritism in the present case was that Mr Rowley met with Mr Stroll without his lawyers.

436. The fact that administrators are under existing duties to act independently and without preference seems to me, if anything, to tell against extending their duties by imposing an additional common law duty of care in tort. An administrator who improperly favours a buyer in a sales process may well be failing to maximise the chances of the best outcome. It would be open to the creditors or members in such a case to complain under the statute or invite the court to exercise its supervisory jurisdiction over its own officers. The administrator is subject to existing legal rules and judicial control. But as I have said the legislature and the courts have defined the class of parties with standing to complain, and potential bidders are outside the ring.

437. For these reasons Mr Rowley did not owe Uralkali a personal duty of care in relation to the Level Playing Field Representations fails.

Were the Level Playing Field Representations untrue?

438. In case I am wrong, I turn to consider Uralkali's claims that the Administrators did not run a level playing field.

439. Uralkali's case is that Mr Rowley unfairly preferred Mr Stroll and Racing Point. I shall return to the particular allegations below.

440. Uralkali submitted that Mr Rowley's motive is no part of its cause of action, but it nonetheless offered one. It said that, while adopting a stance of formal neutrality, Mercedes wanted Mr Stroll's bid to succeed and that Mr Rowley knew this. Mercedes had been responsible for Mr Rowley's original introduction to the management of FI and Mr Rowley wanted to please Mercedes (or possibly had an unconscious bias towards effecting Mercedes' preferences).

441. I find this suggestion far-fetched. Mr Rowley is an insolvency practitioner with decades of experience. He is subject to professional and statutory obligations. He has a reputation to protect. As the history shows Mr Rowley had some limited initial dealings with Mercedes about FI but they did not enter a formal engagement. Mercedes then introduced Mr Rowley to the senior management of FI. It is common for an insolvency professional to be introduced to a struggling company by one of its major creditors. Between the end of May 2018 and administration order Mr Rowley gave insolvency advice to senior management. He met various suitors for the business and its assets. On 27 July 2018 he was appointed as administrator. He understood that a rescue or sale of the assets could only succeed if the buyer had the approval of FOM, the FIA and Mercedes as the engine supplier. He therefore liaised with the three stakeholders about the sales process.

442. Mr Rowley thought at an earlier stage that the three stakeholders would probably have their own views and preferences but as things went on he and MDR had concluded that the decision would rest with the Administrators.

443. Mr Rowley understood at the start of the administration that Mercedes had been in discussions with Mr Stroll about FI for some time and had entered into a letter agreement with him. Mr Wolff of Mercedes had a number of conversations with Mr Rowley in which he gave his views about the various bidders. Counsel for Uralkali submitted that Mr Wolff was indicating that Mercedes could not formally favour Mr Stroll but that it wanted Mr Rowley to select his bid, and that Mr Rowley then did what Mr Wolff really wanted. I find that Mr Rowley fully appreciated his statutory duties to creditors and his fiduciary duties to the company. He understood the statutory hierarchy. The three stakeholders (including Mercedes) confirmed that the decision was for the Administrators to make.

444. I shall turn in a moment to the particular complaints raised by Uralkali, but I find as a fact that he was not influenced by Mr Wolff's informal or off the record views or by the fact that Mercedes had initially introduced him to FI earlier in the year.

445. Before turning to the particular allegations of preferential treatment still pursued, I should record that Uralkali made a number of pleaded allegations which were not pursued at the trial.

446. Uralkali claimed first that the Administrators had not informed it soon enough of the need to buy out 100% of the existing shareholders of FI. That allegation was wrong for at least three reasons. First this was something for a prospective purchaser of the shares to determine, not the Administrators (who had no control over the shares). Second, at the meeting on 2 August Mr Rowley did raise the risk that the staff of FI would walk away if the existing shareholders remained. Third, when Mercedes told Mr Rowley, on 4 August, that it would not partner any new owner if the existing shareholders remained in any capacity, Mr Rowley immediately relayed the decision to Uralkali.

447. Uralkali claimed, second, that the Administrators did not inform it soon enough about the need for consent to be obtained from the Indian banks to a variation of the freezing order if a rescue were to proceed. In fact the need for such consent was disclosed at the same meeting on 2 August, and it was noted by each of Mr Ostling, Mr Sainsbury, Mr Boothman and Mr Kartashkin.

448. Uralkali claimed, third, that the Administrators did not disclose the importance of the views of senior management at FI. But the importance of retaining the staff was emphasised by Mr Rowley at the meeting on 2 August. An email sent by Mr Rowley on 5 August stated (accurately) that the views of FI's management would not be a key factor in the Administrators' selection of the winning bidder, and the contrary was not suggested to him in cross-examination.

449. Uralkali claimed, fourth, that the bidders were not treated fairly on the ground that Mr Stroll had been in negotiations with the Administrators, senior management, and the shareholders in OIH. There was no basis for this. The fact that Mr Stroll had approached Mr Rowley, whilst Mr Rowley was advising FI and trying to reach a solution, does not involve any unfair or unequal treatment by Mr Rowley of anyone. Mr Rowley was equally in contact with other interested parties who approached him, such as Moorad. Moreover, Mr Mazepin had himself shown interest before the administration.

450. After the completion of the evidence at the trial, Uralkali's solicitors sent a letter saying that these allegations were being abandoned.

451. Uralkali relied in closing on twelve "badges" or "indicia" of preferential treatment. I have made detailed findings of fact on most of these points and this part of the judgment needs to be read in the light of those findings (which I shall not repeat in any detail here).

452. The twelve badges are these (summarised for brevity's sake but I have considered Counsel's full formulations in closing written and oral submissions).

453. Badge 1: Uralkali submitted that at the 1 August 2018 meeting between Mr Stroll and Mr Rowley it was only the risk of being sued which prevented a deal being concluded that day for £50m. It claimed that Mr Stroll and Mr Rowley devised a plan that was designed to clear the field by putting off rival bidders, namely by trying to obtain confirmation from FOM that the rights to prize money would not be assigned. It submitted that from the outset, therefore, the Administrators were steering the bid process in favour of Mr Stroll.

454. I reject these submissions. I have made findings of fact about the meeting of 1 August in [141]-[152] above. In brief summary Mr Stroll came to the meeting hoping that he would be able to agree a purchase of the business. He was a domineering character, used to getting his way. He produced a letter from Mercedes and claimed that he was the anointed purchaser. Mr Rowley read the letter and pointed out that it was subject to there being a higher offer. He said that he had to consider other offers. He referred to the prospect of being sued to explain why he could not reach an agreement without undertaking a proper process. He did not say or think that it was only that risk that prevented an immediate deal. I reject the allegation that the parties devised a plan to clear the field by putting off other bidders. I have set out my detailed findings on this point at [150] above.

455. The events of the meeting of 1 August 2018 therefore do not show any preferential treatment. If anything they point against Uralkali's case. Mr Stroll came to the meeting wanting to do a deal there and then. Mr Rowley refused and said that he would have to undertake a sales process. Had Mr Rowley favoured Mr Stroll he

would have struck an early deal with him, or at least agreed an exclusivity arrangement, rather than insisting on a sales process involving rival bidders.

456. Counsel for Uralkali submitted that the bidding process itself was a rigmarole but I have rejected this: I have found on the facts that the process was a genuine one, intended to achieve the statutory objectives.

457. Badge 2: Uralkali submitted that it made the best plan B bid on 3 August, as well as the only realistic plan A offer, and that it ought to have won then. The Administrators could have disregarded the plan A offers (as there were no binding terms). The Administrators could have sought clarification as to any plan B bid. There was no need for a re-opening of the bid process on 4 August. Uralkali submitted that the "the inference is inescapable … [t]he bids were reopened opportunistically in order to give Mr Stroll a second run at the race".

458. I am unable to accept these submissions. I have made findings of fact about Mr Rowley's decision to invite further bids at [221]-[225] above. In brief summary, Mr Rowley and MDR considered the first round bids carefully. Mr Stubbs arranged a call with Mr Collings and sent an email raising a series of questions. Mr Rowley had three reasons for his decision to invite further bids: (i) the lack of evidence of binding terms with OIH for a share sale from Uralkali or from Rich Energy; (ii) the lack of evidence that OIH had agreed to waive its claim against FI (said to be some £159m); and (iii) aspects of the plan B offers, in particular the supposed linkage of Uralkali's offer to valid creditor claims, were unclear. Mr Rowley properly considered that a rescue was feasible and that it should be pursued, with bidders being given a chance to provide evidence of binding terms. By 3-4 August there were good grounds for thinking that either Uralkali or Rich Energy would reach a deal with the shareholders. That was on its own a sufficient reason for inviting further bids. The question whether to seek clarification about the plan B bids was something Mr Rowley considered with the lawyers. I find that the decision to reopen the bids was a genuine one and that it was not taken opportunistically.

459. Uralkali's submission is also at odds with the email from Mr Rowley of 09:51 of 4 August to Ms Fogarty of DWF asking whether there was any update on whether the shareholders were going to proceed with Rich Energy or Mr Mazepin. He said that it was very important for him to know which one so that he could proceed with his decision making. The email shows that he was anxious to know whether there was a viable rescue offer with one or other of the bidders.

460. Badge 3: Uralkali submitted that Mr Rowley undertook an entirely spurious marking down of Uralkali's plan B bid from £75m to £55m.

461. I do not accept this submission. I have addressed Mr Rowley's understanding of the plan B bid at [197]-[200] above. I concluded that Mr Rowley and his lawyers thought that Uralkali's plan B bid involved a formula rather than a fixed amount. That was the main problem with its plan B bid. The "valuation" of the bid was of secondary importance. I have also found that Mr Rowley thought that the plan B bid was to pay a sum representing valid trade creditors (rather than creditors) plus £25m. That was a mistaken understanding (though it appears to have been shared by Mr Collings). There was no marking down of the bid and I reject the submission that the assessment of the bid was spurious.

462. Badge 4: Uralkali relied on the one-to-one lunch with Mr Stroll on 5 August. Uralkali complained that Mr Rowley told Mr Stroll that other bidders were exploring a rescue option via a share purchase and expressed surprise that Mr Stroll was not doing likewise. Uralkali submitted that Mr Rowley gave strategic guidance as to how such a bid could be structured (by reference to the structure used in Uralkali's first-round bid) in order to address Mr Stroll's concern over the problem of securing the Indian banks' consent. It submitted that at this lunch, Mr Rowley had assumed the role of strategic adviser to Mr Stroll (with the advantage of confidential information as to what other bidders were doing which he acquired qua administrator) and that he was shepherding Mr Stroll towards a rescue offer. It submitted that further strategic guidance was given at the follow-up meeting with Withers.

463. I am unable to accept these submissions. I have made findings about the lunch on 5 August and the subsequent meeting with the lawyers at [247] – [248] above. I do not think that going to lunch with a potential suitor at his request amounted to preference. He had a series of meetings with potential purchasers. He wanted to assist any potential suitor who wanted appropriate information and guidance. No particular inference is to be drawn from the lunch being one-to-one. Mr Wormleighton, at Uralkali's request, spoke to Mr Rowley without the presence of lawyers. Mr Rowley later spoke to Mr Mazepin one-to-one. Mr Rowley was an experienced insolvency professional and was quite able to meet with interested parties without being chaperoned. I have no doubt that he would have had lunch with Mr Mazepin had he asked.

464. During the lunch Mr Rowley said that he was surprised that Mr Stroll had not made a rescue bid. He explained the possible structure of a rescue on the same lines as the structure he had given to Uralkali at the meeting of 2 August and the 2/8 email, and in the 4 August email to Uralkali inviting further offers. He gave Mr Stroll the same guidance. He also explained that there were other bidders who had made rescue bids. That is not evidence of preference in the sales process. It was for Mr Stroll to decide whether to pursue a rescue and it was for the shareholders to decide whether they would negotiate with Mr Stroll. But Mr Rowley, as an administrator, of course wished to further the statutory objectives in para 3 of Sch. B1 and part of his job was to facilitate any possible rescue deal. He did not act preferentially in describing the type of structure that might achieve a rescue deal.

465. Badge 5: Uralkali submitted that there was a contrast between that lunch and the meeting with Uralkali on 2 August. Counsel submitted that at the meeting and in the 2/8 email the clear message coming from Mr Rowley was that the Administrators were very doubtful about the prospects of a rescue bid and the successful bidder would be selected on the strength of the plan B bid. Uralkali submitted that the goalposts then moved, so that by 5 August Mr Rowley's focus was on a rescue bid, but no one told Uralkali.

466. I reject these submissions for a number of reasons. I have already made detailed findings about the meeting of 2 August and the 2/8 email above. I have found that Mr Rowley maintained throughout that he would follow the statutory hierarchy. On 2 August he thought that a rescue was less likely than a plan B sale. He said that a rescue was doable but would be challenging or difficult. But there were developments on 3-4 August. DWF told him on 4 August that the shareholders were well advanced in their negotiations with two bidders. By then a rescue was looking more probable

than a plan B sale. I have already addressed Uralkali's case about the 2/8 email and the idea that Mr Rowley moved the goalposts in detail above. I have rejected that case. The submission also ignores the subsequent communications, including Mr Rowley's email of 4 August inviting further bids. That email invited further plan A and plan B bids. It did not say or suggest that the successful bidder would be selected on the basis of the plan B bids.

467. Badge 6: Uralkali submitted that in spite of the assistance afforded to Mr Stroll, Mr Rowley thought that Uralkali remained the closest to gaining control of FI on 5 August and that his suggestion that evening that they team up to make a joint bid showed preference. He submitted that the suggestion of a tie-up between the two front-runners was antithetical to a competitive auction process – while it may have served Mr Stroll's interests, it could only have harmed the interests of the creditors and shareholders of FI.

468. I reject these submissions. I have made findings about the call on 5 August about a possible joint approach at [255] - [261] above. Mr Rowley made the call at the suggestion of Mr Szafnauer. It was an idea that Mr Wolff endorsed. Mr Stubbs also endorsed it. He did not think there was anything untoward about a collaboration. Mr Rowley's suggestion to Mr Mazepin was that Uralkali would acquire the team and that Mr Stroll would pay for a racing seat for two years. Uralkali would therefore have won the prize of owing the team. Mr Rowley made the call because he could not be sure that any party would end up being able to reach binding terms to acquire the company and he thought that the chances might be enhanced if the two competitors compromised with one another. Mr Stubbs explained in evidence that the idea of the call was to try to avoid another stalemate (as with the first round of bids).

469. I have already addressed Mr Rowley's comment about neither party overpaying for the team. He said this to make the proposal more palatable to Mr Mazepin. By that stage the parties were bidding well above the level of the creditors, so they were going to be paid in full. What Mr Rowley was trying to achieve was a rescue. Mr Mazepin's response was frosty and the idea was quickly dropped.

470. Badge 7: Uralkali submitted that Mr Rowley and MDR continued to give substantial assistance to Mr Stroll as to the structuring of his bid ahead of the 16:00 deadline on 6 August. Counsel said that they sought to nurse Mr Stroll's bid over the line and give assistance on the structure of his bid.

471. I do not accept this submission. I have made findings of fact about the communications between Withers and MDR and Mr Rowley on 6 August. In brief summary Mr Rowley and MDR made comments on drafts and explained certain problems and shortcomings. I do not think that the kind of guidance Mr Rowley and MDR gave amounted to preferential treatment. Mr Rowley had the primary statutory objective of achieving a rescue. He had no control over the negotiations with the shareholders. But he and his lawyers could comment on the rescuer's proposed legal structure for a deal. I consider that in doing so he was doing no more than promoting the statutory purpose.

472. The allegation of bias also presupposes that Mr Rowley provided guidance and assistance only to Mr Stroll and not to other bidders. But that is not what happened. Mr Rowley provided guidance to Uralkali about the kind of structure that would be

required. Uralkali's team asked for the guidance at the meeting on 2 August and Mr Rowley outlined a possible structure for a rescue bid (a conditional purchase of the shares coupled with non-refundable funding and a period to enable the bidder to obtain the consent of the Indian banks). The 2/8 email provided further guidance (it explained that a rescue offer would have to be accompanied by a plan B bid). And further guidance about the appropriate structure and contents of bids was contained in the email to Uralkali of 4 August.

473. There are other examples of Mr Rowley and MDR assisting Uralkali. On 30 July Mr Rowley suggested to Uralkali (through Mr Oakes) that they should access the data room rather than making piecemeal requests. On 3 August at 08:00 Mr Stubbs wrote an email to Mr Boothman which ended by saying that they would provide all assistance they properly could to assist Uralkali. I find that that offer was made in good faith. Mr Rowley and his team responded rapidly to ad hoc requests from Uralkali for documents and information. This included an email from Ashurst at 22:57 on 4 August which asked for confirmations about the bidding process and sought detailed information about contingent, prospective and future claims to enable Uralkali to formulate its bid. Again on 6 August the Administrators provided Uralkali with up to date information about the current thinking about the entitlement to prize money.

474. Uralkali and its lawyers did not ask for guidance about the acceptability of their draft documentation for a rescue plan. But I find that, had Uralkali asked, Mr Rowley and MDR would have assisted. I find that Mr Rowley was not trying to nurse Mr Stroll's bid over the line. His objective was to secure a solution and that involved responding to queries from interested parties and providing information and assistance on request. He was carrying out his paramount statutory duty of furthering and facilitating the statutory objectives.

475. Badge 8: Uralkali submitted that the 16:00 deadline had been set for best and final offers on 6 August. Uralkali complied with that deadline. Mr Rowley had turned away a Japanese bidder on account of the 16:00 deadline. But there was one bidder to whom the 16:00 deadline did not apply. It was not until 19:47 that Mr Rowley knew that Mr Stroll had struck a deal with the shareholders. Racing Point's 6 August (draft) bid was not received until 16:13. Uralkali submitted that Mr Rowley had extended the deadline for one bidder and that this was unfair.

476. I cannot accept these submissions. I have made findings about Mr Rowley's assessment of the second round offers at [475]. There are several points. First, the 16:00 deadline was imposed by Mr Rowley to make sure that offers were not drawn out. He did not say that any information coming in afterwards would be ignored. Mr Stubbs gave evidence (which I accept) that deadlines imposed in sales by office-holders are not regarded as strict guillotines. They are a means of seeking to get bidders' best offers as quickly as possible. But it is for the office-holder to assess them and the office-holder can consider information coming in after the deadline. Second, Mr Rowley did not undertake to follow any a rigid sales process or apply a single criterion (such as price). He always said that it would be for the office-holders to make up their minds. He rejected Uralkali's proposal that he should accept the best sealed bid. He told Uralkali that would not happen. Third, at 16:00 on 6 August it appeared to Mr Rowley that Racing Point was close to agreeing binding terms with the shareholders. The primary purpose under the statutory hierarchy was a rescue and

Mr Rowley was under a statutory duty to seek to achieve it. The logic of Uralkali's submission is that Mr Rowley should have let the blade fall at 16:00 and ignored everything that happened afterwards. I reject that notion. Mr Rowley had a statutory duty to achieve the statutory purposes, not to concern himself with the commercial positions of the bidders. By 16:00 there was a strong probability that a rescue deal could be agreed, and he was entitled (indeed obliged by statute) to see whether it would indeed materialise. Fourth, the process then followed by Mr Rowley and MDR was to seek the advice of Ms Hilliard QC. She advised that he was obliged to pursue the rescue option, which he then did. I see no sign of preferential treatment in this series of events. Fifth, the point about the Japanese party is exiguous. That party had approached Mr Rowley for the first time on the day bids were due and he would plainly not have had time to make a bid.

477. Badge 9: Uralkali submitted that Mr Rowley accepted Racing Point's bid in draft. He did not, therefore, accept a best and final offer. Uralkali said that he therefore departed from the "bidding rules". He submitted that an impartial administrator would have considered only the best and final offers received by the bid deadline of 16:00. Had the bids been assessed on that basis Uralkali's bid would necessarily have been selected.

478. I cannot accept this submission, which overlaps with badge 8. First, it presupposes that there was a set of "bidding rules". There was of course no contract or other set of regulations or rules governing the process. Mr Rowley had invited best and final bids by 16:00 on 6 August. That was to flush out the best offers. He made no commitment as to how he would assess the bids. Second, as explained in relation to the previous point, by the deadline it appeared that Racing Point was close to concluding a deal with the shareholders, and a rescue was the first priority under the statutory waterfall. Mr Rowley then assessed the bids with the benefit of advice from leading counsel, who advised him that the rescue had to be followed if he considered it viable (which he did). Uralkali's submission involved the suggestion that Mr Rowley should have rejected Racing Point's rescue proposal on the stroke of 16:00 because it had not been finalised at that time. Had Mr Rowley done that there is every prospect that he would have been in breach of his statutory duties. It is also at odds with the way that sales of this kind by office-holders operate as explained by Mr Stubbs in his evidence.

479. I also consider, third, that the submission that the blade should have fallen at 16:00 on 6 August is at odds with the approach taken by Mr Boothman of Ashurst after the first round of bidding. He wrote on the morning of 4 August explaining that his clients were in further negotiation with Mercedes and would provide an update later in the day. By this email he was providing further evidence and information about the bid.

480. Mr Rowley did not bring the blade down against Uralkali at the deadline for the first round of bids. In his email of 09:51 on 4 August to Ms Fogarty he asked whether there was any update on whether the shareholders were going to proceed with Rich Energy or Mr Mazepin. He said that it was very important for him to know which the shareholders went with so that he could proceed with his decision making. That email was sent before he had decided to invite further bids. Mr Rowley asked in that email for evidence (after the bid deadline) which would have enabled him to proceed with a rescue in favour of Mr Mazepin (or indeed Rich Energy). The email tells against the allegation that he was bending the rules to prefer Mr Stroll.

481. Badge 10: Uralkali submitted that Ms Hilliard was asked to advise on 6 August whether the Administrators "were entitled to accept" Racing Point's bid. The premise of the question on which advice was sought was slanted in favour of Mr Stroll. Nor were critical matters that informed the fairness of the bid process, in particular the requirements and bid criteria set out by the Administrators, brought to the attention of Ms Hilliard.

482. I cannot accept this submission. I have made the relevant findings of fact at [288] – [289] above. The contention about the question that was asked is based on a misreading of the first paragraph of Ms Hilliard's written opinion. There is no basis for the submission that she was led into giving advice favourable to Mr Stroll. She advised that under the statutory hierarchy a rescue came first and that, as long as Mr Rowley considered a rescue to be reasonably viable, he should pursue it. That advice was based on para 3 of Sch. B1. There was only one rescuer, and that was Racing Point. I find that no critical material was withheld from Ms Hilliard. I have addressed (and rejected) the submission about the bid criteria in detail above.

483. Badge 11: Uralkali submitted that Ms Hilliard explained that the Administrators were required to undertake a stress-testing exercise before they would be entitled to accept Racing Point's bid. It submitted that no such exercise was undertaken and that the Administrators were unable properly to exercise their judgement as to whether a rescue was reasonably practicable pursuant to the statutory hierarchy. It submitted that this was in all likelihood a failure by the administrators faithfully to comply with the statutory requirements.

484. I reject these submissions. I have made the relevant findings of fact at [293]-[294] above. The question for Mr Rowley was whether he thought that the rescue was reasonably practicable, and he concluded that it was. The question turned in part on being satisfied that the company had sufficient working capital to continue trading for at least twelve months after any exit. Mr Watkins had been working with a team at FRP since at least 1 August determining the projecting cashflows of the company for a period of more than twelve months. That work showed that, at the level of the proposed funding contained in the Racing Point bid, there would be considerable headroom over the required working capital for the business. Beyond being satisfied that a rescue was realistically practicable, there was no statutory requirement for a stress test.

485. Badge 12: Uralkali submitted that the increase in the amount of Racing Point's plan B offer from £70m on 6 August to £90m was to assuage a concern that the differential between the £70m offer and the £101.5m should narrow. It is suggested that this was a form of procedural unfairness.

486. I cannot accept this submission. I have made the relevant findings of fact above. In brief summary I have found that the increase was presaged in the conversation at about 16:00 on 6 August in which Mr Stubbs overheard Mr Stroll referring to £90m. But the reason why Racing Point was accepted as the winning bidder was because of the rescue offer, not the plan B offer: even the revised figure of £90m was £11.5m lower than Uralkali's bid. On the evening of 6 August when the decision to proceed with Racing Point was taken, its offer was understood to be £70m and that is the basis on which Ms Hilliard advised.

487. Counsel for Uralkali also relied on the cumulative effect of the twelve badges. I have rejected Uralkali's case in respect of each of them and they have no greater force cumulatively. But I also think that in assessing the broader picture there are other features of the case which tell firmly against the allegation that Mr Rowley acted unfairly or was biased towards Mr Stroll and Racing Point.

488. First, Mr Rowley gave assurances that he was running a level playing field when, on Uralkali's case, he actually knew that this was untrue. Counsel for Uralkali was at pains to say that Uralkali's claim was in negligence and that it was not alleging dishonesty. That may be right as a matter of legal labelling, but the substance of its case is that Mr Rowley was favouring Mr Stroll and that he knew he was doing so. Counsel for Uralkali said for instance that the bidding process was "a rigmarole", that Mr Rowley and Mr Stroll "devised a scheme" to clear the way for Mr Stroll, re-opened the bidding process "opportunistically" to give Mr Stroll a second run, and skewed the question he posed to Ms Hilliard to obtain the advice he wanted. Uralkali's case is in substance one that Mr Rowley deliberately lied to them about the sales process.

489. Though motive is not an element of the cause of action, in assessing the probabilities the court must ask itself whether Mr Rowley would have deliberately lied about the conduct of the sales process. Mr Rowley was and is an established professional with everything to lose. He is a Chartered Certified Accountant and a Licensed Insolvency Practitioner. He has been involved in insolvency and restructuring for 30 years. He has been taking appointments for 19 years. He was the joint founder of FRP 10 years ago. He is a prominent and successful practitioner in his field, and he has been entrusted with a succession of high-profile appointments. I find that Mr Rowley took his professional duties seriously. In the FI administration he was dealing with determined and well-resourced bidders. It was always on the cards that there would be a legal challenge from the disappointed bidder. Mr Rowley had everything to lose and nothing to gain from improperly favouring one bidder. I have also rejected as far-fetched the theory that he wanted to serve Mr Wolff's off the record preferences.

490. Second, Mr Rowley was working on the administration with a number of colleagues from FRP and a team of lawyers from MDR, including several insolvency partners. Mr Rowley was more or less camped out in MDR's offices. All of the material decisions were reached after discussions with MDR. MDR attended most of the meetings. It was indeed MDR who communicated some of the assurances that the Administrators were running a level playing field. If Mr Rowley had been favouring Mr Stroll in the ways alleged that would have been obvious to MDR. They were for instance at the meeting of 1 August. Uralkali submitted that, at that meeting, Mr Rowley and Mr Stroll came up with a scheme to clear the way for Mr Stroll; and that the bidding process was a rigmarole. If that had happened it would have been obvious to MDR that Mr Rowley was biased towards Mr Stroll. I find as a fact that the lawyers from MDR were responsible professionals who were seeking to carry out their assignment properly. Uralkali's other "indicia" of preference would also have been enacted in clear view of MDR. In my judgement it is highly unlikely that the lawyers from MDR would have been prepared to say that Mr Rowley was running a level playing field if they had not believed it. Indeed it was never suggested to Mr Stubbs or Mr McCarthy in cross-examination that they thought the emails in which they gave these assurances to Uralkali were false.

491. Third, Uralkali's case involves saying that at least part of the documentation was created as a paper trail. Counsel for Uralkali did put that allegation to Mr Stubbs at one point in cross-examination. He denied it with (controlled) irritation, and I find that there was no papering of the files.

492. Fourth, Mr Rowley, Mr Stubbs and Mr McCarthy all gave evidence. As I have explained earlier, I accept the substance of their evidence on the key points including that they always understood the process to be a fair one with a level field. Mr Stubbs explained that, as a solicitor acting for an office-holder, he would always provide guidance and assistance to any bidder in a sales process. Mr Rowley did this at the meeting with Uralkali on 2 August and again in his email of 4 August.

493. Fifth, I agree with the submission of Counsel for the Administrators that there are other contemporaneous communications of Mr Rowley and his team which illuminate his thinking at the time. These display an open mind about the ultimate outcome, both in terms of whether it would be a rescue or a business and asset sale, and whether the winner would be Racing Point or Uralkali. In his note of his call with MDR on 27 July he referred to "four interested, viable parties". MDR's notes of 30 July said "[p]ossible buyers – Laurence [sic] Stroll … Morad [sic] Group … Andretti Group … Castle Harlan". Writing to a colleague on 2 August he said, "we shall have to make a swift decision … about whether we do make an application to Court to exit admin or whether we sell the business and assets". When writing to DWF on 4 August he said, "hopefully [the shareholders] have made their decision as to whether to proceed with Rich Energy or Dmitri Mazepin". He also used neutral language when he sent the bids to FOM, the FIA and Mercedes. There are similar references in MDR's notes. After a call he had with Ms Fogarty at DWF, Mr Stubbs said "[s]he asked about [Uralkali's] team. I briefly described. Said they would catch up fast and would speak the same language so that would be helpful to her … we will sure do all we can to help the process." There are other documents which show the same open-minded approach to the process.

494. For all these reasons I find that Mr Rowley conducted the sales process fairly and properly. There was a level playing field. Uralkali has failed to establish that the representations were untrue.

Was Mr Rowley negligent in relation to the Level Playing Field Representations?

495. In case I am wrong on the previous issues, making the assumption (contrary to my findings) that Mr Rowley was biased and unfairly preferred Mr Stroll's bid he could not have been acting with reasonable care. It follows that (on that assumption) negligence would have been established.

Did Uralkali rely on the Level Playing Field Representations?

496. In case I am wrong on the previous issues, I turn to the issue of reliance. Uralkali's position was that it relied on the representations. Counsel for the Administrators submitted that Uralkali in fact thought that the playing field was tilted against them and did not believe the Administrators' assurances.

497. I accept this submission. I find as a fact that Uralkali and its advisers did not believe Mr Rowley's statements that he was running a level playing field, for the following reasons:

(a) Mr Ostling's evidence in his witness statement was that on 1 August Mr Oakes told the bid team that there were indications that the appointment of Mr Rowley had been orchestrated by Mercedes and/or Brockstone and that Mr Stroll was also involved. He said that Mr Stroll had a head-start in the bid process and that he and Mercedes might also have had a pre-existing relationship with Mr Rowley.

(b) In his email of 2 August at 23:25 Mr Boothman expressed concern that the Administrators had not been running a level playing field and sought confirmation that bidders were being treated equally. Mr Stubbs responded on the morning of 3 August saying that there was a level playing field.

(c) Mr Boothman of Ashurst spoke to Mr McCarthy on 3 August. Mr Boothman repeated that Uralkali had a concern that the Administrators were favouring another bidder and there was not a level playing field.

(d) On 5 August Mr Ostling told Dr Mallya by WhatsApp that Uralkali was concerned that Mr Rowley was closely aligned with Mr Stroll.

(e) On 6 August at 07:41 Mr Mazepin sent the email to Mr Rowley. He said that "*it is obvious to me that my company will not be able to compete in a fair and transparent competition for the rescue of F1, or the purchase of its business*". He said that recent events had caused Uralkali to question the veracity of Mr Rowley's assurances about the bid process and said that Mr Rowley had taken steps "*aimed to favor one party*". He said the call of the previous evening had "*validated his concerns that … [Mr Rowley] aimed to achieve a result for one bidder [i.e. Mr Stroll]*". In short, Mr Mazepin said that he believed that Mr Rowley had taken steps to favour Mr Stroll and that he did not believe the level playing field assurances. I draw an inference that had he been called as a witness Mr Mazepin would have given evidence that he did not believe Mr Rowley's level playing field assurances.

(f) Mr Ostling's evidence in his witness statement was that Mr Mazepin spoke to him on the evening of 5 August (after the call about the possible joint bid) and that this "was consistent with my conclusion that Mr Rowley was trying to prop up Mr Stroll" and that the second round bids were "an attempt to give Mr Stroll a second bite of the cherry".

498. Uralkali therefore disbelieved Mr Rowley's assurances about the level playing field. A party who does not believe the truth of a statement cannot claim to have relied on it.

499. Counsel for Uralkali submitted that the question was not binary, and that the fact that the assurances had been made gave it some comfort. I reject this submission, which seemed to entail that Uralkali believed the assurances, but only up to a point. I find as a fact that Uralkali in fact disbelieved the assurances. It did not take any comfort from them. Mr Mazepin entered the process with extreme suspicion and Uralkali's lawyers did little to allay those concerns. Uralkali believed that Mr Rowley was biased from

the start (and indeed even before he was appointed). Mr Ostling's evidence was that this view was confirmed as the process went on. Mr Mazepin's email of 6 August shows that he (and therefore Uralkali) did not believe Mr Rowley's assurances, and I infer that he would have provided evidence to the same effect.

Did the Level Playing Field Representations cause loss to Uralkali?

500. In case I am wrong on the earlier issues, I turn to causation. I have to assume at this stage (contrary to my earlier decisions) that Mr Rowley made the Level Playing Field Representations and that Uralkali relied on them in its approach to the bidding process (in the sense that that gave Uralkali comfort).

501. Uralkali accepts that it has to establish on the balance of probabilities that it would have acted differently had the representations not been made. It says that if it can establish this, its loss is to be assessed on the basis of a lost chance or opportunity.

502. Uralkali submitted that if the representations had not been made Uralkali would have taken steps to cause the Administrators to run a fair and transparent bidding process. Mr Ostling said in his first witness statement at paragraph 179 that if the Administrators had refused to give the confirmation they would have used all available legal remedies including applying for an injunction or approaching the FIA, FOM and Mercedes to seek their assistance. He said that Uralkali did not take these steps because the Administrators provided the assurances.

503. There was no cross-examination about this paragraph. Counsel for Uralkali submitted the court was therefore bound to accept it. He relied on the principles summarised by Leggatt LJ in *W Nagel (A Firm) v Pluczenik Diamond Company* [2018] EWCA Civ 2640 at [21]. As explained there, however, the rule is not absolute, and its application is sensitive to the nature of the evidence in question. The relevant passage in Mr Ostling's evidence is not first-hand evidence about real world events: it is concerned with a counterfactual world. I consider that there is no shortcut and that I should address this issue taking into account the entirety of the evidence and the inherent probabilities.

504. I have concluded that Uralkali has not shown on the balance of probabilities that it would have acted differently had the assurances not been given. My reasons are these:

(a) Uralkali would have continued participating in the bidding process and made the same bids that it actually did.

(b) Uralkali would have been advised that there was no proper basis for it to seek injunctive relief. It was not within the class of persons with standing to apply under the provisions of Sch. B1 or to invoke the jurisdiction of the Court's supervisory powers over its officers. It would also have required some evidence of wrongdoing on the part of Mr Rowley before applying to the Court. Though it had suspicions it lacked any such evidence. Counsel for Uralkali submitted that it might have threatened to apply or applied in any case in order to place pressure on the Administrators to change their conduct. I do not accept (on the balance of probabilities) that Uralkali, which was properly advised by experienced lawyers, would have done this.

(c) Uralkali's case is that if the express assurances about the level playing field had not been given it would have contacted the stakeholders and required them to act. I do not think that is a realistic submission. It is improbable that they would have approached Mercedes, as their suspicion was that Mr Rowley was favouring Mercedes' preferred bidder. Uralkali would not have approached Mercedes or the FIA and FOM without some firm and specific evidence that the Administrators were conducting the sales process unfairly. They could not have approached them on the basis of suspicion alone. In the real world Uralkali had suspicions but no firm or specific evidence. I think it is unrealistic to suggest that the position would have been materially different had Mr Rowley left unanswered Uralkali's imputations (at the 2 August meeting and the later emails) that he was not running a level playing field. Uralkali could still not have approached the stakeholders without some evidence that Mr Rowley was biased towards Mr Stroll; and they did not have that. At most they had unsubstantiated suspicions.

505. In case I am wrong, I turn to the question whether Uralkali lost a real or substantial chance of winning the bidding under this head. I conclude that it has not.

(a) Had Uralkali applied to the court I consider the application would have been summarily dismissed for want of standing. Even had that not happened the court would not have acted without cogent evidence that Mr Rowley was acting unfairly, and Uralkali would not have been able to provide this. I do not consider that there is a substantial chance that Uralkali would have obtained an injunction of a different outcome.

(b) Had Uralkali complained to the FIA, FOM or Mercedes that Mr Rowley was not acting fairly (but without any substantial evidence of wrongdoing) they would have asked Mr Rowley to confirm that he was indeed running a fair process and he would have confirmed that he was. Moreover Mercedes would have confirmed what they had already said to Mr Rowley, namely, that they were neutral and prepared to work with any successful bidder who was acceptable to the other stakeholders, albeit that Mr Stroll was further advanced in his negotiations with them.

(c) The stakeholders were all concerned to see the process being completed before the Belgian Grand Prix. Time was therefore tight, and they were keen to see a rapid result. The stakeholders would have required cogent grounds for interfering in the process and Uralkali would not have been able to furnish any. I conclude that there was no substantial chance that complaining to the stakeholders would have led to a different outcome.

The extended Hedley Byrne claim

506. Uralkali claimed that by reason of their representations that the bid process would be operated on a level playing field and that bids would be selected in accordance with the criteria set out in the 2/8 email Mr Rowley came under a duty to conduct the sale process in accordance with those representations.

507. Uralkali relied in this regard on the approach taken by Lord Goff in *Henderson v Merrett*. It also argued that the Administrators had an overarching duty to act independently and fairly, apparently basing himself on the rule in *ex p. James*.

508. Insofar as this claim is based on the alleged representations and an assumption of responsibility under *Hedley Byrne* it adds nothing to claims I have already analysed. The same considerations as I have already discussed (i.e. whether there was a representation, whether there was a duty of care and reasonable reliance, actual reliance, and causation) are relevant to this claim. I have made detailed findings about these points above. I do not think that these various requirements can be diluted or watered down by repackaging the claim as an "extended *Hedley Byrne*" claim.

509. To the extent that this claim goes further than the misrepresentation claim it appears to be based on the contention that the Administrator undertook to provide a service or task for bidders (on an analogy with *Henderson v Merrett*).

510. I am unpersuaded by the argument. *Henderson v Merrett* establishes that a party which undertakes to provide services to another may be under a tortious duty of care in respect of those services. The Administrators in the present did not undertake a service for the benefit of the bidders. Nor did they undertake to perform a task for bidders. The Administrators carried out a sales process to seek to achieve a plan A or plan B outcome in order to achieve the statutory purposes under para 3 of Sch. B1. They were carrying out their statutory functions in furtherance of their duties to the creditors and company. Bidders were invited to make offers. It is impossible to regard this as the provision of a service. That is sufficient to dispose of this claim.

511. In any event the various considerations I have discussed at some length in the previous sections apply with equal force to this claim:

    (a) Mr Rowley was acting as an agent of the company and the principles in *Williams* and *Fraser Turner* apply.

    (b) The same considerations about a broad and uncontrolled class of claimants apply. If this extended duty were owed to Uralkali it would equally be owed to everyone potentially affected by the process, including (it would seem) all bidders, the individual creditors (and not merely the general body of creditors), the shareholders, and the various other stakeholders, including Mercedes, FIA and FOM. There is no logical control mechanism which would justify a duty of this kind in favour of Uralkali but deny it to these other parties.

    (c) I have discussed the way that the imposition of such a duty would affect the performance by administrators of their functions. They would be driven to taking a cautious and over-lawyered approach to what is already a demanding commercial task. This point dovetails with considerations of legal coherence and the boundaries drawn by the legislature and the courts concerning the classes of persons who may apply to the court to control or supervise the conduct of office-holders.

512. These considerations tell decisively against holding that the Administrators undertook a personal responsibility towards Uralkali concerning the conduct of the bidding process.

513. Nor can Uralkali's arguments gain any traction from the rule in *ex p. James*. First, I do not consider anything done by the Administrators on the present facts would have engaged the principles in that case. Second, in any event, as Counsel for Uralkali accepted, the bidders in a sales process have no standing to apply to the court to enforce that duty. To make an obvious but important point, the fact that A owes a duty to B does not show that A owes the same duty to C. Third, for reasons already given above, I consider that the fact that an office-holder may be properly kept up to the mark under existing legal rules (by those entitled to complain or seek supervisory orders) is a powerful consideration for not placing them under separate personal tortious duties (which may lead to an unduly defensive or cautious approach to performance of their functions).

514. I therefore conclude that Mr Rowley did not owe a duty to Uralkali under this head.

515. Uralkali relied on the same points to establish a breach of this duty and causation. For the reasons I have given above, its case fails on those issues too.

516. For these reasons I conclude that the extended *Hedley Byrne* claim adds nothing material to Uralkali's case and it is dismissed.

Breach of confidence

517. There was no contractual restriction on the use of confidential information, so this claim rests on an equitable duty of confidence. The claimed basis of the duty is the notice contained in Uralkali's bid letter of 3 August. The letter was marked "Strictly Private and Confidential" and section VI stated that it was "*being submitted on the understanding that its terms and conditions, including all contents of this letter and all discussions concerning the Proposed Transaction, will be kept confidential and will not be disclosed to anyone outside the Joint Administrators … [with certain exceptions for legal advisers]*".

518. In *Racing Partnership Ltd v Sports Information Services* [2020] EWCA Civ 1300 at [44] Arnold LJ said that the clearest statement of the elements necessary to found an action for breach of an equitable obligation of confidence remains that of Megarry J in *Coco v A.N. Clark* (Engineers) Ltd [1969] RPC 41 at 47:

> "First, the information itself ... must 'have the necessary quality of confidence about it'. Secondly, that information must have been communicated in circumstances importing an obligation of confidence. Thirdly, there must have been an unauthorised use of the information to the detriment of the party communicating it."

519. In the *Racing Partnership* case at [49] Arnold LJ said that the starting point in any confidential information case is to identify with precision the information which is alleged to be confidential.

520. In its pleadings Uralkali defines the "Confidential Information" as: (i) the fact that, as at 5 August 2018, Uralkali was looking to rescue FI via a share purchase, as reflected in its 3 August bid; (ii) Uralkali's bid structure that formed the basis of the 3 August bid namely that it would (a) provide funding to FI in the interim period pending the

Indian banks' consent to a share acquisition and (b) if consent was not granted, it would proceed with an asset and business purchase.

521. Uralkali claims that Mr Rowley disclosed the Confidential Information to Mr Stroll at the lunch on 5 August and meeting with Mr Stroll and Withers.

522. I have made findings of fact about the lunch and the subsequent meeting with the lawyers at [247] – [248] above. The material findings for present purposes are these:

(a) Mr Rowley said that other bidders were exploring a rescue option by way of an acquisition of the shares.

(b) Mr Rowley did not tell Mr Stroll what Uralkali's bid had been on 3 August.

(c) Mr Rowley did not tell Mr Stroll that, as at 5 August, Uralkali was looking to rescue FI by means of a share purchase.

(d) Mr Rowley did not name Uralkali (or any other bidder).

(e) Mr Rowley outlined a possible bid structure. Much of it was rudimentary: the consent of the Indian banks would be needed, and this might take time and interim funding would be required. This echoed what Mr Rowley had told Uralkali at the meeting on 2 August. It was a requirement imposed by Mr Rowley, not something Uralkali had originated. As such, it was not information obtained from any bidder, and was not confidential.

(f) The same applies to Mr Rowley's statement that any rescue offer had to be combined with a fall-back offer for the business and assets. That was something Mr Rowley had told Uralkali (in the emails of 2 August and 4 August). It was not information obtained from Uralkali and was not confidential information about Uralkali's planned bid structure.

(g) The fact that Mr Rowley considered that a rescue offer might be capable of being achieved by reaching terms with the existing shareholders was not information obtained from a bidder. It was not confidential information about the bid structure.

523. I find that Mr Rowley did not disclose any confidential information as defined in Uralkali's pleadings. First he did not identify Uralkali as a rescue bidder. Second, the structure he outlined to Mr Stroll was something Mr Rowley had explained to Uralkali. It was not confidential, and Uralkali could not properly prevent Mr Rowley outlining the same potential rescue structure to other bidders.

524. Nor did Mr Rowley breach any duty of confidence owed to Uralkali by saying, in general terms, that other parties were exploring a rescue by way of an acquisition of the shares. My reasons are these.

525. First, I do not think that such information has the necessary quality of confidence. It is commonplace in a selling process that the seller or its agent will be able to explain to a potential buyer that that there are other interested parties or that other bids have been submitted (but without disclosing the amount of the bids). A seller must generally be expected to be able to do this to maintain an element of competitive

tension and would not generally be thought thereby to be imparting confidences. I do not think that saying, in general terms, that there were other parties exploring a share purchase was imparting anything confidential.

526. Second, I do not consider that such information would fall within the scope of the equitable duty of confidence. The scope of the duty is context-specific, and the underlying principle is that one party may not take unfair advantage of confidential information obtained by him (see *Seager v Copydex* [1967] RPC 349, 368). I do not consider that a recipient of the 3 August offer in the position of Mr Rowley would reasonably have expected or understood that he was prohibited from informing interested parties, in general terms, that other interested parties were exploring a share purchase. Administrators must seek to achieve the statutory objectives and they should not (absent express agreement) be placed under undue restrictions which would prevent them maintaining a competitive process. I do not consider that Mr Rowley's general statement about other bidders being interested in a share purchase could be regarded as taking unfair advantage of any confidential information.

527. It is also relevant to the scope of the equitable obligation of confidence that at the meeting of 2 August 2018 Mr Rowley told Uralkali that there were four very credible parties interested in buying the business and assets and that those parties had explored a rescue before the administration and had decided it was not feasible as they could not get a deal with the shareholders. The scope of any equitable obligation arising from the notice in the 3 August letter has to be considered in that light: Uralkali would reasonably have appreciated that Mr Rowley could not be prevented from explaining in general terms that there was more than one runner in the race, and, indeed the current attitude of those bidders to a possible rescue. The general statement he made to Mr Stroll on 5 August about some bidders exploring a possible rescue was of the same nature.

528. Third, Mr Rowley did not, by saying this, identify Uralkali even by implication. There had been several bidders in the first round and nothing Mr Rowley said served to identify Uralkali.

529. Uralkali submitted that the real mischief lay in the combination of Mr Rowley telling Mr Stroll that (i) other bidders were exploring a rescue option via a share purchase and (ii) he was surprised that Mr Stroll was not taking that course given the bid structure that could be used to address Mr Stroll's concerns about a rescue. But the question was whether any part of the information provided was Confidential Information. I do not consider that it was for the reasons given above.

530. Uralkali also submitted that Mr Rowley's evidence was that the structure he described to Mr Stroll at the meeting was the structure that Uralkali had used in its first-round bid. However while Mr Rowley agreed that it was the same structure he also said that it was a structure he had himself proposed to Uralkali on 2 August. Hence he was not accepting that he disclosed anything confidential.

531. Uralkali also relied on an answer given by Mr Rowley in evidence where he appeared to accept that he was conveying to Mr Stroll that another bidder had come up with the structure and had used it in its bid. But that answer needs to be seen in the light of the previous point. His evidence was that he had himself suggested the structure. Hence he could not have been accepting that he conveyed that another bidder had come up

with the structure and used it. Reading the whole passage of evidence I conclude that what he accepted was that he described to Mr Stroll the same structure as he had previously suggested to Uralkali. I find that he did not inform Mr Stroll that another bidder had in fact used that structure.

532. In any case, I do not think even if he had conveyed that, it would have been confidential information since he would have been saying no more than that another bidder was considering using a structure Mr Rowley himself had proposed. Moreover, where there is a partial disclosure of information there will only be a breach of confidence if the information wrongly provided was material. The structure Mr Rowley outlined to Mr Stroll (a conditional offer, an exclusivity period, interim funding, and a fall-back plan B offer) was not confidential – indeed Mr Rowley had explained it to Uralkali in the first. Even if Mr Rowley had (contrary to my finding) said that another bidder had adopted the structure he had proposed, he would not have been disclosing any material information. What mattered was that there was a viable structure, not that another potential bidder had adopted it.

533. For these reasons I conclude that Mr Rowley did not breach any duty of confidence to Uralkali.

534. The Administrators submitted that Uralkali had unclean hands. In the light of my decision that there was no breach of confidence this does not arise. But in case I am wrong I shall address it briefly.

(a) The principle is that where a claimant seeks relief based on equitable principles (such as a claim based on a breach of an equitable duty of confidence) he may be denied relief by reason of his own misconduct or impropriety, if that misconduct has a sufficient nexus to the relief sought, and this involves a multifactorial assessment by the trial judge (see e.g. *UBS AG (London Branch) v Kommunale Wasserwerke Leipzig GmbH* [2017] EWCA Civ 1567 at [171]).

(b) The Administrators said that Uralkali had unclean hands because it was actively seeking to obtain details about other bidder's proposals including the price. Mr Ostling asked Dr Mallya to tell him how much more Racing Point was offering for the shares. In one WhatsApp message he noted that Dr Mallya had agreed to provide this information "in confidence". Mr Ostling gave evidence that he had sought to find out how much Racing Point was bidding so that he could try to beat it. The information Uralkali was trying to extract from Dr Mallya, the amount of Mr Stroll's bid, has the quality of confidence I have found was lacking in Mr Rowley's statements to Mr Stroll. Mr Ostling appears to have realised this (hence he noted that Dr Mallya was going to provide it "in confidence"). Uralkali wanted it so that it could better Mr Stroll's offer.

(c) Uralkali submitted that Mr Ostling was simply attempting to ascertain the price sought by Dr Mallya. But I find that he did more than this. He sought to discover the amount of Mr Stroll's bid. Counsel for Uralkali submitted that it was for Dr Mallya as the seller of the shares to decide whether to disclose the amount of the bid. He suggested that Dr Mallya would not be subject to a duty of confidence concerning that information. But it is clear from Mr Ostling's WhatsApp message (saying that that Dr Mallya was going to share Mr Stroll's

offer terms "in confidence") that he thought Dr Mallya could not properly disseminate the terms of Mr Stroll's bid. I find as a fact that Mr Ostling was seeking to procure information which he believed to be covered by a duty of confidence.

(d) Uralkali also submitted that the position of a seller was different from that of an administrator who should remain neutral. I do not think that throws any light on the present question, which is whether Uralkali was guilty of misconduct in seeking to discover the terms of the offer made by Mr Stroll. It seems to me that, in advancing its case in confidence Uralkali is seeking to look two ways at once. It contends that Mr Rowley was under an equitable duty of confidence concerning all aspects of Uralkali's bid. On the other hand it says that it was a matter for Dr Mallya whether he chose to disclose to one bidder the price offered by another.

(e) Uralkali submitted finally that there was no relevant nexus between Uralkali's alleged conduct in seeking to obtain the terms of the bid made by Mr Stroll to Dr Mallya and the relief sought. I accept this submission. Although I have found that Mr Ostling was seeking to obtain confidential information he did not succeed. The relief sought is equitable compensation. To the extent that Uralkali was involved in misconduct, its conduct did not affect or influence the actions of Mr Rowley or Mr Stroll or the losses (if any) suffered by Uralkali.

535. In case I am wrong so far, I turn to the issue of causation. Uralkali submitted that the consequence of the disclosure of the Confidential Information was that Mr Stroll changed his mind. He came into the lunch expecting to make only a plan B offer. He left it (or the subsequent meeting) realising that he should pursue a rescue. Uralkali submitted that the change was plainly brought about as a result of the information that Mr Rowley had passed to him over lunch. It contends that Uralkali has therefore lost a real or substantial opportunity to purchase the business and assets of FI or its shares.

536. I do not think that the question is as simple as that submission suggested. First, the remedy being sought is equitable compensation. The appropriate compensation for breach of confidence will depend, in part, on the contribution made by the confidential element of any information provided. Mr Rowley said a number of things said to be confidential at the meeting. I have found that he did not breach any confidence. But suppose (contrary to that finding) that some of the information was confidential but other parts were not: for instance, that there was nothing confidential about the structure Mr Rowley outlined, but the fact that there had been other bids was. It would be necessary to assess the contribution made by the confidential elements to what then happened.

537. But in any event, it seems to me that the determination of how Mr Stroll would have acted in the absence of the disclosure of the information by Mr Rowley falls to be determined as a loss of an opportunity. The breach is the disclosure by Mr Rowley to Mr Stroll. The question what would have happened without that breach requires an analysis of how Mr Stroll, a third party, would have acted had the breach not occurred.

538. Had I found in favour of Uralkali on the breach of confidence claims I would therefore have ordered that all questions of the appropriate remedy (including the

question of how Mr Stroll would have acted in the counterfactual) should be dealt with at a further hearing. To the extent it may be relevant to the assessment of equitable compensation I find that (assuming there was a breach of confidence) Uralkali would have suffered the loss of a real or substantial opportunity.

The position of Mr Baker

539. I have dismissed all the claims against Mr Rowley. The same reasoning applies to the claims against Mr Baker.

540. In case I am wrong, I should address the separate position of Mr Baker on the assumption that Mr Rowley had been liable.

541. It is common ground that Mr Rowley is the central actor in this case and that he shouldered the lion's share of the work in relation to the administration. Mr Baker had a limited role considering the agreements being finalised with Racing Point on 7 August. Mr Rowley said in evidence (and I accept) that he did not keep Mr Baker abreast of developments in the administration.

542. Uralkali submitted that Mr Baker should be liable for the wrongs committed by Mr Rowley. It says that he was appointed as a joint administrator and that it wrong as a matter of policy for one joint administrator to be entitled to stand back and look the other way when serious failures took place on his watch. Uralkali says that any representations were made on behalf of both of them and that the breach of confidence on the part of Mr Rowley was made in his capacity as joint administrator and Mr Baker is accordingly jointly liable.

543. I reject these submissions.

544. The claims in negligence are all premised on an assumption of responsibility by the defendant. As *Fraser Turner* shows an administrator does not, merely by reason of his appointment, owe a tortious duty to third parties who may be adversely affected by his actions; something more, something out of the ordinary, is needed. Mr Baker had no involvement in any of the relevant events said to give rise to Mr Rowley personal assumption of responsibility. In any event Mr Baker had no reason to suppose that Mr Rowley (a seasoned professional backed by others at FRP and an experienced legal team) was acting carelessly or improperly. There is therefore no basis for saying that he acted negligently. The case against Mr Baker in negligence is therefore without foundation.

545. There is equally no basis for the claim in breach of confidence. Mr Baker was not privy to the alleged confidential information and did not disclose it to anyone.

546. Nor is there any basis for saying that Mr Baker as one office-holder should be held liable for a breach of confidence by the other. He was not aware of the Confidential Information and did not disclose it to anyone.

547. Uralkali's argument came in the end to the assertion that one joint office-holder is liable for the wrongs of the other. There is no principled basis for that assertion.

548. For these reasons, I would have dismissed all the claims against Mr Baker even if Uralkali had succeeded in one or more of the claims against Mr Rowley.

Conclusion

549. Uralkali's claims against Mr Rowley and Mr Baker are dismissed.