Neutral Citation Number: [2021] EWHC 1294 (Ch)

Case No: 8276 of 2018 & CR-2019-BHM-000782

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

Date: 17 May 2021

Before:

MR JUSTICE ZACAROLI

Between:

CARRAWAY GUILDFORD (NOMINEE A) LIMITED AND 18 OTHERS	**Applicants**
- and -	
(1) REGIS UK LIMITED **(2) EDWARD WILLIAMS (As Joint Supervisor of Regis UK Ltd)** **(3) CHRISTINE MARY LAVERTY (As Joint Supervisor of Regis UK Ltd)**	**Respondents**

Peter Arden QC and Ben Shaw (instructed by **Hogan Lovells International LLP**) for the **Applicants**
Matthew Weaver (instructed by **Pinsent Masons LLP**) for the **Second and Third Respondents**

Hearing dates: 3, 4, 5, 8, 9, 10 and 29 March 2021

APPROVED JUDGMENT

COVID-19: This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII and other websites. The date and time for hand-down is deemed to be 10.00 am on 17 May 2021.

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MR JUSTICE ZACAROLI

Mr Justice Zacaroli:

Introduction

1. This is my judgment in respect of the challenge, made by certain landlords of premises previously leased to Regis UK Limited (the "Company"), to the company voluntary arrangement ("CVA") under Part 1 of the Insolvency Act 1986 ("IA 1986") in respect of the Company.

2. On 10 May 2021, I handed down judgment in respect of a challenge made by landlords to the CVA in respect of New Look Retailers Limited ("New Look" and the "New Look Judgment"). As I indicated in paragraph 3 of the New Look Judgment: the trial relating to the New Look CVA took place the week after the trial relating to the Company CVA; the same solicitors and counsel represented the applicant landlords in both matters; and counsel for the respondents in each matter were permitted to attend and observe the trial in the other matter. Further argument from the parties in this case was heard, following the conclusion of the New Look trial, to enable any additional points that had emerged during that trial to be ventilated.

3. The New Look Judgment contains a full treatment of many of the legal issues that underlie the Applicants' challenge to the CVA in this case. I do not repeat that exercise in this judgment, but will instead cross-refer to the New Look Judgment where it is relevant to do so.

Background

4. On 8 October 2018, the directors of the Company, issued a proposal (the "Proposal") for a CVA between the Company and its creditors and its sole member, International Beauty Limited ("IBL").

5. On 26 October 2018, meetings of the Company and of its creditors voted in favour of the Proposal, ostensibly by the requisite statutory majorities. The CVA took effect subject to the terms of section 5 IA 1986 upon the filing with the court of the report of the second and third respondents ("Mr Williams" and "Ms Laverty", together the "Nominees") pursuant to section 4(6) IA 1986. The Nominees became joint supervisors of the CVA.

6. By an Insolvency Application Notice dated 27 November 2018, certain landlords of commercial premises who are affected by the CVA (the "Applicants") seek to challenge the CVA pursuant to section 6(1) IA 1986 (the "Application"). The Applicants allege that there was material irregularity in respect of the creditors' meeting and unfair prejudice to their interests on numerous grounds.

7. On 10 December 2018 the Company wrote to all creditors purporting to modify the CVA in response to certain of the objections raised in the Application (the "Modification Letter"). The validity and effect of that purported modification is a matter of dispute between the parties.

8. The relief sought in the Application includes: an order under section 6(4)(a) of IA 1986 revoking or suspending the CVA; an order under section 6(4)(c) of IA 1986 that a further meeting of creditors of the Company be convened to reconsider the Proposal; an order that the Nominees repay to the Company the fees and remuneration received by them (whether as nominees or supervisors); and a declaration that the modifications notified in the Modification Letter require the creditors' approval under clause 34.1 of the CVA.

The Issues raised by the Application

9. The agreed list of issues for trial (leaving aside issues specifically relating to relief) runs to 21 issues, falling into two broad categories.

10. First, numerous aspects of the CVA are said to give rise to material irregularities or unfair prejudice. These are relied on in order to seek an order revoking the CVA.

(1) Disclosure. Whether the disclosure to creditors was inadequate (such as to constitute a material irregularity) in the following respects:

(a) inadequate details were provided of certain transactions entered into by the Company in 2017 and 2018 (respectively, the "2017 Transactions" and the "2018 Transactions" and, together, the "Antecedent Transactions"), which were subject to possible challenge in the event of a liquidation or administration;

(b) The Statement of Affairs and the estimated outcome statement were inaccurate and/or incomplete because:

(i) they wrongly treated as valid debts owed to Regis Corporation ("Regis Corp") and International Beauty Limited ("IBL") (respectively the "Regis Corp Debt" and the "IBL Debt"), and a debenture dated 2 August 2018 in favour of Regis Corp (the "Debenture");

(ii) they wrongly identified a shut-down administration as the realistic alternative to a CVA; and

(iii) they failed to include any value for recoveries in respect of the Antecedent Transactions.

(2) Regis Corp and IBL debts. Whether:

(a) The admission of Regis Corp and IBL to vote was a material irregularity on the grounds that neither was a creditor because the assumption of the debt to both constituted an unlawful return of capital and/or a breach of duty by the directors;

(b) The treatment of Regis Corp and IBL as Critical Creditors constituted unfair prejudice;

(3) Whether the discounting of the Landlords' claims by 75% for voting purposes constituted a material irregularity or unfair prejudice;

(4) Whether various modifications (primarily rent reductions) to the terms of the leases with the landlords whose claims were compromised by the CVA (the "Compromised Landlords") were unfairly prejudicial, and whether that was mitigated by the grant of a new right in favour of the Landlords to terminate the Leases or the availability of a profit-share fund.

11. Second, in order to obtain an order that the Nominees repay their fees, it is contended that the Nominees acted in breach of duty in various respects in promoting the CVA.

(1) Whether the Nominees were in breach of duty in: (a) stating in their report that there was no manifest unfairness; (b) opining that the Proposal should be put to a meeting of the Company's creditors; (c) failing to provide adequate information in relation to the Antecedent Transactions; (d) failing to consider whether a trading administration or pre-packaged sale were the most realistic alternatives to a CVA;

(2) If the Nominees were in breach of duty, whether the Applicants are entitled to an order under section 6(6) of IA 1986 that the Nominees repay to the Company their fees and remuneration.

12. It is important to note what is *not* in issue in this case.

13. First, the Applicants in this case do not advance the jurisdiction challenges that were made in respect of the New Look CVA.

14. Second (unlike the challenge to the New Look CVA), although the Regis Corp Debt and the IBL Debt were unimpaired and, together, were material in the sense that without them the requisite majority would not have been obtained at the creditors' meeting, the Applicants do not contend that this in itself gives rise to material irregularity or unfair prejudice. Nor do they advance such a case in respect of the substantial body of other creditors whose claims were unimpaired by the CVA but whose votes nevertheless counted towards the statutory majority.

15. The Applicants had sought permission to amend the claim in December 2019 to contend that there was a material irregularity in Regis Corp and IBL being permitted to vote in favour of the CVA notwithstanding that their claims were unimpaired by the CVA. Permission was refused by James Morgan QC sitting as a deputy High Court Judge. After the closure of their case on the facts at trial, the Applicants sought permission to amend to plead that the same facts constituted unfair prejudice. I refused permission, principally on the grounds that there was no reasonable justification offered for such a late amendment, which would add unfairly to the burden on the Nominees' legal team mid-trial, and that it was in substance a second bite of the cherry, since it raised the same underlying matters as the failed application to amend in December 2019.

16. Finally, it is not contended that the differential treatment – as between different categories of landlords who are compromised by the CVA – gives rise to any material irregularity or unfair prejudice.

The practical utility of these proceedings

17. On 23 October 2019 Regis Corp, which had until October 2017 been the ultimate parent of the Company but in October 2019 was the holder of a qualifying floating charge, appointed Messrs Harding and Cowlishaw of Deloitte joint administrators of the Company. In order to sidestep arguments as to the validity of that appointment (for reasons I develop below), the Applicants sought and obtained an order from Mark Cawson QC sitting as a Deputy High Court Judge on 1 November 2019 appointing the same persons as joint administrators with effect from 23 October 2019.

18. As a result of the appointment of administrators, the CVA automatically terminated on 23 October 2019. The Company itself has played no part in the proceedings since the appointment of the Administrators. The claim continued against the Nominees. The only relief sought against the Nominees is that they should be ordered to repay their fees, which amount to £15,000 relating to their role as Nominees and £30,000 relating to their role as supervisors.

19. On 1 November 2019, the Nominees sought to strike out the claim against them on the basis, among other things, that the court could not (or would not) revoke a CVA that had been terminated (it being clearly impossible to suspend the CVA or order a further meeting once the CVA had terminated) and that there was no realistic prospect of the court ordering them to repay their fees.

20. By an order dated 14 November 2019 James Morgan QC, sitting as a deputy High Court Judge, dismissed the strike-out application. In a judgment delivered on the same date ([2019] EWHC 3073 (Ch)), he concluded that it was arguable that the court has a power to revoke a CVA once terminated and that there remained at least some utility in an order revoking the CVA notwithstanding it had been terminated. That was to a large extent because, as a result of clauses 35.9 and 35.10 of the CVA, although upon termination of the CVA the compromises and releases effected by it were deemed never to have happened, there was a carve-out for "any variations to the terms of the Leases".

21. So far as the application to strike out the relief sought in the Application against the Nominees was concerned, the deputy judge held that it was an open question whether, assuming the allegations in the Application were made out, the Nominees would be required to repay their fees and remuneration.

22. Mr Weaver, who appeared for Nominees, submitted that there was no continuing practical utility in these proceedings. He accepted, in light of the strike-out application, that the trial would go ahead, but he submitted that I should take into account the lack of practical utility in the proceedings in considering whether it was appropriate to determine at least certain of the issues raised. In particular, I should refrain from making findings against

persons who were not before the court, for example, findings as to breach of duty by the directors of the Company.

23. Things have moved on since the strike-out application in November 2019. The Administrators have made it clear that all landlords are entitled to claim in the administration on the basis of the contractual rights contained in their leases without any modification as a result of the CVA. It is therefore common ground that the revocation of the CVA is not required in order to restore the landlords to their pre-CVA rights.

24. The Applicants nevertheless maintain that there is utility in the claim to revoke the CVA for the following reasons:

    (1) The order sought against the Nominees (for the return of their fees) is based on section 6(6) of IA 1986. The power under that subsection to give supplemental directions is dependent upon the court revoking the CVA.

    (2) Revocation of the CVA would prevent the Nominees relying on clause 28.13 of the Proposal. This provides an indemnity for the Nominees against any liability incurred by them in defending any challenge to the Proposal. It is expressed (by clause 35.10 of the Proposal) to survive termination of the CVA.

    (3) Revocation of the CVA would prevent the Nominees relying on clause 37.1 of the Proposal, which provides that the Nominees, among others, shall not incur any personal liability. Clause 37.1 is manifestly incomplete. It consists of two lines at the bottom of page 91 of the Proposal and continues on to page 92, but page 92 is missing and was missing from the version that was provided to creditors. On the basis of the part of the clause that is there, the parties proceeded on the assumption that it had the effect of precluding the Nominees from incurring "any personal Liability", without specifying for what or to whom.

    (4) A large proportion of the Applicants' costs as against the Company had already been incurred by the time the Company went into administration. Determination of the Application was accordingly relevant, if for no other reason, to determine whether the Applicants are entitled as against the Company to the costs incurred prior to its administration.

25. I accept that there is a theoretical need to determine whether the CVA is to be revoked, for the purposes of considering whether to order repayment of the Nominees' fees.

26. I do not accept that there is utility in revoking the CVA in order to prevent the Nominees relying on the indemnity in clause 28.13. That indemnity relates only to any liability incurred by the Nominees in defending the Proposal or any challenge to it. It is doubtful that an indemnity which is expressly designed to operate in circumstances where there is a challenge to the Proposal

would, as a matter of construction, cease to apply if that challenge is successful. In any event, the only challenge to the Proposal is that brought by the Applicants. If there is otherwise no utility in pursuing an application to revoke the CVA, it cannot be right to justify the application on the basis that the costs which the Nominees incur in defending it could otherwise be recovered from the Company. In the absence of the Application, there would have been no such costs, and the indemnity would be irrelevant.

27. As to clause 37.1, it was not suggested that the Nominees owed any duty to the creditors, so the only relevance of the clause was in releasing the Nominees from a liability owed to the Company. The Company, through its administrators, has not intimated any, or any potential, claim against the Nominees. The Applicants have not pointed to anything which might give rise to such a claim. In those circumstances, I cannot see any utility in revoking the CVA just to prevent the Nominees from relying on the purported release from liability in clause 37.1.

28. The only remaining utility to the proceedings, therefore, relates to the costs as against the Company incurred before it ceased to play an active part upon going into administration. Here, too, the utility is limited given that the costs would amount, at best, to an unsecured claim and there is no likelihood of a distribution to unsecured creditors in the administration.

29. The Applicants (at the time of the strike out application) had been open in saying that one of the reasons for pursuing the challenge to the CVA, even after it had terminated, was to obtain a ruling from the court on issues that had been raised, or were likely to be raised, in the context of other CVAs of retail companies. Even if that had once been a justification for pursuing these proceedings, it had fallen away by the time of the trial, in light of the challenge to the New Look CVA.

30. I accept Mr Weaver's submission that the lack of practical utility in the proceedings is a highly relevant factor, when considering whether it is appropriate to make findings of wrongdoing against persons who are not before the court. This is of particular relevance in relation to the claim that there was a material irregularity in permitting Regis Corp and IBL to vote at the creditors meeting, on the grounds that the Regis Corp Debt and the IBL Debt were void as constituting a breach of directors' duties or an unlawful return of capital.

<u>The Proposal</u>

31. The Proposal was divided into two sections, plus 30 schedules. Section 1 described the background, context and reasons for the proposed CVA, summarised the terms of the proposed CVA, explained the process for obtaining approval of the CVA and set out corporate, statutory and financial information. Section 2 contained the detailed terms of the Proposal.

32. The objectives of the Proposal were stated to be:

> "…to rationalise the Company's leasehold obligations, restore the viability of the Company's business, improve the balance sheet of the Company and assist in a return to profitability."

33. The Company's business would continue to be managed by the directors. It would continue to trade from most of its leased premises but, in many cases, with a reduced rent. Creditors (other than those regarded as critical to the ongoing business) would receive a dividend of seven pence in the pound to be paid from a trust fund, to be funded by nine quarterly payments by the Company of £33,000.

34. Section 1 contained a brief summary of the Company's history, including a corporate reorganisation which occurred in October 2017 (the "October 2017 Transactions") and described the trading challenges it currently faced. It stated that:

> "Management has identified that the company in its current format is not sustainable. The company's performance will continue to be undermined by the over rented part of its salon portfolio and the lack of availability of funding for investment in salon improvements and marketing outreach."

35. The Proposal dealt shortly with the likely consequences if the CVA was not approved. Having referred to Grant Thornton's appointment to conduct a "thorough review of the Company and provide advice in relation to restructuring options available to the Company", it stated as follows:

> "When modelled it was evident that the CVA represented the best outcome to Creditors as a whole compared to other restructuring options. The Directors have therefore concluded that the best available option for Creditors and the Shareholders is a company voluntary arrangement of the Company. If the Proposal is not approved it is anticipated that the Company will no longer be able to trade as a going concern, which would be likely to result in the appointment of administrators or liquidators to the Company."

36. An estimated outcome statement was provided at Schedule 13. This indicated that in the absence of the CVA the alternative was a "shut down administration", in which realisable assets would be likely to amount to £1,563,000 which, after deduction of the costs of realisation (£655,000) would result in a sum that was insufficient to repay anticipated preferential creditors. Accordingly, it estimated that there would be a nil return to ordinary unsecured creditors. In contrast, under the CVA, there would be a sum of £400,000 which, after deduction of £70,000 for the anticipated costs of the CVA, would enable a dividend of 7p in the £ to be paid to unsecured creditors.

The Terms of the CVA

37. By clause 4.1 of the detailed terms of the Proposal, with effect from the Effective Date, no creditor was entitled to take or continue any legal process, other process, action or self-help remedy against the Company or its assets for the purposes of obtaining payment of any liability or placing the Company into an insolvency process.

38. Each landlord was placed into one of five categories, as follows:

(1) Category 1. These were entitled to payment in full of the rent and other amounts due pursuant to the leases. The only compromise of their rights was: (a) rent was payable monthly in advance; and (b) any right to terminate or forfeit the leases on grounds relating to the CVA was waived.

(2) Category 2. The rights of these landlords were modified as follows:

(a) All claims in respect of arrears of rent, service charge, insurance and other claims were compromised and released in exchange for a sum equal to 7% of the determined amount of such claims;

(b) All claims in respect of dilapidations were to be paid at the rate of 7% of the "Dilapidations Allowance" (being an allowance equal to £10 per square foot);

(c) From the Effective Date, rent was reduced to 75% of the contractual rate, and was payable monthly in advance;

(d) From the effective date, insurance and service charges were payable monthly in arrears;

(e) Landlords had the right to give not less than 60 days' notice to terminate any time within (i) 90 days following the Effective Date; and (ii) 90 days prior to the third anniversary of the Effective Date, but where the Landlord was the landlord of multiple premises, it was entitled only to serve a notice terminating all of the leases;

(f) Any right to terminate or forfeit the leases on grounds relating to the CVA was waived; and

(g) Following termination, the Landlord is solely liable for the Rates of the relevant premises.

(3) Category 3. The rights of landlords in this category were modified in the same way as the Category 2 Landlords, except that: (1) rent from the Effective Date was reduced to 50% of the contractual rate; and (2) the Landlords' right to give not less than 60 days' notice of termination of the lease was exercisable within 90 days following the Effective Date or within the period of 90 days prior to each anniversary of the Effective Date.

(4) Category 4. The rights of landlords in this category were modified in the same way as Category 2 Landlords, except that: (1) rent from the Effective date was reduced to 25% of the contractual rate; and (2) the Landlords' right to give not less than 60 days' notice of termination of the lease was exercisable at any time before the expiry or determination of the lease.

(5) Category 5. The rights of landlords in this category were modified in the same way as Category 2 Landlords, except that: (1) rent from the Effective date was reduced to nil; and (2) the *Company* and the Landlord were entitled to terminate the Lease by giving not less than 30 days' notice at any time.

39. By clause 13, creditors which were deemed critical to the ongoing trading of the Company were unaffected by the CVA and would be paid in full in accordance with the existing contractual or other terms. They were affected by the CVA only if the entry into the CVA constituted a breach of contract, in which case that breach was waived. These "Critical Creditors", numbering 111, were listed at schedule 27. The largest were Regis Corp (in the sum of £1,097,136) and IBL (in the sum of £594,035).

40. By clause 14, all Non-Critical Creditors were entitled to be paid 7% of their "Allowed CVA Claim", in full and final settlement of all claims. The Allowed CVA Claims would be paid within 30 days of the date falling 34 months after the Effective Date.

41. By clause 22, the "Compromised Creditors' Payment Fund" was established. All Allowed CVA Claims, together with the supervisors' costs, expenses and disbursements, were payable from the Compromised Creditors' Payment Fund. The Company was obliged to make nine quarterly payments of £33,000, commencing on 24 January 2019, and a final balancing payment (if required) on 24 April 2021. If the supervisors considered that there was insufficient in the Compromised Creditors' Payment Fund to satisfy the Allowed CVA Claims and their costs, expenses and disbursements, then the Company was obliged to pay such additional sums as the supervisors required.

42. By clause 23 a "Profit Share Fund" was to be established, into which the Company would pay 20% of the amount by which the cumulative aggregate of the net profit of the Company for the period of 2 years following the Effective Date exceeded £250,000, subject to a cap of £200,000. The fund would be shared among the Profit Share Fund Creditors (defined in a subsequent amendment letter dated 24 October 2018 as the Compromised Landlords and Non-Critical Creditors) in proportion to their CVA Allowed Claims together with interest under s.189 IA 1986, with any surplus being repaid to the Company.

43. Clause 33 provided that the Company has power to modify the provisions of the CVA, provided (among other things) that the modifications do not materially alter the effect or economic substance of the CVA.

44. By clause 35.6, the CVA would automatically terminate immediately following the appointment of Administrators. By clause 35.9, upon termination, subject to clause 35.10: "the compromises and releases only (excluding any variations to the terms of the Leases) effected under the terms of the CVA shall be deemed never to have happened, such that the Compromised Creditors shall have the claims against the Company that they would have had if the Proposal had never been approved (less any payments made during the course of the CVA)". Clause 35.10 excluded, among other things, clauses 28 and 37 from the effect of clause 35.9.

45. Clause 37 (which, as I have noted above, is cut off after two lines) provided that the directors, the Nominees and the supervisors, their firm, staff, advisers and agents shall incur no personal liability.

46. Schedule 1 to the Proposal set out how Landlords' claims would be calculated for voting purposes. In essence, this required them to be calculated by reference to the anticipated amount of future rent that would not be received, on the assumption that the premises would be re-let at 85% of the contractual rent. To this was then applied a 75% discount.

The Statement of Affairs

47. The Statement of Affairs annexed to the Proposal identified assets subject to a floating charge in the sum of £1,563,168, of which £900,780 consisted of cash. After preferential creditors of £1,232,250 and deduction of the prescribed part of £69,184, that left £261,734 for the floating charge holder (Regis Corp). Regis Corp's debt was included at £1,691,171. Accordingly, other than the prescribed part there would be no distribution to unsecured creditors (totalling £15,074,586).

The Nominees' Report

48. The Nominees Report, made by Mr Williams as one of the two joint nominees, contained the following comments on the proposal.

(1) "I have considered the proposal and I have discussed it with the directors, but I have not carried out a detailed investigation into the Company's affairs or activities. I have no reason to suppose that the details provided are inaccurate."

(2) "The statement of affairs displays a fair reflection of the Company's assets and liabilities insofar as I have been able to ascertain them during my discussions with the directors."

(3) "The directors have provided an estimate of the liabilities. The Nominees are not aware of any reason why these estimates cannot be relied upon by the creditors and members of the Company."

(4) "The terms of the proposal do not include any provisions which would appear to impact in an unfair or prejudicial manner on any creditor or class

of creditors in relation either to the conduct of a decision procedure for creditors to consider the proposal or in relation to its implementation."

49. As to antecedent transactions, the Nominees stated:

> "The directors state in the proposal that circumstances exist which might, in the event that the Company goes into liquidation, give rise to the possibility of claims by the liquidator under Section 238 (transactions at undervalue), 239 (preferences) or 244 (extortionate credit transactions) of the Insolvency Act 1986.
>
> I have discussed these transactions with the directors and I have no reason to doubt their statement in this regard.
>
> I have not considered the quantum or likelihood of success of any potential action against the Company of its directors [sic]. I consider that the disclosure made by the directors in the proposal is sufficient to enable the creditors and members to come to a conclusion on their position."

50. Under the heading "Conclusion", Mr Williams said:

> "The nominees consider there is a reasonable prospect of the proposal being approved and implemented and that:
>
> - The Company's true position as to the assets and liabilities is not materially different as represented to Creditors
> - The Proposal have a reasonable prospect of being approved and implemented as intended
> - There is no manifest unfairness."

The statutory requirements

51. The statutory framework relating to CVAs is set out at [46] to [58] of the New Look Judgment. I refer here to the provisions which relate to the contents of the proposal and the position of the nominee.

52. Section 1(2) IA 1986 defines a nominee (who must be a person who is qualified to act as an insolvency practitioner) as the person required by a CVA proposal to "act in relation to the voluntary arrangement either as trustee or otherwise for the purpose of supervising its implementation".

53. The nominee is required by section 2(2) IA 1986, within 28 days of being given notice of the CVA proposal (or such longer period as the court may allow), to submit a report to the court stating their opinion whether (1) the proposed CVA has "a reasonable prospect of being approved and implemented" and (2) the "proposal should be considered by a meeting of the company and by the company's creditors". By Rule 2.9(2) of the Insolvency Rules 2016 ("IR 2016"), the nominee's report must state why the nominee

considers the proposal does or does not have a reasonable prospect of being approved and implemented, and why members and creditors should or should not be invited to consider the proposal.

54. The directors of the company are obliged, by section 2(3) IA 1986 to submit to the nominee, for the purposes of enabling the nominee to make their report, the proposal and a statement of affairs, containing such particulars of its creditors, its debts and other liabilities and its assets as are prescribed. The contents are prescribed by Rule 2.6(1) IR 2016 and include: a list of assets, with estimated values; in the case of property on which a claim against the company is secured, particulars of the claim and "how and when the security was created"; the names and addresses of unsecured creditors with the amounts of their respective claims; and "any other particulars that the nominee in writing requires to be provided for the purposes of making the nominee's report on the proposal to the court." The statement of affairs is to be verified by the directors with a statement of truth: Rule 2.6(5) of IR 2016.

55. The contents of the proposal are prescribed by Rule 2.3(1) IR 2016. Among other things, it must state the nature and amount of the company's liabilities, how they will be met, modified, postponed or otherwise dealt with by means of the CVA. If the company is not in administration or liquidation the proposal must state:

> "(iii) … whether, if the company did go into administration or liquidation, there are circumstances which might give rise to claims under section 238 (transactions at an undervalue), section 239 (preferences), section 244 (extortionate credit transactions) or section 245 (floating charges invalid), and
>
> (iv) where there are circumstances that might give rise to such claims, whether, and if so what, provision will be made to indemnify the company in respect of them."

56. By Rule 2.3(1)(x), the proposal must also contain "any other matters that the proposer considers appropriate to enable members and creditors to reach an informed decision on the proposal".

57. By Rule 2.8(2) IR 2016, "if it appears to the nominee that the nominee's report to the court cannot properly be prepared on the basis of information in the proposal and statement of affairs, the nominee may require the proposer to provide (a) more information about the circumstances in which, and the reasons why, a CVA is being proposed; … and (c) any further information relating to the company's affairs which the nominee thinks necessary for the purposes of the report."

58. By Rule 2.8(4) IR 2016, the proposer is obliged to give the nominee such access to the company's accounts and records as the nominee may require in order to consider the proposal and prepare the nominee's report.

Issue 1: Inadequate Disclosure as a Material Irregularity

The required standard of disclosure in a CVA proposal

59. I have addressed the required standard of disclosure in the New Look Judgment at [299] to [304]. In essence, non-disclosure will constitute a material irregularity only if there is a substantial chance that the non-disclosed material would have made a difference to the way in which creditors voted at the meeting: *Somji v Cadbury Schweppes plc* [2001] 1 BCLC 498, per Robert Walker LJ at [35]; *Trident Fashions (No2)* [2004] 2 BCLC 35, per Lewison LJ, at [46].

Issue 1(a): Inadequate disclosure of the Antecedent Transactions

60. The principal focus of the Applicants' non-disclosure claim is the Antecedent Transactions. Before addressing the alleged inadequacies in the disclosure, it is first necessary to explain those transactions.

Outline of the 2017 Transactions

61. Prior to October 2017, the Company's issued share capital was held by Haircare Limited ("HL"). The Company's ultimate parent was Regis Corp, a US company headquartered in Minneapolis which through its subsidiaries conducted its primary business through hairdressing and beauty salons. In the UK, the most visible parts of the Company's business were branded under the Regis, Supercuts, and Vidal Sassoon names.

62. In October 2017, HL sold its shares in the Company to IBL. The ultimate parent of IBL is the Beautiful Group Holdings LLC, which is itself owned by a private equity group based in Los Angeles called Regent LP.

63. Prior to the sale, the Company undertook a number of transactions in order to remove those parts of the business which were not to be included in the sale to IBL. The key features of the transactions were:

(1) The Company transferred its Sassoon division (the "Division") to HL. The consideration for the transfer was approximately £2.2 million, being the book value of the Division. This was left outstanding as an inter-company debt. The debt was then the subject of a dividend in specie to HL. There is no evidence as to the actual value of the Division at the time of the transfer.

(2) The Company also distributed to HL, by way of a dividend in specie, its rights under a promissory note in the sum of £6.5 million from RHS UK Limited, a company in the Regis Corp group, due in 2032.

(3) The Company discharged outstanding debts due to a variety of entities within the Regis Corp group (in the aggregate sum of about £2.3 million), and Regis Corp waived a debt due from the Company in the sum of approximately £243,000.

(4) The Company transferred its interests in 12 franchises to a company within the Regis Corp group, The Barbers, Hairstyling for Men & Women Inc ("The Barbers"). The consideration was £1.

(5) The Company transferred its interest in intellectual property rights, including a number of European and UK registered trademarks, to The Barbers (for £1) and to Supercuts UK (Franchise) Limited, another entity in the Regis Corp group (also for £1).

(6) There is no evidence of the actual value, as at the date of the transfer, of the franchise and intellectual property rights for which the Company received only a nominal consideration. Some evidence of value is provided by the fact that IBL assumed an obligation to pay for such rights under the franchise agreements referred to below, and that in one case the payments amounted to £90,000 per month.

(7) IBL became franchisee of businesses owned by the Regis Corp group, as follows:

(a) The Barbers (as franchisor) and IBL (as franchisee) entered into a franchise agreement in respect of the "Supercuts" brand. IBL was obliged to pay The Barbers a monthly fee based on a percentage of its monthly gross revenues generated from the Supercuts brand. For the first year this approximated to about £90,000 per month.

(b) The Barbers (as franchisor) and IBL (as franchisee) entered into a franchise agreement in respect of various brands referred to as the "Regis Premium Brands". A monthly fee based on a percentage of gross revenues generated from the Regis Premium Brands was payable by IBL, although not for the first year.

64. The Company continued to trade under and with the benefit of the Supercuts and Regis Premium Brands, notwithstanding that IBL, and not the Company, was the franchisee. There is no evidence of any formal agreement (whether in writing or otherwise) pursuant to which the Company was entitled to do so, or pursuant to which the Company incurred any obligation to pay (whether Regis or IBL) in return for that benefit. Nevertheless:

(1) In his witness statement, Mr Williams said that the Company accrued royalties of approximately £90,000 per month (being 5% of the Supercuts revenue) to IBL, for onward payment to Regis Corp. In his oral evidence he explained that he had understood from the directors that it had been agreed that since the Company, and not IBL, had the benefit of the franchise agreements and the licences, the Company would reimburse IBL for the amounts due from IBL to Regis Corp. He said that the Company's books and records had been examined by his team, and that these revealed transactions reflecting an amount due from the Company to IBL in the sum of £594,000. He also said that they had been told by the directors that this amount was due to IBL. He had not asked to see a written agreement between IBL and the Company, but that was because (he suspects) his

understanding was that this was an informal arrangement and would not have been documented in a formal sub-franchise agreement.

(2) This was corroborated by the witness statement of Ms Lang (a director of the Company, albeit she did not attend trial), and by the Company's own defence, filed before it went into administration.

65. Between October and December 2017, Regis Corp also made payments to the Company of approximately £2.2 million. There is no evidence of the basis upon which these payments were made. They do not appear to have given rise to any indebtedness from the Company to Regis Corp.

The 2018 Transactions

66. Within a matter of months after the 2017 Transactions, disputes arose between Regis Corp and IBL in connection with the sale. This culminated in a settlement agreement dated 2 August 2018 (the "Settlement Agreement") between Regis Corp and entities in the Regis Corp group on the one hand and entities in the Beautiful Group (including IBL and the Company) on the other hand.

67. The Settlement Agreement recited that IBL was obliged to pay £1,656,147.71 pursuant to the agreements entered into in connection with the sale of the Company to IBL. In settlement of IBL's obligation to make that payment, IBL executed a promissory note in the sum of approximately US$2.2 million. The promissory note had a maturity date of 2 August 2020. If by that date no event of default had occurred, and upon certain other conditions being satisfied, the promissory note would be converted into a "Contingent Payment Right" which, in essence, entitled Regis Corp to receive a percentage of net proceeds received by IBL or the Company in respect of certain "Monetization Events".

68. At the same time as the Settlement Agreement, the Company executed a debenture in favour of Regis Corp (the "Debenture") in which: (1) the Company undertook to pay, as primary obligor, the amount due by IBL to Regis under the Promissory Note; and (2) the Company granted a fixed and floating charge over all its assets and undertaking to Regis Corp as security for such amount.

69. It is common ground that the Company received no consideration (whether from Regis Corp or IBL) for assuming the liability to pay, or for the grant of the security, pursuant to the Debenture.

Solvency of the Company at the time of the Antecedent Transactions

70. The Applicants and the Nominees adduced expert evidence as to the financial position of the Company before and after each of the 2017 Transactions and the 2018 Transactions. For the Applicants, Mr Mark Shaw of BDO LLP produced two written reports and attended trial to be cross-examined on them. For the Nominees, Mr Mark Nicholas Cropper of AlixPartners also provided two written reports and attended trial to be cross-examined on them.

71. The experts agreed that the Company was balance sheet solvent before and after the date of the 2017 Transactions and that it does not appear that the Company became cash-flow insolvent as a consequence of them. It is common ground, therefore, that although various aspects of the 2017 Transactions either clearly (in the case of the distributions in specie of the Division and other assets) or arguably (in the case of the transfer of the franchises and intellectual property rights) constituted transactions at an undervalue within the meaning of section 238(4) IA 1986, no claim under section 238 IA 1986 could have been brought. That is because the transactions would only have been entered into at a "relevant time" for the purposes of section 240 IA 1986 if the Company had been insolvent at the time of the transaction or had become insolvent as a consequence of it.

72. The experts also agreed that the Company was balance sheet solvent both before and after the 2018 Transactions. There are a number of indications that the Company was cash-flow insolvent as at 2 August 2018. These include the facts that: within days of executing the Debenture it approached Grant Thornton with a view to considering entering into a CVA; in early October 2018, without anything to suggest that there was any material change in its position in the intervening period, the Company made the Proposal which indicated that in the absence of a CVA the Company would be forced into an administration in which there would be no return to unsecured creditors; and in early August 2018 the Company was unable to pay VAT which was then due. Nevertheless, the agreed conclusion of the experts is that they did not have sufficient information to determine whether the Company was cash-flow insolvent at the time of the 2018 Transaction. They also agreed that the entry into the Debenture would not in itself have caused the Company to become cash-flow insolvent.

73. In those circumstances, it is not possible to conclude that the financial position of the Company would have been a bar to a claim under section 238 IA 1986 in respect of the 2018 Transactions. At the very least, viewed from the perspective of the Company and the Nominees at the time that the Proposal was put to creditors, there was a real prospect that the Debenture had been entered into at a time when the Company was insolvent.

Was there adequate disclosure of the 2017 Transactions?

74. The Proposal contained a summary of the 2017 Transactions which contained most of the points that are included in the summary I have set out above. The Applicants contend, however, that the disclosure was inadequate in the following respects.

    (1) The Proposal failed to disclose that the effect of the 2017 Transactions was to convert an asset-rich company into one which needed to enter into a shut-down administration within ten months. In particular, the Company's financial statements for the year ended 1 July 2017 disclosed that the Company then had net assets of £14.18 million and Mr Shaw's evidence demonstrated that after the 2017 Transactions the net assets of the Company had reduced to £6.49 million.

(2) The Proposal failed to identify the actual value transferred out of the Company. That applied in particular to the transfer of the franchises and intellectual property rights for which only nominal consideration was received.

(3) The Proposal failed to disclose the legal basis for the potential claims that could have been brought in respect of the 2017 Transactions. Rather than a generic list of the sections of IA 1986 under which transactions could be brought, it is said that the Proposal should have linked each section to the relevant transaction to which it potentially related.

(4) The Proposal ought to have expressed a view as to the merits and quantum of possible claims.

(5) The last of the bullet points containing the detail of the 2017 Transactions referred to the contributions made by Regis Corp to the Company in October to December 2017. That was misleading because there was no evidence as to the basis on which these payments were made to the Company or as to whether they were linked in any way with the transfers and distributions made by the Company in favour of Regis Corp entities.

75. It is contended that these matters amounted to a material irregularity because there was a real prospect that proper disclosure would or might have affected the voting intentions of an honest and intelligent creditor voting on the CVA. That was principally because the non-disclosures were fundamental to the existence of claims that would not be available unless the Company went into liquidation or administration. More broadly, it was because it went to the manner in which the Company's affairs had been conducted. I address the latter point below at [94].

76. I do not accept that there was any material irregularity in respect of the disclosure in respect of the 2017 Transactions, for the following reasons.

77. First, and most importantly, as I have pointed out above, there would in fact have been no sustainable claims under the relevant statutory provisions. The reason disclosure is required of transactions potentially vulnerable to challenge pursuant to the statutory causes of action available to a liquidator or administrator is because such causes of action are not available within a CVA. The creditors are entitled to know whether there are any potential causes of action which would be lost to them upon approval of the CVA.

78. Even if the Proposal ought to have included greater details of the extent to which value left the Company, or of the merits and quantum of the claims, those greater details would have included the unlikelihood (at best – assuming that full information as to the Company's financial position at the time of the transactions had not been obtained) or impossibility (at worst – if such evidence was available) of any claims under IA 1986 being successful. I do not think, therefore, that there was a material irregularity in failing to provide more extensive disclosure of the nature of the transactions, or the merits or quantum of claims, when that disclosure would have revealed that there was no material prospect of the claims succeeding. In these circumstances, I also

conclude that there was no material irregularity in the fact that each transaction was not linked to a specific provision in IA 1986. As Norris J held in *Discovery (Northampton) Limited v Debenhams Retail Limited* [2019] EWHC 2441 (Ch) ("*Debenhams*") (at [127]), what is required by IR 2016 is communication as a matter of substance and not by way of a particular form of words.

79. Second, and in response to the Applicants' first and second points, I do not consider that the Proposal was materially lacking in detail as to the value transferred away from the Company under the 2017 Transactions.

80. It is true that the Proposal did not identify the value of the franchises and intellectual property rights which were disposed of for a nominal sum, albeit that the Proposal did indicate that the Company was currently paying approximately £90,000 per month by way of royalties in respect of the rights which had been transferred away under the 2017 Transactions. There is no better evidence even now that the assets had any greater value than that which might be inferred from the information given to creditors in the Proposal.

81. The Proposal did, however, identify that the value extracted from the Company by the 2017 Transactions included, in addition to whatever was the book value of the franchises and intellectual property rights, at least some £8.7 million of assets (i.e. the book value of the Division and the face value of the promissory note distributed to HL). The creditors were also told that the financial position of the Company was now such that the only realistic alternative to a CVA was an administration in which there would be no dividend for unsecured creditors. Although not expressly stated, therefore, it was implicit that within one year of the 2017 Transactions under which substantial value was removed from the Company it was in a parlous financial state. Against that background, I do not think there is a substantial chance that, had either (1) the estimated value of the franchises and intellectual property rights or (2) the fact that the consequence of the 2017 Transactions was to reduce the net assets from £14.18 million to £6.49 million been disclosed, creditors would not have approved the CVA in the form as presented to them.

82. As to the Applicants' fifth point, I accept that the Proposal implies that the substantial contributions made by Regis Corp to the Company in 2017 were part of the 2017 Transactions. Whether they were or not is unknown. To that extent, therefore, the Proposal is misleading. In light of the points I have made above, however, I do not regard this as material, or giving rise to a material irregularity.

Was there adequate disclosure of the 2018 Transactions?

83. In relation to the 2018 Transactions, the disclosure provided in the Proposal was as follows:

> "On 2 August 2018, in connection with a settlement of certain issues relating to the Sale and franchise arrangements, the Company granted a debenture ("the Debenture") in favour of

> Regis Corp to secure the repayment to Regis Corp, by the Company, as primary obligor, of all monies owed to Regis Corp by IBL under the terms of a Secured Promissory Note dated 2 August 2018 ("the Note"). The principal sum of the Note represents amounts owed by IBL to Regis Corp pursuant to the Sale."

84. It went on to explain that the principal sum of US$2,202,676 was currently due and owing, that Regis Corp confirmed that it had valued its security at £594,035 and that the sterling value of the unsecured portion of the debt was £1,097,136 (the "Regis Corp Debt").

85. It also stated, for the avoidance of doubt, that Regis Corp had given that confirmation on the basis that the security was not released and that the Regis Corp Debt was not compromised by the CVA.

86. The Applicants contend that this disclosure was inadequate for the following reasons.

    (1) There was no disclosure of the dispute between Regis Corp and IBL which gave rise to the 2018 Transactions. For example there was no reference to IBL's defaults in payment of sums due to Regis Corp.

    (2) There was no disclosure of the nature and origin of the liabilities secured by the Debenture, namely that they constituted post-acquisition financial assistance.

    (3) There was no disclosure at all of potential statutory claims in respect of the 2018 Transactions, and of potential claims that it constituted an unlawful return of capital and that it was entered into in breach of the directors' duty to take into account the interests of creditors. Nor was there any disclosure of the merits or quantum of such claims.

87. I accept Mr Arden QC's submission that the Proposal did not comply with Rule 2.3(f)(iii) in that it failed to disclose that circumstances existed in relation to the Debenture which gave rise to the possibility of a claim under section 238 IA 1986. Viewed from the date of the Proposal, there was a clear risk that the Company was insolvent at the time the Debenture was granted. That remains a possibility, given that the experts have not been able to opine one way or the other on this point. Even taking into account that no particular form of disclosure is required (see [78] above), at a minimum the Proposal ought to have identified the Debenture as a transaction which gave rise to the possibility of a claim under section 238.

88. Nevertheless, I do not consider that this constituted a material irregularity, for the following reasons.

89. Mr Williams' evidence was that, from his discussions with the directors, he understood that the Company had obtained a clear benefit from the Debenture, namely the ability to continue to operate with the benefit of the franchise and licences provided by Regis Corp. Although he understood that it was IBL, not

the Company, that was the contracting party with Regis Corp, it was nevertheless the Company, not IBL, that in practice traded under the franchise agreement and with the benefit of the licences.

90. The position as explained by Mr Williams accords with the facts that: the Company was indeed using the rights conferred by the franchise agreements and accompanying intellectual property rights of the Supercuts and Regis Premium Brands; non-payment of the sums due from IBL to Regis Corp would put the continued enjoyment of those rights at risk: and it was clearly to the Company's benefit to support – by the grant of the Debenture – payment of the sums due by IBL in this respect. As Mr Weaver submitted, it is not surprising that, IBL having failed to comply with its obligations as purchaser of the Company, Regis Corp was looking for security against the valuable assets of the trading company.

91. In my judgment, these are matters that would have provided strong support for a defence to a claim under section 238 by virtue of subsection 238(5): "the court shall not make an order under this section in respect of a transaction at an undervalue if it is satisfied – (a) that the company which entered into the transaction did so in good faith and for the purpose of carrying on its business; and (b) that at the time it did so there were reasonable grounds for believing that the transaction would benefit the company."

92. Had the Proposal addressed the possibility of a claim under section 238 in relation to the Debenture, it ought also to have disclosed the above facts, which would have rendered such a claim of doubtful merit. I do not believe that such disclosure would have given rise to the substantial chance that creditors would have assessed the CVA differently. At most, it would have identified the possibility of a claim with a speculative prospect of recovery, which could only be achieved after considerable expense and delay.

93. As to the first and second of the Applicants' objections, while the Proposal could have more clearly stated that IBL was in default of payment of sums due to Regis Corp, I consider that it did disclose the fact of IBL's default. In the passage quoted above, at [83], it was disclosed that the Note was entered into as part of a settlement of issues between IBL and Regis Corp and that it represented amounts owed by IBL to Regis Corp pursuant to the purchase of the Company. That appears to me to amount to a statement that IBL owed sums to Regis Corp which it had failed to pay. Moreover, while it did not use the phrase "post-acquisition financial assistance", this also made it clear that the Debenture imposed obligations on the Company (the subject of the purchase by IBL) in order to secure amounts due by IBL as purchaser.

94. More broadly, the Applicants contend that greater disclosure of the 2017 and 2018 Transactions was necessary because it went to "the manner in which the affairs of the Company had been and were being conducted". This is said to have been material because it might have led creditors to prefer that the Company's affairs were placed under the control of an independent office holder. I do not accept this. As I have already indicated, the Proposal did sufficiently inform creditors that (1) substantial assets had been distributed to Regis Corp before the sale to IBL, (2) within a year the Company's financial

position was such that without the CVA it would go into an administration from which there would be no distribution to unsecured creditors, (3) IBL had defaulted on its obligations as purchaser and (4) that the Company had been burdened, via the Debenture, with those obligations. These were the essential facts from which creditors could draw adverse inferences as to the manner in which the Company's affairs had been managed since the acquisition in 2017.

95. Moreover, this has to be seen in the context of the choice facing creditors: a shut-down administration, in which creditors received virtually nothing, or a CVA with the prospect of at least some recovery. (For the reasons I explain below, I consider that it was reasonable for the Company to present a shut-down administration as the likely alternative to the CVA.) In those circumstances, I do not think that there is a substantial chance that the fuller disclosure, which the Applicants contend should have been made, would have caused creditors to have voted against the CVA so as to place the Company under the control of an independent office-holder.

<u>Issue 1(b): Inadequacies in the statement of affairs and the estimated outcome statement</u>

96. The Applicants contend that the Statement of Affairs and the EOS were materially inaccurate or incomplete for three reasons:

(1) They treated the Regis Corp debt and the IBL debt as valid liabilities and the Debenture as valid security, whereas the debts and the security were ultra vires and void;

(2) They failed to include any value for recoveries in respect of the Antecedent Transactions; and

(3) The EOS wrongly stated that the realistic alternative to the CVA was a shut-down administration, whereas it should have identified either a period of trading followed by a pre-pack sale or trading administration followed by a sale as the most realistic alternative.

The Regis Corp Debt and the IBL Debt

97. So far as the Regis Corp Debt is concerned, the Applicants originally contended that the Debenture constituted (i) an unlawful distribution contrary to Part 23 of the Companies Act 2006; (ii) an informal return of capital; and/or (iii) a breach of the directors' duties. The first basis was not pursued, however, in the absence of information concerning the Company's capital history.

98. The remaining arguments involve serious allegations against the Company, Regis Corp and, most importantly, the directors of the Company. For the reasons given at [17] to [30] above, in circumstances where the Company is not taking an active role in the proceedings, none of Regis Corp, IBL or the directors of the Company are parties at all, and there is no utility in determining the validity of the Regis Corp Debt, I do not think it appropriate to make any findings on these points.

99. The Applicants' challenge to the IBL Debt proceeds on the assumption that it was a new debt created at the time of the CVA. If it was, then it is challenged on the basis of similar allegations to the challenge to the Regis Corp Debt. For the same reasons as set out in the previous paragraph, I do not think it inappropriate to make any findings on that challenge.

100. In any event, on the basis of the evidence before the court, I consider on balance that the IBL Debt was not a new debt created at the time of the CVA. The fact that the Company undoubtedly operated with the benefit of the brands and licences made available by Regis Corp to IBL under the franchise agreements, and the fact (as noted by Mr Williams) that the Company's records reflected ongoing liability to pay these amounts to IBL, support the contention that there was an informal arrangement between the Company and IBL to reimburse IBL in respect of its liabilities to Regis Corp under the franchise agreements.

No recoveries in respect of the Antecedent Transactions

101. The statement of affairs contained no reference to any recoveries in respect of the Antecedent Transactions. The estimated outcome statement included a line item "recovery from disclosable transactions", but did not ascribe any value to these.

102. The experts called by each party opined on how potential recoveries in respect of possible antecedent transactions ought to be disclosed. Mr Shaw (the insolvency expert called by the Applicants), in his report, provided an alternative statement of affairs, in which there were line items for recoveries from five different antecedent transactions. This identified both the book value (e.g. in relation to "Asset Dividends" it identified the book value of the Dividend (£6.552 million)) and an estimate of the realisable amount. In each case, however, the amount estimated to be realised was "uncertain". He also provided an estimated outcome statement, which contained four different possible scenarios, containing different possible outcomes in relation to the antecedent transactions.

103. Mr Cropper (the insolvency expert called by the Nominees) stated that he would expect to see a footnote to an estimated outcome statement indicating that there are potential antecedent transactions that would require further investigation. He would not expect to see any value attributed to them.

104. In reality, the issue between the experts on this point came down to *where* disclosure ought to be made: in the body of the statement of affairs and/or estimated outcome statement (per Mr Shaw) or as a footnote to the estimated outcome statement (per Mr Cropper).

105. As was pointed out to Mr Shaw in cross-examination, the statement of affairs is intended to identify the assets and liabilities of the company as at the date it is prepared. In the case of a CVA by a company that is not in administration, the possibility of claims in respect of antecedent transactions cannot be described as assets of the company. For that reason, I consider that it was not necessary for them to be identified in the statement of affairs.

106. As to whether they should be referred to in the body of the estimated outcome statement or by way of footnote (or even a cross-reference to the body of the Proposal), either is adequate. The overriding requirement is to provide sufficient information to enable creditors to make an informed choice.

107. Neither expert would have expected to see a value ascribed to them. The most that Mr Shaw said was that in presenting different possible outcomes (in his estimated outcome statement) he would include the face value of the claims in order to illustrate the difference full recovery would make to the outcome for creditors.

108. The question as to the prospects of recovery in respect of the Antecedent Transactions in this case is a legal one. I have already concluded that there was no realistic prospect of a successful claim in respect of the 2017 Transactions, and that the prospect of success in relation to a claim in relation to the 2018 Transactions was at best doubtful. In those circumstances, I do not regard the way in which recoveries from antecedent transactions were referred to in the estimated outcome statement as a material irregularity.

A shut-down administration as the comparator

109. The Applicants contend that the Proposal, in particular the estimated outcome statement, was inaccurate because it identified a shut-down administration as the relevant comparator. They contend that the most likely alternative, if the CVA was not approved, was a sale of the business, either by way of pre-pack sale (i.e. a marketing process followed by the appointment of administrators who would immediately effect a sale of the assets and business of the Company) or following a period of trading in administration.

110. The Applicants rely on the following: (1) when the Company was placed into administration in 2019, the administrators did in fact trade for a limited period before selling the business as a going concern; (2) the evidence of Mr Shaw, who considers that in the event of a pre-pack or administration sale, unsecured creditors would have received between 5p/£ and 18p/£ (greater than the estimated returns of between 7p/£ and 10.8p/£ in the CVA).

111. Mr Williams' evidence was that he carefully considered what was the most likely alternative to the CVA. An analysis had been undertaken in September 2018 of the likely outcome on a pre-pack sale. This had indicated a worse recovery than under the CVA. He did not believe that it would in any event have been possible to achieve a pre-pack sale, given that the Company was forecast to enter a period of extreme financial distress and the directors considered there was a risk that the Company would not be able to meet its debts as and when they fell due from about the time scheduled for the creditors' meeting. There had been no attempt to pursue an accelerated sale process in parallel with the preparation for the CVA and he considered that there would have been insufficient cash or time to do so after the date of the meeting in the event that the CVA was not approved.

112. He also did not consider a trading administration to be realistic possibility, given in particular that there was limited funding within the Company, the

directors had told him that there was no funding to continue the business, there was a real risk that employees would walk away in an administration, and the directors considered that Regis Corp would – for fear of damaging its brands – terminate IBL's (and thus the Company's) ability to continue trading with the benefit of the brands. The witness statement of Ms Lang (albeit untested by cross-examination) was to the effect that she had been told by Regis Corp that it would not want to be associated with the Company if it went into administration.

113. Accordingly, Mr Williams' belief at the time was that the most likely outcome was a shut-down administration but that, even if it had been possible to achieve a pre-pack sale, the outcome would still have been worse than in the CVA.

114. The Nominees' contention that a shut-down administration was the most likely alternative to the CVA is supported by the expert opinion of Mr Cropper.

115. I can deal shortly with the Applicants' reliance on the fact that a period of trading followed by a sale was achieved in the administration of the Company a year later. I consider this to be irrelevant. First, it involves an impermissible use of hindsight in relation to a question that is to be assessed on the basis of information available at the time. Second, if reference is to be had to what happened a year later, then it is necessary to refer to the whole picture. While a sale as a going concern was indeed achieved by the administrators, that was at enormous cost. A sale price of some £1.8 million and further deferred consideration up to about £300,000 was achieved, but the fees incurred in doing so were approximately £3.5 million. In terms of outcome for unsecured creditors, therefore, it was no better than the shut-down administration envisaged in the Proposal.

116. I can also deal shortly with the possibility that the Company would have traded on for a period in order to market the business for sale with a view to entering into a pre-pack administration. This turns on an assessment of the likelihood of the directors having been willing to trade on. It is necessary to assess this from the following perspective: the creditors would have just voted down the CVA; the directors had not pursued a marketing process in parallel with preparing the CVA as a "plan B"; no trading would have been possible without Regis Corp's support, because it could terminate IBL's (and thus the Company's) right to use the IP rights; even with that support, according to the cashflow forecasts prepared at the time, it would be possible to continue trading only if key debts were deferred, in particular if rent payable under leases with numerous landlords was moved to monthly payments; even then, trading could only continue for a short period and it was far from certain that any sale could be achieved within that timescale. Both experts were agreed that the directors faced the risk of wrongful trading liability from trading on. In my judgment, in the circumstances which existed at the time, it was a reasonable conclusion that the directors would not have been prepared to take that risk.

117. That leaves a possible trading administration. As a preliminary point, there was a difference between the parties as to whether it is appropriate to assume that an accelerated marketing process would have been carried on in parallel to the preparation for the CVA (in which case, the period of continued trading necessary within an administration after the date of the CVA meeting would have been that much shorter) or whether it should be assumed that a marketing process would have had to commence immediately after the failure of the CVA. In my judgment, the latter is correct. That is because the relevant question is what would have happened to the Company as at the date of the meeting of creditors if the CVA had not been approved. As a matter of fact, as at that date, there had been no preparation for a pre-pack, so a marketing process would have had to start from scratch. Whether or not the directors of the Company could be criticised for not having taken steps to advance a pre-pack process before then is irrelevant (and I make no comment on that either way).

118. Both Mr Cropper and Mr Shaw gave evidence as to the likelihood of a sale of the business being achieved within an administration if the CVA was not approved. In short, Mr Shaw was more optimistic than Mr Cropper. I have no reason to doubt the expertise of the experts or the genuineness of the opinions held by them. Both of them, however, were necessarily reliant on a number of assumptions, given the limited evidence available and the fact that the question inevitably involves a degree of speculation.

119. Those assumptions included such matters as the likelihood of Regis Corp supporting the business by agreeing not to terminate the franchise agreements and licences with IBL, the extent to which employees were likely to walk away, and the extent to which agreement could have been reached with sufficient landlords to defer rent payments so as to assist with cashflow.

120. The most important point of distinction between the experts was whether an insolvency practitioner would have accepted an appointment with a view to trading in administration without having secured substantial non-recourse funding first. Mr Cropper's opinion was that they would not have done so. The business had a very low asset base which meant that if the administrator embarked on a trading period and was unable to secure a sale, the costs incurred could not have been covered by the sale of assets. In those circumstances, the administrator's own firm would be at risk (as appears to have happened, in practice, to the administrators appointed in 2019). He estimated the minimum necessary funding to be in the region of £3.4 million, based on the cashflow forecasts available at the time. I found this evidence, which was based on a careful analysis of the difficulties which the business faced, to be compelling. On the basis of the evidence I have seen, I think it is most unlikely that funding of that magnitude would have been available.

121. Mr Shaw's response to this was that costs could be kept down, and any available cash maximised, by adopting a number of strategies. These included taking a "light touch" approach to the administration, providing for a very short time period for offers in a marketing process, timing the administration so as to maximise available cash and deferring payment of creditors (taking an

optimistic approach to being able to do so) and accepting that the administrators may be prepared to write-off part of their time.

122. In certain respects, Mr Shaw's conclusions were weakened by reliance on factual scenarios which I have found not to have been realistic, or by reference to what happened in the subsequent administration. For example, the conclusion in his first report that the costs of a marketing process would have been manageable was based, in part, on the possibility of it being run in parallel with or instead of the CVA process. Similarly, in assessing the likelihood of Regis Corp terminating the licences, he placed reliance on the fact that the risk of brand damage was minimised in a pre-pack process. As I have noted, the first scenario is irrelevant because it did not happen and I do not regard the second as realistic in the circumstances that existed at the time. Moreover, I note that he mistakenly assumed that the balancing exercise to be undertaken pursuant to the decision in *Re Atlantic Computer Systems plc* [1992] Ch 505 would have enabled the administrators of the Company to continue trading with the benefit of the licences irrespective of Regis Corp's attitude, but he rightly acknowledged in evidence that this was wrong because Regis Corp's agreement was with IBL, not the Company.

123. Mr Shaw's preferred alternative estimated outcome statement identified a range of possible outcomes, from a shut-down administration, in which there was no return to unsecured creditors, to a trading administration in which there was a sale of the business and full recovery in respect of the Antecedent Transactions resulting in a full return to unsecured creditors. He said that these were put forward to be "illustrative", not "determinative", in a world where "you could just say it is uncertain".

124. The question for me is not to determine what <u>would</u> have happened if the CVA had not been approved, but whether it was reasonable in the circumstances at the time to identify a shutdown administration as the likely alternative. In my judgment it was. I accept that this is a question on which reasonable insolvency experts can (and did) disagree. In the end, taking into account the points I have made above, I prefer Mr Cropper's evidence that without substantial support in the form of guaranteed funding (which I find would not in fact have been available), the risks and uncertainties in achieving a sale in an administration were too great.

<u>Issue 2: Unfair Prejudice: Regis Corp and IBL as Critical Creditors</u>

The facts

125. The Regis Corp Debt and the IBL Debt were wholly unimpaired by the CVA. Landlords in Categories 2 to 5, along with all other Non-Critical Creditors, were entitled to receive a dividend of only 7% on their claims.

126. The prejudice to the creditors whose claims were impaired by the CVA is clear. It was common ground between the Applicants and the Nominees that such prejudice was unfair unless it could be objectively justified: *Mourant & Co Trustees Ltd v Sixty UK Ltd* [2010] EWHC 1890 (Ch), at [67]. As I have noted in the New Look Judgment, a common justification for paying a creditor

in full is that it is necessary to do so because that creditor's ongoing support for the company is critical to the success of the CVA and it will not provide that support unless its existing debt is paid: *Prudential Assurance Co Ltd v PRG Powerhouse Ltd* [2007] EWHC 1002 (Ch), per Etherton J at [90].

127. The justification advanced in the Proposal for leaving Regis Corp's debt unimpaired was:

> "Regis Corp has indicated that it presently intends to continue to support the Company in a CVA, and keep in place all licence/franchise agreements with IBL to enable the Company to continue to use the Supercuts name. If the Company was to lose its licence/franchise agreements with Regis Corp (via IBL), the Directors consider that this would have a severe and detrimental impact on the business of the Company. Regis Corp will only agree to continue supporting the Company in the event that the Regis Corp Debt is not compromised by this CVA (including any amendment to this CVA) and IBL and the Company continue to comply with the franchise and other agreements. However, under the terms of the Note, Regis Corp have agreed that in the event that IBL (and the Company) continue to perform their obligations under the various franchise and other agreements for a period of 2 years, and certain other conditions set forth in the Note are met, Regis Corp will, on the expiry of the 2 year period, agree to convert the principal and interest of the Note Debt into an unsecured contingent payment right."

128. Under the terms of the Promissory Note, if the Company went into administration or liquidation that would constitute an event of default and the whole amount would become due and payable immediately. By a side letter entered into by Regis Corp on the same date as the Debenture, it was agreed that the entry into a CVA would not constitute an Event of Default, provided that the CVA was initiated before 31 December 2018 and did not affect in any way, among other things, the Secured Obligations under the Debenture.

129. The justification in the Proposal for leaving the IBL Debt unimpaired was as follows:

> "IBL as the Connected Creditor, will also not be Compromised under the terms of this Proposal. IBL is a Connected Creditor and is owed the sum of £594,035 as an inter-company liability due and owing from the Company in connection with outstanding royalty payments, transitional service payments and payments for stock.
>
> IBL is a non-trading holding company which has the benefit of all trademarks and branding pursuant to which the Company trades. It is essential that this payment due from the Company to IBL is not compromised as IBL is under an obligation to account to Regis Corp for this payment. If IBL do not account

> to Regis Corp for the amount of this payment, then there is a risk that Regis Corp could terminate the various franchise and other agreements it has with IBL which will, in turn, prevent the Company from operating under its existing trade names. In addition to this, as stated above, provided both IBL and the Company comply with their agreements with Regis Corp for a period of 2 years, and certain other conditions set forth in the Note are met, Regis Corp will, on the expiry of the 2 year period, agree to convert the principal and interest of the Note Debt into an unsecured contingent payment right, which will benefit the Company. The payment to IBL is therefore deemed by the Company to be a critical payment and will not be compromised by this Proposal."

130. The Applicants contend that that there was no justification for treating either Regis Corp or IBL as a Critical Creditor because the notion that Regis Corp would have terminated the licence/franchise agreements with IBL if the Regis Corp Debt had been impaired by the CVA is fanciful. Had the directors of the Company proposed any impairment of the Regis Corp Debt, the Applicants contend that Regis Corp would have agreed to that, because that was the logical thing to do to maintain its continued receipt of royalty payments.

131. The Applicants rely on the contemporaneous communications with Regis Corp during the course of the development of the CVA Proposal. The following is a summary of the key aspects.

132. Part of the context for the discussions was the acknowledgment that the vote at a meeting of creditors was likely to be close, and that it was important that the Regis Corp Debt was voted in support of the CVA to ensure that the statutory majority was obtained. This is demonstrated, for example, by an email exchange between Mr Mike O'Brien of Regent and Mr Michael Reinstein (director of the Company and founder, chairman and CEO of Regent) in early September 2018. Mr O'Brien requested a list of creditors who would vote in the CVA. Mr Reinstein responded on 8 September 2018 saying:

> "We are not fully confident that we can get Regis to modify the credit agreement and become an unsecured debt holder. Can you provide specificity about how the vote would go in the event that Regis would have to abstain from the process. Why is their vote suddenly so material? What has changed?"

133. As this email shows, the discussion with Regis Corp began with an attempt to get it to release its security so that it could vote the whole of the Regis Corp Debt in favour of the CVA. This is confirmed by an email from Mr Thomas Wehinger (General Counsel of Regent) to Ms Amanda Rusin (the General Counsel of Regis Corp) on 26 September 2018 in the following terms:

> "… please find attached the necessary documents for the release of Regis' UK security interest. We need this release to secure Regis' vote in the upcoming CVA process and to ultimately protect Regis' royalty and franchise payments."

134. Regis Corp instructed Ropes & Gray LLP to act on its behalf. In response to a request from Ropes & Gray for details as to how the CVA would treat Regis Corp's unsecured debt if it agreed to release its security, Mr Wehinger, in an email of 3 October 2018, stressed the deadline of 5 October 2018 for the launch of the CVA and said:

> "In order to meet this deadline it is critical that the position on the security release is understood as all the CVA documentation has been prepared on this basis and a positive vote from Regis is likely to be a key foundation of reaching the 75% threshold."

135. He also indicated that the CVA was "based on the point that there is no compromise to Regis Corp of their debt and that their trading balances and royalty will be met in full".

136. On 4 October 2018 Ms Rusin emailed Mr Wehenger asking:

> "What would be Regis' percentage of the unsecured vote be [sic]? What is the vote going to be on? Who are the other creditors involved? All landlords? Are you concerned the other unsecured creditors will not vote for the plan?"

137. Mr Wehenger responded on the same date as follows:

> "As we have mentioned before, the October 5th CVA launch date is incredibly significant because it optimises the correct voting blocks to ensure passage of the CVA proposal (provided Regis modifies its creditor status). If we are unable to reach a consensus by EOD Thursday, the Company will immediately refocus its efforts on a wind down with a November Administration/Liquidation.
>
> On our earlier call, you expressed concern that, typically, a secured lender is not asked to release liens when facing a restructuring proceeding. We believe that retaining the liens here would (1) have little to no practical value for Regis, (2) deprive Regis of the opportunity to earn substantial franchise fees, and (3) result in other significant adverse consequences.
>
> If the liens are released, as requested, Regis will be eligible to vote its contingent claims in the CVA and drive approval of the CVA plan on October 24th. Given the value of Regis's contingent claim, Regis's affirmative vote will likely result in an approved composition plan. The benefits to the ongoing UK business resulting from this plan will be significant. In turn, the plan will position the UK business to satisfy the contingent purchase price adjustment claim – if it ever matures – and deliver on anticipated franchise fees.

> If the liens are not released, and Regis is therefore ineligible to vote, we believe that the CVA plan will be rejected…"

138. Shortly thereafter, it appears that Regis Corp changed its mind on releasing its security and instead focused on voting in respect of the unsecured part of its debt. Ms Rusin emailed Mr Wehinger on 4 October 2018 as follows:

> "I think we are working on a solution where we can vote the undersecured portion of the collateral which will give you a majority of the votes you need. This is of course done with the assurances you provided our tram [sic] yesterday that the Regis debt won't be compromised in this CVA."

139. She reiterated this in a further email of the same date: "I think the assurance and seeing in the CVA plan docs that the Regis debt won't be impaired is what we need to move forward and finalize."

140. Mr Wehenger relayed Regis Corp's position to the Company's lawyers, Grant Thornton and the Company's directors in an email of 4 October 2018:

> "Can you please confirm that Regis' debt won't be compromised by the CVA? I just heard back from Amanda and this is an absolute requirement for Regis to agree to the release of the security interest."

141. It is clear (for example, from an email from Mr Wehinger to Ms Rusin on 4 October 2018 attaching draft wording for the CVA prepared by Mr Williams) that, at this stage, the Company's debt to Regis Corp was being treated as comprising both the sum of $2.2 million pursuant to the Debenture and the sum of £594,035 due in respect of royalties and other fees due under the franchise agreements. This was wrong, as the franchise agreements were between Regis Corp and IBL, not the Company. The error was compounded in an email from Shoosmiths, the Company's lawyers, to Ropes & Gray on 5 October 2018 where it was suggested that the sum due in respect of royalties was secured by the Debenture, but the amount due under the Promissory Note was unsecured.

142. Ropes & Gray pointed out the error in an email of 5 October 2018, stating that the franchise agreements were with IBL and that amounts due under them were not secured by the Debenture. They went on to state that of the amount due under the Promissory Note (the sterling equivalent of which was £1,691,171) Regis Corp was valuing its security under the Debenture in the sum of £594,035. It was common ground between the Applicants and the Nominees that there was no rational basis for valuing the security at this amount, which was precisely the sum due from IBL to Regis Corp under the franchise agreements. Notwithstanding the absence of any rational basis for this valuation it was never challenged, and the resulting unsecured portion of the Regis Corp Debt (being £1,097,136) was accepted for voting purposes.

143. Since none of the Company, IBL, Regent or Regis Corp is playing any part in these proceedings, there is limited evidence beyond the contemporaneous

documents I have referred to above. Prior to the Company going into administration, two witness statements were served on its behalf. One was from Jackie Lang, the managing director of the Company. Her evidence, which was untested as she was not made available for cross-examination, was that "the Company determined" that Regis Corp and IBL were Critical Creditors. She noted that the Company needed to use the names "Regis" and "Supercuts" in order to trade, and that if the payments were not made to Regis Corp it was "highly likely" that the franchise agreements (and thus the Company's ability to use these names) would have been terminated. She said that she knew that Regis Corp would not have continued to support the Company if they and IBL were not treated as Critical Creditors. She referred to being told by Ms Rusin that Regis Corp was not prepared to take any reduction in the debt in the CVA.

144. Mr Williams' evidence was that Regis Corp was "robust" in stating that, if it did not receive ongoing payments of any royalties due under the franchise agreement and any outstanding monthly royalties that were already due, it would withdraw all rights of the Company under the franchise agreement. He does not identify the source of his understanding of Regis Corp's stance in this respect. It is clear from the following paragraph of his statement, however, that his understanding came from the Company:

> "I understand that the Company considered the position before agreeing to make IBL and Regis Corp Critical Creditors and to meet the ongoing payment terms under the franchise agreement. If the Company did not agree, the Company considered that the CVA would, in all likelihood have failed following its launch, there being a real risk that Regis Corp could terminate the franchise agreement(s) and other agreements it had with IBL, the knock-on effect being that the Company would be prevented from using the Supercuts brand should the use of the Supercuts name be withdrawn."

145. This was confirmed by his oral evidence: he believed that management had taken the view that given the fragile working relationship between Regis Corp and the Company, Regis Corp "would not necessarily support a CVA, vote in a CVA, whatever the sort of terminology was." He referred on a number of occasions to this as the "working assumption" that Regis Corp was likely to be required to be paid. He said the directors' position at the time was that any further "ask" of Regis Corp would "potentially be the straw that broke the camel's back".

<u>Conclusion as to treatment of Regis Corp and IBL as Critical Creditors</u>

146. Based on the contemporaneous documents summarised above and Mr Williams' evidence, I accept that Regis Corp made it clear that its support for the CVA was conditional upon the Regis Corp Debt not being impaired by the CVA. The principal focus of the discussions as to the treatment of Regis Corp's debt within the CVA was to ensure that Regis Corp would be able to vote, and would vote in favour of, the CVA, in circumstances where it was

appreciated that its vote would be important in order to obtain the requisite majority at the meeting of creditors.

147. The message coming from Regis Corp was that the non-impairment of the debts in the CVA was important, in the earlier part of the discussions, to its agreement to release its security and, once that idea had been abandoned, to its agreement to vote in favour of the CVA.

148. There is, however, no express reference in the contemporaneous documents to which I was referred to the effect that Regis Corp would terminate the franchise/licence agreements if its debt was impaired in the CVA. Nor is there any evidence in the contemporaneous documents that Regent, or the Company, made any attempt to test what Mr Williams referred to as the "working assumption" that Regis Corp would terminate the franchise/licence agreements if its existing debts were not honoured in full by the CVA.

149. Nevertheless, I consider there is – on balance – sufficient justification for the non-impairment of the Regis Corp Debt. In this regard, it is critical to appreciate the nature of the Regis Corp Debt and what it meant to leave it "unimpaired". As I have noted above (at [67]), provided that there was no event of default under the Promissory Note, then the debt would never have to be repaid, but would be converted into a "Contingent Payment Right" as from 2 August 2020 (essentially giving Regis Corp the opportunity to share in any upside on a sale or other Monetization Event). Leaving the Regis Corp Debt unimpaired meant, therefore, that Regis Corp's right to share in the upside from a future sale or the like was preserved but that if, in the meantime, there was default under the Promissory Note, then the Regis Corp Debt would be payable immediately.

150. In the latter event (default under the Promissory Note) it is unrealistic to think that the Company could have avoided going into administration, given Regis Corp's ability to terminate IBL's use of the licences on which the Company's trading depended. The CVA would then have automatically terminated, and by clause 35.9 of the Proposal the compromises and releases contained within it would have been deemed never to have happened. In that event, all other creditors would have been in the same position as Regis Corp. Accordingly, there was no real impact on the CVA creditors by leaving the Regis Corp debt unimpaired: either it would not become payable or, if it did become payable in full, so would all the debts due to other CVA creditors.

151. Given that Regis Corp had only very recently negotiated the right to look to the Company to satisfy IBL's outstanding obligations under the 2017 sale, I do not find it surprising or illogical that Regis Corp would have insisted on preserving that right in the CVA. It is not in dispute that Regis Corp's support – specifically its agreement to permit IBL (and thus the Company) to operate with the benefit of the franchise agreements and licences – was critical to the success of the business within the CVA.

152. I also note (although only in passing, as this was not relied on in argument) that Regis Corp's right to enforce its security in relation to the Regis Corp Debt could not have been affected without its agreement. Without Regis

Corp's agreement, therefore, it would have in any event remained entitled to look to its security for the full amount of the Regis Corp Debt (subject only to the practical question whether the security was of sufficient value at the time of enforcement to satisfy the debt).

153. The position is materially different in relation to the IBL Debt. As appears from my review of the contemporaneous correspondence above, until 5 October 2018 no distinction was made between the Regis Corp Debt and the IBL Debt. Both were treated as being debts due from the Company to Regis Corp. When that error was pointed out, the Proposal was modified to include the language set out above (at [129]) in relation to the IBL Debt. This simply assumed that if the Company did not pay IBL, then IBL would not pay Regis Corp. There is no evidence that any consideration was given to whether it was still appropriate to regard IBL as a Critical Creditor given these changed circumstances.

154. In assuming that IBL was a Critical Creditor because the amounts paid to it would be paid on to Regis Corp, those promoting the CVA failed to give any consideration to the following facts: the entity that was legally obligated to Regis Corp was IBL; although IBL was a non-trading holding company, it was wholly owned by Regent, a global private equity firm, likely to have sufficient assets to assist; and to the extent that the Company's debt burden, in particular to landlords, was reduced, Regent as equity holder stood to benefit.

155. Mr Weaver submitted that from the Company's perspective it was entitled to consider that the only way Regis Corp would be paid royalties was if the Company paid them to IBL. Otherwise, he said, Regis Corp would be being asked to put its hopes in a third party "who may or may not come up with the goods."

156. That, however, ignores the fact that Regent is not simply a third party. Although the acquisition of the Company was structured through IBL as the purchasing vehicle, it was Regent that was behind the purchase. Moreover, as I have pointed out, as the ultimate owner of the Company it was Regent that stood to gain from a CVA which enabled the Company to survive. The cash flow forecast annexed to the Proposal estimated that the Company would return to profitability in the third year of the CVA. In simple terms, the CVA impaired certain creditors (mostly the Compromised Landlords) with a view to benefitting the shareholders.

157. In stark contrast to the position as described above concerning the Regis Corp Debt, treating IBL as a Critical Creditor had an immediate and significant impact on other CVA creditors. That is because the IBL Debt, being nearly £600,000, was due and payable, and would be paid in full from the Company's assets in the CVA. In contrast, the amount funded from the Company's assets to pay Allowed CVA Claims was only £330,000. In other words, the Proposal envisaged the Company paying a sum to its shareholder almost twice as large as the amount that it would pay in order to fund the claims of *all* impaired creditors under the CVA. But for the CVA, IBL would have recovered nothing. Repayment in full of IBL was to be made possible, therefore, only because of a CVA under which impaired creditors would be paid a fraction of

their claims (7%) and Compromised Landlords would be entitled only to reduced rent going forward.

158. In those circumstances, the Company ought to have had a reasonably strong negotiating position as against an owner that sought to have its debt paid in full. There is no evidence that any attempt was made to negotiate with Regent in this respect. The only evidence Mr Weaver could point to was a sentence in Mr Williams' statement that in answer to his question whether the Company had access to other funding options to enable it to trade on, "such as support from Regis", the directors confirmed that they had been informed there was no funding available. That falls a long way of short of what would be expected of a company in the circumstances described in [154] above.

159. It is perhaps not surprising that no such discussions took place in circumstances where the negotiations with Regis Corp over its treatment in the CVA were effectively carried out on the Company's side by Regent itself. That, however, does not provide an adequate answer to the lack of justification for IBL, as shareholder, receiving payment in full of debts owed to it by the Company.

160. Accordingly, I conclude that the categorisation of IBL as a Critical Creditor was not justified and that the preferential treatment that it received under the CVA was unfairly prejudicial to those creditors whose debts were impaired, including the Applicants.

Issue 3: 75% discount of Landlords' claims

161. I have dealt at [284] to [292] of the New Look Judgment with the justification for applying a blanket discount to landlords' claims in respect of future rent for voting purposes. In that case I concluded that the discount of 25%, where the claim of each landlord had been estimated by reference to the circumstances of the particular lease, was justified on the basis that it was a reasonable method of estimating a minimum value.

162. I also concluded that even if there was an irregularity, it was not material because it had no impact on the outcome at the meeting, since any adjustment to the claims of landlords who voted against the CVA was balanced by the same adjustment to the claims of landlords who had voted in favour. The latter point applies equally in this case: even if there was an irregularity in applying a 75% discount, it was not material as it similarly had no impact on the outcome of the meeting.

163. I will therefore address only briefly the question whether the 75% discount was justified.

164. There are two important differences between this case and the New Look CVA. First, the claims of all landlords were calculated according to the same formula – which assumed that each of the premises would be re-let at 85% of the contractual rent after a void period of six months and with a rent-free incentive period of 6 months. That is so, despite the fact that there were large variations in the likelihood of premises being re-let, which would broadly

mirror the category into which the relevant lease was put. Thus, those premises which the Company hoped to retain, and where the CVA provided for a higher percentage of rent, were more likely to be re-let (and at a better rent) than those which the Company wished to vacate and where the CVA provided for no rent to be paid.

165. The Applicants do not specifically object to the use of the same formula for the different categories of landlords, but the fact that the claims have been calculated in that way highlights that a blanket discount is not appropriate. The justification offered for it (as in the New Look case) is that a discount of some kind is justified in order to arrive at an estimate of the minimum value. The problem is, however, that while the prospect of the formula being an overestimate of the landlord's loss is a real one in respect of Category 2 (where the premises are inherently better quality), the opposite is true in respect of Category 5 (where the premises are of much worse quality). Accordingly, whereas a blanket percentage discount was justified in the New Look CVA, I do not think that it can be justified in the Regis CVA.

166. The second difference is that the discount is much larger, at 75%. While – as I noted in the New Look Judgment – it is difficult to identify precisely what percentage discount would be appropriate, there has to be some adequate justification offered for such a large discount. In this case there was none. In Mr Williams' witness statement, the justification for the amount of the discount was that such a discount had been applied to his knowledge in most retail CVAs since 2011. While I accept that this might have a bearing on the reasonableness of Mr Williams' conduct in valuing landlords' claims in this way, I think that the fact that the same discount was used in other CVAs is irrelevant to the question whether it amounts to a material irregularity. In none of them was the reasonableness of the discount tested in, or resolved by, a court. Nor do I consider it relevant either that this was not raised as an issue in discussions between the Nominees and the British Property Federation in advance of the meeting or that there was no appeal against the chair's decision to admit the landlords' votes with this discount.

167. Mr Weaver submitted that it was not permissible to challenge the *amount* of the discount, because it is not the court's role to consider whether this was the best term that could have been offered, or whether some other term might have been fairer. I do not accept this: the question whether an appropriate discount has been applied to a creditor's claim for voting purposes is one which a court can clearly opine on, as it is a matter on which an appeal lies to the court against the chair's decision.

Issue 4: Modifications to the terms of the Leases

168. Under this heading, the Applicants advanced substantially the same arguments as in the challenge to the New Look CVA. First, they contended that the impairment of their leases was in principle unfair in circumstances where the Company continued to occupy the relevant premises (inviting me to depart from the decision in *Debenhams*). Second, they contended that the nature and extent of the modifications to the leases were in any event unfairly prejudicial to the Compromised Landlords.

169. As in New Look, the Compromised Landlords had the option to terminate the leases instead of being bound by the lease modifications, so the only period during which rent reductions were forced on them was during the notice period before they could exercise their termination rights.

170. These arguments replicated those that were advanced in New Look. I refer to [202] and following of the New Look Judgment, where I rejected these arguments. Save for a few points of difference (identified below), the conclusions I reached in the New Look Judgment apply equally to the arguments advanced in this case.

171. I reiterate that the challenge made in this case is of significantly narrower scope than that in New Look. The statutory majority was achieved at the creditors' meeting by virtue of the very large votes of Regis Corp, IBL and Category 1 Landlords, all of whom were wholly or substantially unimpaired. The issues of material irregularity or unfair prejudice to which that potentially gives rise (see the New Look Judgment at [197]) are not live in this Application, however, because the Applicants did not plead, and were refused permission to amend to plead, such a case.

172. In light of my finding that the CVA was unfairly prejudicial to the Applicants as a result of the treatment of the IBL Debt, it is strictly unnecessary to consider whether the specific modifications to the leases were also unfairly prejudicial. I will nevertheless briefly address the few points of objection to the lease modifications in this case that go beyond those in New Look.

173. The Applicants' case under this head included that rents were reduced to below market rent. As in New Look, however, no expert evidence was adduced. Insofar as the Applicants rely on the fact that the formula for calculating the claims of landlords for voting purposes assumed that all of the premises could be re-let at 85% of market rent, that assumption was not based on any expert evidence of the likely rent that could be achieved in the market.

174. The Applicants' case also included that the termination rights and profit share fund in the CVA were insufficient mitigation for the impairment to their rights under the leases. Their arguments in this respect largely replicated those advanced in New Look. I refer to [223] to [229] of the New Look Judgment for the response to them. The Applicants made three additional points, however, that were not made in the New Look case.

175. First, they submitted that the termination rights granted to them by the CVA were insufficient mitigation because they had to be exercised within 90 days of the Effective Date. Landlords would not want to exercise a right to terminate a lease without securing a replacement tenant and it would take longer than 90 days to secure a tenant. Representatives of certain of the landlords gave evidence as to their own practice in this respect, and I heard expert evidence from Mr Jonathan Stott of Savills plc that this was the view taken by landlords generally. The Nominees adduced an expert report of Mr Tony Devlin of CBRE. He did not attend trial to be cross-examined, but he agreed that it would have been difficult to re-let the properties within 90 days.

176. While it is true (as Mr Devlin pointed out in his report) that landlords were free to exercise the termination right before securing a replacement tenant, I accept Mr Stott's evidence that landlords would not ordinarily do so, as this would leave the landlord with an empty property. That would expose the landlord to business rates liability and may impact on any nearby premises a landlord might have.

177. Nevertheless, I do not think that in the circumstances of this case, that amounted to unfair prejudice. As noted in the New Look Judgment at [218] and following, the critical considerations are: (1) that landlords had the option to terminate their lease or to accept the modifications to their leases under the CVA and (2) that these options provided a more favourable outcome than the relevant comparator (being a shut-down administration in which there would be no material recovery).

178. As to the prejudice arising from the fact that the landlords are unable to recover their property until 60 days after the Effective Date, the answer is similar to that I have given in the New Look Judgment at [232] and following. In the absence of the CVA there is no realistic prospect that the landlords would have recovered rent from the Company during that period at a rate higher than that offered by the CVA.

179. The likelihood is that in a shutdown administration no rent at all would be paid, save perhaps for a very short period where continued occupation was required in order to remove stock and other removable items from the premises. That is worse than the position under the CVA (for Categories 2 to 4, where a proportion of contractual rent would be paid under the CVA) and no better than the position in relation to Category 5 (where no rent would be paid under the CVA).

180. Moreover, those landlords that gave evidence were in agreement that it would take significantly longer than 60 days to be able to secure a tenant paying rent in any of the premises even if the landlord had been able to recover the premises the day after the meeting of creditors. Accordingly, there is no evidence of prejudice arising from the fact that they were unable to recover their premises and re-let them during the notice period.

181. The second additional point was that any landlord of multiple leases in Categories 2 to 5 could only exercise a right of termination in respect of one lease if it exercised it in respect of all. That could, in my judgment, have led to affected landlords being unfairly prejudiced by being forced to accept a reduction in rent in a particular lease without an unqualified option to terminate that lease. As I have noted above it was part of the reasoning in the New Look Judgment, in support of the conclusion that modifications to a lease are not unfairly prejudicial, that the landlord has the option to terminate the lease (and that the recovery provided in the CVA in the event of termination is at least as good as in the relevant comparator). The requirement to terminate all leases is a fetter on the option to terminate each lease which, in my judgment, removes an essential element in that reasoning.

182. This was a matter which was, however, corrected by the Modification Letter. The Applicants contend that the Modification Letter was ineffective because the modification of the termination right fell outside the scope of clause 33 of the Proposal. That clause empowered the Company to modify the provisions of the CVA at any time after the Effective Date provided (relevantly for present purposes):

> "a) such modifications do not materially alter the effect or economic substance of the CVA; and
>
> b) the Supervisors have confirmed to the Company that, in their opinion (acting reasonably), the modifications do not materially alter the effect or economic substance of the CVA."

183. The Applicants contend that: the modification to the termination right conferred substantial additional rights on Compromised Landlords at the expense of the Company; unimpaired creditors might therefore have regarded the CVA as less favourable to their interests; and since the modification may have affected voting intentions, it should have been tested at a further meeting of creditors.

184. I do not accept that the test for materiality of a modification is whether it would have affected voting intentions. The test is that laid down in clause 33: whether it materially alters the effect or economic substance of the CVA (although I can see that in practice there may be a natural alignment between the two). All Compromised Landlords have the option to terminate their leases. The economic substance of the CVA assumes, therefore, that all, none or some of the leases with Compromised Landlords might be terminated. I do not think it alters the economic substance, or effect, of the CVA to permit landlords who otherwise would have to terminate all of their leases to terminate only one or some of them.

185. The other change effected by the Modification Letter limited the impairment of Compromised Landlords to three years. I have not addressed this separately, because – for the reasons developed in the New Look Judgment – I do not consider that the long-term amendments to leases, where the landlord has the option to terminate at the outset, give rise to unfair prejudice.

186. The third additional point related to the <u>Company's</u> right to terminate leases with Category 5 Landlords. One of the proposed amendments to the claim which the Applicants sought in December 2019 was to plead that this termination right fell outside the scope of Part 1 IA 1986 on the basis that it was an attempt to alter proprietary rights of the Category 5 Landlords. Permission to amend was refused. As pleaded, the Applicants' remaining objection is that the termination right is inherently unfair in that it fails the vertical comparator, because it results in a full and final release of the Company's obligations.

187. I find this point somewhat academic because, although the Applicants were refused permission to plead this point as a jurisdictional one, it has been established, at first instance at least, that a CVA cannot affect proprietary

rights of landlords: *Debenhams* at [99] and, by analogy with schemes of arrangement, that also precludes a provision which enables the company to force a surrender of the lease on its landlord: *Re Instant Cash Loans Limited* [2019] EWHC 2795 (Ch).

188. Nevertheless, addressing the point as pleaded, I do not accept that the vertical comparator test is failed merely because the termination involves the release of the Company's liabilities. While it is true that upon a disclaimer in a liquidation the landlord would have a right to claim damages including for the loss of future rent, that right would have been worthless in respect of the Company (or, at least, would have been worth less than the recovery which the Category 5 Landlords would receive under the CVA).

189. As regards the profit share fund, I accept the Applicants' contention that the supposed benefit from the fund provided for by clause 23 of the Proposal was illusory. It was to be funded by profits during the first two years of the CVA, but no profits were anticipated in that period. As I have pointed out at [229] of the New Look Judgment, the fact that profit share funds have been included in other CVAs does not make the absence of one (or the inclusion of one with only illusory benefits) unfairly prejudicial. This case is different from New Look in that it is the *current* equity holders that stand to gain from any future profits of the Company. The absence of a real profit-share arrangement is something to weigh in the balance when considering the differential treatment of creditors within the CVA. In the present case, it is something which exacerbates the prejudice to the Compromised Landlords arising from the treatment of the shareholder as a Critical Creditor. Since I have already concluded that that constituted unfair prejudice, I need not consider whether the absence of an effective profit-share arrangement was itself unfairly prejudicial.

<u>Issue 5: Breach of duty by the Nominees</u>

190. I have referred above (at [51] to [58]) to the functions of a nominee as set out in IR 2016. It is evident from the Rules that the nominee plays an important role in the promotion of a CVA. This was foreshadowed in the report of the Cork committee, albeit in the context of a proposal that the "trustee" in relation to IVAs and CVAs would play a greater role than that which parliament decided upon in IA 1986. That report, at [364(1)], identified, as one of four matters of "paramount importance" about its proposals for IVAs:

> "The system which we propose places heavy responsibilities upon the shoulders of the trustee; if his professional competence, independence and integrity give rise to doubts, confidence in the new system will quickly evaporate".

191. A nominee's responsibilities, in the context of an IVA, were considered at some length by Lindsay J in *Re a Debtor (No.140 IO of 1995); Greystoke v Hamilton Smith* [1996] 2 BCLC 429. At p.433b-f, he noted that the heavy responsibilities cast upon the nominee (as envisaged in the Cork Report) were carried through into the statutory provisions.

192. At p.434e-h, Lindsay J quoted from a guidance note issued by the Department of Trade and Industry in March 1995, which he described as representing "a fair view in general terms of responsibilities which the legislation casts upon a nominee". This stressed that it was not sufficient for the nominee to ensure that the proposal met the criteria set out in the legislation. He should also use professional judgment to decide whether the proposal is feasible: "as nominee you will consider the proposal, and make such enquiries as you consider necessary to satisfy yourself that the proposal ought to be put to creditors."

193. At p.434-435, Lindsay J said that although a nominee was not expected in every case to have personally verified every figure and tested every part of the proposal, the minimum expected of a nominee "at least in those cases where the fullness or candour of the debtor's information had properly come into question" was that he had taken "such steps as are reasonable to satisfy himself and shall have satisfied himself on three counts":

> "… first that the debtor's true position as to assets and liabilities does not appear to him in any material respect to differ substantially from that which it is to be represented to the creditors to be, second that it does appear to him that the debtor's proposal as put to the creditors' meeting has a real prospect of being implemented in the way it is to be represented it will be … Third, that the information that he has provides a basis such that (within the broad limits inescapably applicable to what have to be the speedy and robust functions of admitting or rejecting claims to vote and agreeing values for voting purposes) no already-manifest yet unavoidable prospective unfairness in relation to those functions is present."

194. He continued, at p.435g-

> "…what steps are reasonable in the circumstances for a nominee to satisfy himself will, inevitably, depend on a host of variables such as the strength of the grounds for such questions or doubts as shall have arisen, their materiality to the propriety or feasibility of the debtor's proposals, the quality of the debtor's answers to the nominee in intended resolution of those doubts, the ease or difficulty with which independent inquiry by the nominee may resolve any continuing doubts, the expense entailed in such further inquiry and the availability of funds to meet that expense. Plainly, the less inquiry the nominee undertakes, the more important, in terms of reliance upon it, becomes the fullness and candour of the information provided by the debtor. If, for whatever reason, the nominee's inquiries in questionable cases have been so restricted or unsatisfactory that the nominee would be unable to assure creditors that he had satisfied himself that those three minima were met, then he should not unequivocally report, under s 256(1)(a), that in his opinion a meeting of creditors should be summoned. Where such doubts have reasonably arisen it cannot be right for the nominee unquestioningly to accept whatever is put in front of

> him on the supposed basis that it is not for him but for the creditors to accept or reject the proposal; it is fundamental to the intended operation of IVAs that what the creditors vote upon is not the debtor's raw material but a proposal that, at least to the qualified extent I have described, has survived scrutiny and which, to at least that extent, has commended itself to an independent professional insolvency practitioner as proper to be put to, and capable of being not unfairly voted upon by, the creditors. Although it may be said, in the broadest terms, that the plan of the 1986 Act in relation to IVAs is 'Leave it to the creditors', it is not, in other words, anything that is so to be left; the formalities apart, the 'it' to be left to them by the nominee has (at least in the cases of doubt which I have described and with which I am, for the moment, concerned) to have met the three minima I have mentioned."

195. This passage from Lindsay J's judgment was endorsed by the Court of Appeal in *Bramston v Haut* [2012] EWCA Civ 1637 at [60] per Kitchin LJ. Mr Weaver accepted that it accurately identified the duties of nominees. Mr Arden QC, who appeared for the Applicants, referred me to *Re Ahmed, Tradition (UK) Ltd v Ahmed* [2008] EWHC 2946 (Ch), in which a nominee of an IVA was found to have fallen below the required standards of a nominee because, among other things, the nominee had failed to investigate the validity of claims of family members, upon which the approval of the IVA depended.

196. Mr Weaver contended that the responsibilities of a nominee are relatively light, citing a number of points in support. First, whereas the Cork Report had recommended imposing trustee-like duties on a nominee, including the power to set aside antecedent transactions, this recommendation had not been implemented in IA 1986. Second, the proposal is at all times that of the debtor. The nominee is not responsible for the proposal, only for his report. Third, the nominee is to a large extent dependent upon the information provided by the debtor, and the nominee has no power to compel the debtor, or any third party, to provide information. Fourth, CVAs are intended to be a more flexible and cheaper alternative to schemes of arrangement, and the responsibilities of nominees must be viewed in that context. In particular, given the limitations of time and cost, nominees cannot be expected to undertake any extensive investigations of the debtor and its affairs.

197. These submissions, in my judgment, understate the responsibilities of a nominee. While it is true that the proposal is that of the debtor, and the nominee has no power to compel the debtor or anyone else to provide information, the nominee has the power to refuse to provide a report unless and until information is provided, or to warn creditors in the report that information is lacking. In many CVAs involving small companies and uncomplicated arrangements, cost and time constraints will be important factors in limiting the work of a nominee. Where, as in this case however, a CVA is used by a large company to implement a complex arrangement of the kind typically implemented via a scheme of arrangement, then more should be expected of the nominee.

198. The position of the Nominees in this case is complicated by the fact that Grant Thornton, and Mr Williams in particular, acted as advisor to the Company in the run-up to the CVA. Mr Arden QC accepted that there is nothing wrong with that, but he rightly emphasised the importance of the nominee retaining clear independence in reporting to the court on the proposal. Some of the criticism of Mr Williams (at least the criticism that was implied during his cross-examination) related to his actions in the period prior to his appointment as nominee. He was criticised for his part in the drafting of certain parts of the Proposal (for example the failure to make reference to Regent as the ultimate owner of IBL, or to identify Sassoon as the division that had been transferred out of the Company prior to its sale to IBL). He was also criticised for siding with the Company in its "negotiation tactics" with the British Property Federation in advance of the CVA, during which the Company put forward a proposal including provisions described as "aggressive" with the intention of making "concessions" in order to persuade landlords to vote in favour.

199. Mr Weaver contended that Mr Williams' duties as nominee only arose once the Proposal, in final form, was provided to him. His report, however, was issued the following day, which meant that he was formally acting as nominee for only one day.

200. In my judgment, as Mr Arden QC accepted in closing submission, the critical focus, in considering whether a nominee has complied with his or her duties, is on the report. That is because the nominee's only function under IA 1986 and IR 2016 is to provide a report to the court. That is not to say, however, that a nominee who receives a proposal on day one and provides a report on day two is to be judged on the basis that he or she had only one day to provide the report. Indeed, it would be surprising if any nominee was in a position to comply with his duties in reporting on a CVA (certainly one as complex as this) within just one day.

201. While I do not, therefore, criticise Mr Williams for steps he took in relation to the formulation of the Proposal prior to his formal appointment, the question whether the Nominees in this case complied with their duties in respect of the report must be viewed in the context of Mr Williams' prior engagement with the Company. In particular, information acquired by him during that prior engagement is relevant in considering whether he complied with his duties in presenting his report to the court.

202. The case against the nominees was opened broadly: in relation to each of the alleged failings in relation to the CVA, the nominees were said to have acted in breach of duty. In their skeleton argument, the Applicants indicated that they would develop their submissions as against the Nominees in closing after the evidence. In the event, Mr Arden QC's closing submissions addressed the position of the Nominees in only a few minutes, in which he said that the Applicants' case revolved essentially around the issue of disclosure and the Regis Corp Debt. He accepted that the case against the Nominees depended upon my prior findings as to material irregularity and unfair prejudice. In other words, where I concluded that a particular aspect of the CVA did not amount to unfair prejudice or a material irregularity, then the Applicants could not establish that the Nominees had breached their duty. Moreover, a finding

of unfair prejudice or material irregularity was merely a necessary starting point in the case against the Nominees: it clearly does not follow, just because there is such a finding, that the Nominees failed in their duties. As I point out below at [211], no relief could be obtained for breach of duty unless the nominee had acted as no reasonable nominee would have done.

203. In light of this, the only substantive issue that I need to address is whether the Nominees fell below the required standard of nominees in recommending that the Proposal be put to a meeting of creditors in circumstances where the inclusion of IBL as a Critical Creditor was unfairly prejudicial to the Applicants.

204. I have set out the circumstances relating to the IBL Debt and the treatment of IBL as a Critical Creditor above (see, in particular, [153] to [160]). As I have noted, until 5 October 2018 the IBL Debt was treated as being due to Regis Corp and, when that error was corrected, there was no separate consideration given to whether it was still appropriate to treat IBL as a Critical Creditor. It was treated as such simply because any money paid from the Company to IBL would be paid on by IBL to Regis Corp.

205. In his witness statement, Mr Williams referred only to the risk that Regis Corp would terminate the franchise agreements with IBL if it was not paid in order to justify treating Regis Corp and IBL as Critical Creditors. There is no evidence that he made any attempt to question with IBL or Regent the propriety of IBL being paid in full notwithstanding the numerous factors that suggested that would be unfair to the Compromised Landlords. Those factors included: IBL, as shareholder, stood to benefit from the impairment of creditors within the CVA; although IBL was a mere holding company, it was part of the Regent group; it was Regent's default in paying Regis Corp for the acquisition of the Company that had led to Regis Corp's demand for security over the Company's assets; and treating IBL as a Critical Creditor would result in nearly £600,000 being paid to it by the Company following approval of the CVA, whereas only half that sum was being made available to pay a dividend to all the impaired creditors.

206. In my judgment these are matters which any reasonable nominee ought to have taken into consideration before accepting without question that the shareholder is properly to be treated as a Critical Creditor. I do not accept that lack of time, lack of resources, or lack of powers to compel the Company or its shareholders to provide information justifies not having done so in this case. As Lindsay J noted in *Greystoke*, the creditors are entitled to rely on the fact that an independent professional nominee is satisfied, after an appropriate level of scrutiny, that the proposal is capable of being fairly voted upon.

207. In this one limited respect, therefore, I conclude that Mr Williams' conduct did fall below the standard required of a nominee. I received no submissions from either side on the position of Ms Laverty, the other joint Nominee. I note that she played no active role in the preparation for the CVA and that the Nominees' report, though made by Mr Williams on behalf of both Nominees, was signed only by him. In the absence of any submissions relating to her position, I do not make any findings so far as her conduct is concerned.

Relief against the Nominees

208. There is no indication in IA 1986 or IR 2016 as to what sanction might be imposed upon a nominee who fails to comply with the obligations imposed upon him or her, as explained in *Greystoke*.

209. The Applicants contend that an order can be made that the Nominees repay their fees, under section 6(6) IA 1986. That section enables the court, if it revokes the CVA, to "give such supplemental directions as it sees fit and, in particular, directions with respect to things done under the voluntary arrangement since it took effect."

210. The Nominees say that there is no power under section 6(6) to make any such order and in any event there is no proper basis to make such an order in this case.

211. It is common ground that, if a power exists, no order could be made unless the Nominees were found to have acted as no reasonable nominee would have done in the circumstances of this case. This is the same test that the court applied in *Re Trident Fashions plc (in administration) No.2)* [2004] EWHC 293 (Ch), when asked to determine whether a nominee's conduct in failing to place material before a creditors' meeting amounted to a material irregularity: it would do so only if the nominee made a judgment to which no reasonable insolvency practitioner could come.

212. No such order has been made under section 6(6) in any prior case. Mr Arden QC pointed to other situations in which the court has power to deprive an office holder of fees but, as he acknowledged, that is where the court exercise a statutory power over the fees of the office holder. No such statutory power exists in relation to nominees or supervisors.

213. The only sanction which has been imposed in any prior case, so far as the researches of Counsel uncovered, is that the nominee has been ordered to pay some part of the applicant's costs of a successful challenge to the IVA or CVA. The possibility of such an order was envisaged by Hoffmann J in *Re Naeem (a bankrupt) (No 18 of 1988)* [1990] 1 WLR 48 at 51.

214. In *Re a debtor (No.222 of 1990) ex parte the Bank of Ireland (No.2)* [1993] 1 BCLC 233, Harman J noted that a nominee was required to be a qualified skilled person and had a duty to exercise a professional independent judgment. He also noted that "one would not expect a professional man, acting in the course of his professional duties, to be personally charged with costs arising out of that exercise." The case before him was, however, wholly exceptional. The conduct of the nominee had fallen very far below the proper standard of duty required of a professional licensed insolvency practitioner, and that conduct had been causative of the proceedings before him. He therefore made an order that the nominee pay one half of the applicants' costs.

215. Echoing Harman J's comment that one would not expect a professional person acting in the course of their professional duties to be charged with the costs arising out of that exercise (although I stress that the question of costs is not

before me at this stage), it is equally (if not more so) the case that a professional person would not ordinarily be deprived of their fees as a result of a breach of their duty.

216. Mr Weaver referred me, in this regard, to *Jackson & Powell on Professional Liability*, 8th ed., at 3-011, where the following is said:

> "The approach which is adopted in most cases, and which, it is submitted, is correct, is that where the defendant's negligence renders his services valueless, he is not entitled to recover (or to retain) any remuneration for the work in question. In any other case, where the defendant has substantially (albeit negligently) performed the work, he is entitled to be paid the normal remuneration and the client must rely upon his remedy in damages."

217. Mr Arden QC agreed that was the correct approach in cases of professional negligence.

218. While I do not rule out the possibility that in cases of particularly egregious conduct a nominee might be required to repay fees, and that a power under section 6(6) exists to do so, I do not think it would be appropriate (in the absence of fraud or bad faith) to deprive a nominee of fees in a case where, had he or she been sued in professional negligence, a claim to deprive them of their fees would have failed.

219. In this case it is not (and could not be) suggested that the services provided by the Nominees were valueless. That is self-evidently the case in respect of their work as supervisors (to which the larger portion of their fees relates). Accordingly, and taking into account the limited extent to which I have concluded that Mr Williams' conduct fell below that of a reasonable nominee, I conclude that this is not an appropriate case in which to deprive the Nominees of their fees.

<u>Relief: revocation of CVA?</u>

220. In his skeleton argument, Mr Weaver contended that there is no jurisdiction to revoke a CVA that has already terminated in accordance with its terms. That was on the basis that a purposive approach should be adopted to construing section 6(4) IA 1986, and there would be no purpose in revoking a CVA that had already terminated. I do not accept this. Depending on the terms of the CVA, it may well be that parts of it survive termination. That was indeed the position in this case in that, prior to the concession made by the administrators of the Company, the provision in the CVA which deemed the release of claims not to have happened in the event of termination did not apply to the Compromised Landlords. In any such case, there would be a clear purpose in revoking the CVA so as to bring it to an end completely.

221. Even though I have concluded that the CVA was, in one respect, unfairly prejudicial to the Applicants, it is common ground that revocation of the CVA does not automatically follow. The remedy is discretionary.

222. Mr Weaver's principal contention is that I ought not to revoke the CVA because, it having already terminated, there is no purpose in doing so. As I have set out above, at [28], the only remaining possible utility in these proceedings is in relation to the costs of the Applicants as against the Company in administration. Mr Arden QC nevertheless contended that if I concluded there were grounds for revoking the CVA, I should do so, if only because it is simply "the right thing to do".

223. Mr Weaver accepted that, if I decided not to order the Nominees to return their fees, then it made no difference to his clients whether I ordered the revocation of the CVA or not. The Nominees have defended these proceedings solely because of the claim made against them personally and, once that is resolved in their favour, they are indifferent to the position as between the Applicants and the Company.

224. In my judgment, as between the Applicants and the Company, having concluded that the CVA was unfairly prejudicial to the Applicants, the proper course is to make an order revoking the CVA.