Neutral Citation Number: [2021] EWHC 2275 (Ch)

Case Number **CR-2017-003729**

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (Ch D)
IN THE MATTER OF PARAGON OFFSHORE PLC (IN LIQUIDATION)
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

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

Date: 13 August 2021

Before :

DEPUTY INSOLVENCY AND COMPANIES COURT JUDGE AGNELLO QC

B E T W E E N :

MICHAEL R. HAMMERSLEY

Applicant

And

(1) NICHOLAS GUY EDWARDS

(2) DAVID PHILIP SODEN
(The Joint Liquidators of Paragon Offshore PLC (in liquidation)
(3) PARAGON OFFSHORE LIMITED

Respondents

Mr Mark Arnold QC (instructed by Weil, Gotshal & Manges (London) LLP) for the First and Second Respondents
Mr Henry Phillips (instructed by Skadden, Arps, Meagher & Flom (UK) LLP**)** for the Third Respondent
Mr Michael Hammersley, acting in person

Hearing date: 26 March 2021

- - - - - - - - - - - - - - - - - - - -

APPROVED JUDGMENT

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 13 August 2021 at 2pm.

Introduction

1. This is the hearing of the application dated 12 January 2021 issued by the First and Second Respondents ('the Joint Liquidators') of Paragon Offshore PLC (in liquidation) ('Paragon Parent') seeking to strike out or dismiss the application pursuant to rule 14.11 of the Insolvency Rules 2016 as amended by my order on 18 January 2021, brought by Mr Hammersley. The rule 14.11 application ('the Revised Rule 14.11') seeks an order excluding the 'Loan Note Instrument' held by Paragon Offshore Limited ('New Paragon') as well as certain consequential relief. There is also before me an application issued by Mr Hammersley dated 10 March 2021 seeking summary judgment of his Revised Rule 14.11. As I indicated during the hearing of the dismissal application of the Joint Liquidators, the summary judgment application of Mr Hammersley would be dealt with after I have dealt with the dismissal application of the Joint Liquidators. Since the hearing, there has been an exchange of correspondence between the parties as well as letters addressed to me. Mr Hammersley effectively invites me to deal with his summary judgment application. As I stated during the hearing, the application which I heard and for which I reserved my decision, was that of the application made by the Joint Liquidators. Obviously the outcome of the Joint Liquidators' application will have a bearing on the summary judgement application made by Mr Hammersley. I will deal with this again at the end of this judgment, in so far as is necessary.

2. Mr Mark Arnold QC appeared on behalf of the Joint Liquidators and Mr Phillips appeared on behalf of the Third Respondent ('New Paragon'). I am grateful to both Counsel for coordinating their submissions so that there was no repetition between them. I also extend my thanks to Mr Hammersley. This is one of many appearances Mr Hammersley has made before me and as in previous appearances, Mr

Hammersley made his submissions succinctly and replied to questions I asked of him in order to ensure that I had understood the submissions he was making. I am therefore grateful to him. Although the application before me seeking dismissal of the Revised Rule 14.11 relates to matters and issues I have dealt with before in previous judgments, it is necessary to set out some of the background to this application.

Background

3. Paragon Parent was the head of a well known corporate group. According to the witness statement of David Soden, dated 27 February 2020, together with its subsidiaries ('the Group'), Paragon Parent was a leading provider of standard specification offshore drilling services. From about 2014, the depression in global prices contracted the demand for the Group's services. On 23 May 2017, Paragon Parent was placed into administration by order of Mrs Justice Rose (as she then was). The Joint Liquidators were appointed as Joint Administrators alongside another partner from the same firm (the 'Former Administrators'). Sometime prior to the application for an administration order, Paragon Parent had sought protection pursuant to the Chapter 11 laws of the US, at the US Bankruptcy Court in Delaware. After various earlier draft plans, on 2 May 2017, the Fifth Plan was filed in the US Bankruptcy Court. The Fifth Plan was essentially a debt for equity swap involving the transfer of certain assets to certain senior creditors (the secured lenders and senior noteholders), including cash payments, equity in New Paragon and reinstated debt as well as certain other interests, in consideration for the release of certain of Paragon Parent's financial liabilities to those senior creditors. The Fifth Plan provided for New Paragon to be incorporated and thereafter for its shares to be distributed amongst Paragon Parent's senior creditors. Paragon Parent had a 100% interest in Prospector Offshore Drilling Sarl, a holding company for the Prospector group. The Fifth Plan contemplated that these share were to be transferred from Paragon Parent to New Paragon. The purpose of the UK administration was to effect and carry out the terms of the approved Chapter 11 Fifth Plan. The Fifth Plan also included a rationalisation of Paragon Parent's inter-company liabilities which allowed for the reduction of these liabilities from US$820 million to US$500 million approximately. The claims in respect of these inter-company liabilities were then to be transferred to New Paragon by means of a Loan Note Instrument. Instead of Paragon Parent owing money to its

subsidiaries, these inter-company liabilities against Paragon Parent would be transferred to New Paragon.

4. The terms of the Fifth Plan set out in summary at paragraph 28 of Mr Todd Strickler's witness statement dated 16 May 2017 (filed in support of the application for an administration order) are as follows:-

(a) the RCF Lenders and the Term Loan Lenders (both terms defined below) will receive their pro rata share of:

i) a $410 million cash payment;

ii) senior secured first lien debt (in the face amount of $85 million);

iii) 50% of the equity interests in New Paragon that are to be distributed pursuant to the UK Sale Transaction (subject to dilution by a management incentive plan); and

iv) 50% of the Class A Litigation Trust Interests and 25% of the Class B Litigation Trust Interests,

in consideration for a full release of the RCF and the Term Loan;

(b) the Senior Noteholders (as defined below) will receive their pro rata share of:

(i) a $105 million cash payment;

(ii) 50% of the New Paragon Equity (subject by a management incentive plan); and

(iii) 50% of the Class A Litigation Trust Interests and 75% of the Class B Litigation Trust Interests,

in consideration for the full release of the Senior Notes (as defined below); and

(c) the holders of General Unsecured Claims will receive cash in an amount equal to the lesser of 30% of their claim or their pro rata share of $5 million; and

(d) there will be no return to the shareholders of Paragon Parent on the basis that the existing ordinary shares have no economic value, Paragon being insolvent.

5. In order to satisfy the court that an administration order should be made in this jurisdiction, the court needed to be satisfied that Paragon Parent was insolvent. The witness statement of Mr Strickler dated 16 May 2017 contained the details of the Fifth Plan, as well as details of the liabilities of Paragon Parent and how these liabilities arose. The Judge was satisfied that Paragon Parent was insolvent and exercised her discretion and made the administration order.

6. The principal liabilities of Paragon Parent to non-Group entities as at 16 May 2017
were summarised by Mr Strickler as follows:-
Revolving credit facility (the 'RCF') (referred to above as the RCF Lenders) - US$755,764,000

Term loan facility (the 'Term Laon Agreement') referred to above as the Term Loan Lenders – US$641,875,000

6.75% senior notes (referred to above as the Senior Noteholders) - US$474,636,199
7.25% senior notes (referred to above as the Senior Noteholders) - $546,114,112.

Mr Hammersley seeks in the Revised Rule 4.11 to challenge the liability of Paragon Parent under certain of the financial documents. In essence, as I deal with below, Mr Hammersley disputes that Paragon Parent is liable for certain of these liabilities, being the liability of Paragon Parent as guarantor (pursuant to the Guaranty and Collateral Agreement) under the Term Loan Agreement and liability under the Senior Notes. He also asserts that the liability under the finance documents was restricted to those sums which were secured, so that effectively there was no liability in relation to unsecured liabilities.

7. After the making of the administration order and in line with what was set out in the Fifth Plan, the Former Administrators entered into the UK implementation agreement on 6 July 2017 (as amended on 18 July 2017) (the 'UK Implementation

Agreement'). The Loan Note Instrument is essentially part of what was envisaged under the Fifth Plan and as is set out in the UK Implementation Agreement. In summary:-

(i) Section 4.6(a) of the Fifth Plan provided that the intercompany liabilities were to be dealt with "in accordance with the terms of the UK Implementation Agreement..';

(ii) Clause 6.1(a) of the UK Implementation Agreement provided that New Paragon would retain certain intercompany claims against Paragon Parent, but that Paragon Parent would have no such claims against New Paragon;

(iii) one of the recitals to the Loan Note Instrument states that the claims of the senior financial creditors (being those the subject of the various financial instrument which I have referred to above) were to be released in consideration for the UK Sale Transaction (as defined in the witness statement of Mr Strickler dated 16 May 2017) and certain other distributions under the Fifth Plan.

8. Mr Hammersley seeks to argue that the Loan Note Instrument deals with what he calls 'the deficiency claims' owed by Paragon Parent to its financial creditors. He asserts that these claims are non recourse, meaning that they are not liabilities for which Paragon Parent is personally liable. I will deal with this below, but in this short summary, that argument, in my judgment, runs contrary to what is set out in the finance documents themselves. Mr Hammersley then seeks to rely on certain provisions of the US Bankruptcy Code in order to establish that as the finance creditors claims were deficiency claims, these were extinguished and accordingly the Loan Note Instrument must be disallowed. The Loan Note Instrument deals with the assumption of liability by Paragon Parent to New Paragon in the sum of approximately US $500 million, being the balance of the inter company liabilities.

9. The Former Administrators became the Joint Liquidators on 31 May 2019. On 27 February 2020, the Former Administrators applied for their discharge pursuant to paragraph 98(2)(c) of Schedule B1 of the Insolvency Act 1986. That application came before me over several days. Mr Hammersley appeared and opposed the discharge. On 20 July 2020, I delivered a written judgment (the discharge judgment) granting the discharge and dismissing the points made by Mr Hammersley. Mr

Hammersley then issued an application seeking to review, vary or rescind the order I made on 20 July 2020. After hearing the application made on behalf of the Former Administrators seeking a summary dismissal of that application, I delivered a written judgment on 19 October 2020, summarily dismissing Mr Hammersley's application to review, vary or rescind the order made giving effect to the discharge judgment. Some of the points made by Mr Hammersley in the Revised Rule 14.11 relate to documents and matters which I considered in relation to the earlier applications before me.

The Revised Rule 14.11 application

10. Rule 14.11 states as follows:-

> "*(1) The court may exclude a proof or reduce the amount claimed –*
>
> *(a) on the office-holder's application, where the office-holder thinks that the proof has been improperly admitted, or ought to be reduced; or*
>
> *(b) on the application of a creditor, a member, a contributory or a bankrupt, if the office-holder declines to interfere in the matter"*

11. Mr Hamersley seeks an order excluding the Loan Note Instrument held by New Paragon as well as certain consequential relief. As he summarises in his argument, Mr Hamersley asserts:

(1) that the Loan Note Instrument was improperly admitted in the sense that it should not have been admitted at all;

(a) that the proof underlying the Loan Note Instrument is a deficiency claim arising under section 1111(b) of the US Bankruptcy Code. This is because, asserts Mr Hammersley, the claims of the finance creditors were 'non-recourse' and such claims are therefore deficiency claims;

(b) that section 1111(b) of the US Bankruptcy Code does not allow creditors to have a post-bankruptcy deficiency claim and a reversionary interest in the collateral;

(2) on the basis that the points raised above are held in favour of Mr Hammersley, then he invites me to exercise my discretion and put Paragon Parent's legitimate 'shareholder creditors' back on an equal footing.

12. The starting point here is the claim made by Mr Hammersley that in some way the Loan Note Instrument has been improperly admitted. Rule 14.11 of the Insolvency Rules 2016 allows the court to exclude a proof of debt or reduce the amount claimed therein, on the application of the office holder or on the application of a creditor, member or contributory. The Loan Note Instrument which is the subject of challenge by Mr Hammersley is not, as noted by Mr Arnold, a proof of debt as such. It is a document entered into by the Former Administrators of Paragon Parent in accordance with the terms of the UK Implementation Agreement and the Fifth Plan. It records an assumption of a liability to New Paragon by Paragon Parent acting through its Former Administrators. In any event, for the purposes of the summary judgment dismissal application before me, Mr Arnold has sought to deal with the issues raised by Mr Hammersley and invites me to grant the summary judgment dismissal application based on the issues raised by Mr Hammersley. Mr Phillips deals with the issue of rule 14.11 and I deal with this point below under the heading 'proof of debt'.

Summary judgment principles

13. The principles applicable in relation to an application for summary judgment are well known and have been helpfully set out by Mr Arnold in his skeleton, being the principles, as summarised by Lewison J in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) and approved by the Court of Appeal in *AC Ward & Sons Ltd v Catlin (Five) Ltd* [2009] EWCA Civ 1098 in the following terms (omitting citations):

"The correct approach on applications by defendants is, in my judgment, as follows:

i) *The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success.*

ii) *A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable.*

iii) *In reaching its conclusion the court must not conduct a "mini-trial".*

iv) *This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In*

some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents.

v) *However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial.*

vi) *Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case.*

vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction."

I bear these principles in mind in my consideration of the documents and the evidence filed.

The non-recourse argument – position of the finance creditors

14. In support of the application of the Joint Liquidators, Mr Arnold took me through the terms of the finance documents to demonstrate that the financial creditors did have claims against Paragon Parent personally. Mr Arnold therefore submitted that the finance creditors did have recourse to Paragon Parent because it was personally liable to those creditors under the terms of the various finance instruments and documents. Accordingly, Mr Arnold submits, if I am satisfied that Paragon Parent had a personal liability to the finance creditors, then section 1111(b)(A)(ii) of the US Bankruptcy Code is inapplicable.

15. I have already considered in detail the finance documents relied upon by Mr Arnold and also relied upon by Mr Hammersley in the context of the discharge application. The finance documents are governed by New York law, but there is no suggestion that the documents are to be construed otherwise than by reference to their clear language or by applying principles of construction which differ materially from those applicable under English law. Mr Arnold referred me to these well known principles confirmed recently by Mr Justice Marcus Smith in *Re LB Holdings Intermediate 2 Ltd [2020] EWHC 1681 (Ch)* at paragraph 63. Mr Hammersley did not refer me to any case which contradicted the principles or the approach to this issue. I will consider the relevant finance documents in turn.

(1) Revolving Credit Agreement (17 June 2014) ('the RCF')

16. The parties to RCF are Paragon Parent (as 'Parent Borrower'), Paragon International Finance Company (as Cayman Borrower) and the 'Lenders' as well as JP Morgan Chase Bank, NA, as the Administrative Agent. The documents set out the various lenders, which include Deutsche Bank Securities Inc and Barclays Bank, as Syndication Agents, Citibank, Credit Agricole, Credit Suisse and others as Documentation Agents and JP Morgan Securities LLC and others as Joint Lead Arrangers and Joint Lead Bookrunners. Paragon Parent is defined as being both the Parent Borrower and a Credit Party. 'Credit Party' means each Borrower and each Guarantor (under the definitions section). The Lenders agreed to make credit facilities available to the Parent Borrower and/or to other borrowers (section 2.1). The definition of 'Borrower' means the Parent Borrower, the Cayman Borrower or any Additional Borrower (which means the wholly owned subsidiaries of the Parent

Borrower which have been designated as an additional borrower). Section 2.8(a) states that Paragon Parent unconditionally promised to repay those facilities. Paragon Parent's filing for Chapter 11 relief constituted an event of default which entailed that all the outstanding loans under the RCF became immediately due and payable (section 8.3)

(2) Term Loan Agreement (18 July 2014)

17. Paragon Parent and Paragon Offshore Finance Company were parties to this agreement alongside various lenders, with JP Morgan Chase Bank NA as Administrative Agent. Under this agreement, Paragon Parent was not a borrower, but was a Guarantor pursuant to the Guaranty and Collateral Agreement (the 'GCA'). It was a condition precedent of the Term Loan Agreement that the GCA was entered into (section 4.1(a)).

(3) GCA (18 July 2014)

18. Paragon Parent was a party to the GCA alongside Paragon International Finance Company, Paragon Offshore Finance Company and other grantors. The GCA was in favour of JP Morgan Chase Bank NA, as collateral agent. Under the terms of the GCA, Paragon Parent as guarantor, guaranteed the Borrower's liability under the Term Loan Agreement pursuant to section 2.1(a). Paragon Parent also granted certain security in respect of its liabilities as Parent Borrower under the RCF and also its liabilities as guarantor in respect of the Term Loan Agreement pursuant to section 3 of the GCA. Paragon Parent remained liable for any deficiency pursuant to section 6.9, if the proceeds of any sale or other disposition of the collateral was insufficient to pay its obligations. The guarantee liability of Paragon Parent crystallised upon the commencement of the Chapter 11 proceedings.

(4) Unsecured Senior Notes

19. Paragon Parent was the primary borrower under the Senior Notes which had amounts outstanding of $456,572,000 and $527,010,000 becoming due in 2022 and 2024 respectively. These also became immediately due and payable upon the commencement of the Chapter 11 proceedings under their terms.

20. In my earlier discharge judgement, I had considered these documents and determined that these were liabilities of Paragon Parent and formed part of the liabilities of Paragon Parent to its creditors (see in particular paragraphs 11- 15, 23-33 and 34). In granting the administration order, Mrs Justice Rose clearly reached the view that these were liabilities of Paragon Parent. Judge Sontchi had also reached the same conclusion in the US Bankruptcy Court. In my earlier discharge judgment, it was clear to me that Paragon Parent was insolvent. Furthermore, in my earlier judgment, I considered and held that part of that liability arose by reason of the guarantee liability of Paragon Parent under the GCA.

21. Mr Hammersley argues that under the terms of the GCA, Paragon Parent had no personal liability to the financial creditors. In particular he seeks to argue that this is clear from the fact that Paragon Parent granted a first priority lien over substantially all of its property but this lien did not extend to what was defined as 'excluded assets'. In my judgment, there is a difference between liabilities which are owed by Paragon Parent to the lenders, of which the guarantee liability is just one and security granted by Paragon Parent. In my judgment, Paragon Parent was clearly liable as guarantor under the terms of the GCA. This position is not altered by the extent of the security provided by Paragon Parent. The fact that the security provided by Paragon Parent did not encompass all of its assets does not in some way alter the existence and ambit of the guarantee liability of Paragon Parent under the terms of the GCA. The GCA does not restrict the ambit of Paragon Parent's liability to only that covered by the security. No such restriction appears from the clear wording in the GCA. Part of the guarantee liability was secured and part of it was unsecured. This is clear from the terms of the GCA.

22. Mr Hammersley took me to the definition of 'Excluded Assets' in the GCA. This describes the assets over which security was not granted. However, in my judgment, this does not assist Mr Hammersley's argument. The liability of Paragon Parent under the terms of the guarantee is not restricted to only part of the liability which is secured by the first priority lien. Paragon Parent is liable in relation to all the liabilities which it guaranteed. This is what is set out clearly in section 2.1(a). This is not restricted to what has been secured. There is, in my judgment, no term of the GCA which provides any support for such a construction sought by Mr Hammersley. The

definition of Excluded Assets merely sets out what effectively are the assets over which no security has been granted. In my judgment, this provision provides no support for the construction upon which Mr Hammersley seeks to rely.

23. Mr Hammersley also relied upon section 3 of the GCA, being the section titled "Grant of Security Interest'. As the title indicates, this section sets out the property and/or assets over which security is granted to the Collateral Agent for the benefit of the secured parties (being the secured term lenders and other lenders holding security under the relevant lenders). The provision sets out a description of the property and/or assets over which security is granted. Mr Hammersley submits that the effect of this provision is that the lenders are non recourse. He relies on the wording that the security interest is granted, *'as collateral security for the prompt payment and complete payment and performance when due…'*. In my judgment, this provision does not restrict the lenders to only what they can recover from the secured assets. This is not in my judgment what the clause actually states. Moreover this strained construction also contradicts other clauses in the GCA, in particular section 6.9 which expressly states that the relevant parties remain liable for any deficiency if the proceeds of any sale or disposition are insufficient to pay the obligations arising under the respective agreements. This includes the guarantee liability assumed under the terms of this agreement by Paragon Parent. In this context, Mr Hammersley sought to argue that the remedial provisions, of which section 6.9 is just one, only apply to the lending which is secured. Mr Hammersley's proposed construction goes against the clear and unambiguous wording of the provisions themselves and the GCA when read in its entirety. In my judgment, by reason of the clear terms of the GCA, Paragon Parent was liable in respect of all the guaranteed liabilities, regardless of any security which had been granted.

24. Mr Hammersley also seeks to argue that Paragon Parent was not liable under the terms of the Senior Notes. Again, I considered these documents in my earlier discharge judgement. I concluded that Paragon Parent was liable under those notes. In my judgment, Paragon Parent is clearly primarily liable under the terms of the notes. Mr Hammersley seeks to argue that as a non guarantor, Paragon Parent was not liable under the Senior Notes. In my judgment, this point lacks merit because the notes are

clear in their language. Paragon Parent is primarily liable, as the primary borrower, under the terms of the notes.

25. As a result of the very clear language in both the GCA and the senior notes, in my judgment, it is unsustainable for the financial creditors to be viewed, as Mr Hammersley seeks to do, as non recourse creditors. Both under the GCA guarantee liability as well as under the senior notes (which created unsecured liabilities) the finance creditors were significant creditors of Paragon Parent. For the most part, these liabilities were unsecured. As Paragon Parent was insolvent, the assets of Paragon Parent which are not the subject of any security in favour of any particular creditor, are available to meet these unsecured claims. Accordingly, the arguments raised by Mr Hammersley in relation to section 1111(b) of the US Bankruptcy Code are inapplicable.

26. The construction and the status of the finance creditors are clearly matters which can and, in my judgment, should be determined by way of a summary judgement application. The position of the finance creditors is clear from consideration of the documents. The terms of the relevant finance documents are not ambiguous and their construction is clear. Mr Arnold took me to the Judgment of United States District Judge Stark of 12 March 2019, when, in dismissing the appeal brought by Mr Hammersley, the learned Judge also considered the argument that the ownership of residual value of the Prospector entities (which were excluded assets under the GCA) were not available for the creditors of Paragon Parent. This argument is the same as Mr Hammersley is seeking to run before me, namely that in some way the finance creditors have restricted their liabilities to those for which they have security.

27. The Learned Judge stated (page 759 and 760 first column):-

'Appellant argues the Paragon Parent's "credit agreements expressly warn that unrestricted subsidiaries will not respond in the event of a default of Paragon Parent's restricted subsidiaries" and "Paragon Parent's own general counsel affirmed that none of the creditors in the Paragon Cases have claims against Paragon Parent – only Paragon Parent's restricted subsidiaries …

This Court joins the Bankruptcy Court in rejecting these contentions, which are

"incorrect as a matter of law." … Paragon Parent had both secured and unsecured debt standing ahead of equity holders for recovery … The fact that the Prospector Entities were not collateral for Paragon Parent's secured debt does not mean that the economic benefit of the Prospector Entities bypasses Paragon Parent's unsecured creditors, including the deficiency claim of Paragon Parent's secured creditors, and goes to Paragon Parent's equity holders.'

28. The reference to 'deficiency claim' in this passage is relied upon by Mr Hammersley in support of his assertion that in some way this assists his case. In my judgment, this reference does not support his case. The starting point is consideration and construction of the finance documents themselves. This is what I have dealt with above. As I have reached the conclusion that Paragon Parent was personally liable to the finance creditors, Mr Hammersley's argument therefore fails. As Mr Arnold submitted, the above passage from the judgment does not deal in any way with section 1111(b) of the US Bankruptcy Code. I agree. The passage quoted makes it clear that the economic benefit of the Prospector entities was available to meet the claims of the creditors. This included the liabilities of Paragon Parent to its finance creditors which arose by reason of any deficiency relating to the realisation of any security held. This is again, in my judgment, a recognition, as appears in my earlier discharge judgment, that Paragon Parent was hopelessly insolvent and that its assets were therefore available to meet its liabilities and therefore not available for the equity holders.

29. As I have found against him on the construction of the finance agreements and held that the claims were personal liabilities of Paragon Parent, the rest of Mr Hammersley's argument relating to the effect of these claims being non recourse becomes irrelevant. I make this point to ensure that there is no subsequent claim that I somehow failed to deal with the detailed argument raised by Mr Hammersley in relation to the provisions of the US Bankruptcy Code. These are simply irrelevant by reason of the determination I have made relating to the construction of the finance documents and the status of the finance creditors. In order to succeed in his case, Mr Hammersley would need to persuade me that he is correct in his interpretation that the claims of the finance creditors were non recourse. I have found against him and

therefore the rest of his arguments cannot succeed because the position is that the financial creditors are personal liabilities of Paragon Parent.

30. Mr Hammersley also sought to persuade me that his 'securities fraud' claim gave him standing as a creditor. According to the proof of claim forms filed in the Chapter 11 proceedings, this claim related to the alleged violations under United States law. However, this assertion by Mr Hammersley runs against the fact that his claim was submitted and dealt with the US Bankruptcy proceedings (as set out in paragraph 26 of Mr Soden's sixth witness statement). The claim was subordinated to the holders of general unsecured claims by the order dated 30 May 2017 of the Honourable Judge Sontchi and discharged by section 10.3 of the Fifth Plan. Mr Hammersley asserts that the Judge did not have jurisdiction to deal with his claim. However the difficulty for Mr Hammersley in this argument is that the claim was submitted in the US bankruptcy proceedings and dealt with in that jurisdiction. In any event, this claim of Mr Hammersley as an alleged creditor rather than a holder of equity takes the matter no further in relation to what I need to determine. I have held on a question of construction that his non recourse argument fails. His attempt to seek to assert that he was in some way a creditor despite the treatment of his claim in the US Bankruptcy proceedings does not alter the determination I have made above in rejecting his non recourse argument.

The Loan Note Instrument (18 July 2017)

31. The arguments raised in this context by Mr Hammersley relate to his assertion that in some way the Loan Note Instrument relates to the deficiency claims, being, he asserts, the non recourse claims of the finance creditors. I have already held above that the finance creditors had direct recourse against Paragon Parent in relation to the liabilities arising under the various finance documents. However, for completeness, I will consider exactly what in my judgment is the ambit of the loan note instrument. As I have set out above in the background section, the Loan Note Instrument was entered into by Paragon Parent acting through the Former Administrators. Mr Hammersley challenges the document and asserts that it represents an assignment of the financial creditors' deficiency claims. He submits that no mention was made before District Judge Stark in relation to the inter-company liabilities. Mr Hammersley also sought to rely on other instances where no reference was made to

the inter company claims. What is important, in my judgment, is to consider the documents themselves. I have already dealt with the position relating to inter company claims as set out and dealt with in both the Fifth Plan and the UK Implementation Plan. I also need to consider the Loan Note Instrument itself. The recitals in the loan note refer to the Chapter 11 Fifth Plan as well as to the UK Implementation Agreement and the terms in the Loan Note Instrument have the same meanings as those given in those two other documents. The recitals record that Paragon Parent entered into the Loan Note Instrument in order to document its assumption of liability to New Paragon in relation to the existing inter-company balances in the sum of US $500 million in accordance with the Fifth Plan and the UK Implementations Agreement. The fifth recital states as follows:-

***'WHEREAS**, in connection with the Reorganization Steps and in accordance with Clause 6.1(Reorganization Steps) of the U.K. Implementation Agreement and the Steps Paper the Company has assumed certain obligations in relation to certain existing intercompany balances owed by certain of the Company's direct and indirect subsidiary undertakings and parent undertakings (each as defined in the Companies Act 2006), in an aggregate amount of US$500,000,000 (the "**Assumed Obligations**").'*

32. Clause 2.1 stipulates that Paragon Parent ('the company') undertakes to pay the Loan Amount (being the intercompany balances) to the Creditor (being New Paragon). As I have set out above, according to section 4.6(a) of the Fifth Plan, the inter-company liabilities were to be dealt with in accordance with the terms of the UK Implementation Agreement. Clause 6.1(a) of the UK Implementation Agreement provided that New Paragon would retain certain intercompany claims against Paragon Parent. This is the purpose of the Loan Note Instrument which is clear from its terms. In my judgment, the Loan Note Instrument deals with the intercompany claims and the assumption by Paragon Parent of this liability in favour of New Paragon. The loan note, in my judgment, does not represent the alleged deficiency claims. Accordingly, I am satisfied that there is no merit in these argument raised by Mr Hammersley in relation to the Loan Note Instrument. It does not deal with deficiency claims. As I have set out above, Paragon Parent was personally liable in relation to the guaranteed and other unsecured liabilities and these were not therefore non recourse claims. In my judgment, the reliance by Mr Hamersley on the lack of reference to the inter company claims is irrelevant. The documents themselves are clear as I have dealt with above. The arguments raised by Mr Hammersley in his Revised Rule 14.11 are, in my judgment, without merit. They run counter to what I have held to be the clear

construction of the relevant documents themselves. Mr Hammersley also sought to argue that the Loan Note Instrument enabled there to be 'double dipping'. I have reached a conclusion on the construction of the documents which means that I do not need to deal with this argument. In any event, as Mr Arnold pointed out, the Fifth Plan was approved by Judge Sontchi. Its terms are reflected and carried out by the UK Implementation Agreement and the loan note instrument.

Proof of debt- rule 14.11

33. Although I have dealt above with the argument raised by Mr Hammersley relating to the position of the finance creditors, in my judgment, Mr Hammersley's Revised Rule 14.11 also fails on the basis of there not being, on the evidence, a proof of debt. As raised earlier in this judgment, Mr Hammersley's Revised Rule 14.11 seeks the exclusion of the Loan Note Instrument. Rule 14.11 provides the court with the jurisdiction to exclude a proof or to reduce the amount claimed therein where the court is satisfied it has been improperly admitted by an office holder. As Mr Phillips sets out in his skeleton argument, New Paragon has not submitted a proof of debt either in the administration or in the liquidation which followed from the administration of that company. As such, there has been no adjudication or admission of any proof of debt in relation to the Loan Note Instrument. Mr Phillips submitted therefore that the jurisdiction of rule 4.11 is simply not engaged. Mr Phillips has helpfully set out in his skeleton a history of 'proving' in insolvency proceedings and the importance of the formal procedures as well as the ability to seek a determination from the court. I do not need to set this out in any detail because, in my judgment, the position is clear. There is no evidence before me that New Paragon had submitted a proof of debt in the administration or in the liquidation of Paragon Parent. As Mr Phillips sets out in his skeleton, there is no requirement for a creditor to submit a proof of debt. This is entirely a matter for the creditor in question. So, in order for rule 14.11 to be engaged, there must be a proof which has been submitted and upon which a determination has been made. The Revised Rule 14.11 is misconceived on the basis that the Loan Note Instrument is not a proof of debt upon which an adjudication has been made.

34. For the avoidance of doubt I should add that at the hearing on 18 January 2021, I did not, *'explicitly find that entry into the Loan Note did constitute an adjudication*

on a proof of debt'. This is the point made before me by Mr Hammersley. In my judgment, Mr Hammersley is mistaken. The hearing on 18 January 2021 was a directions hearing. An application was made to join the Joint Liquidators to the Revised Rule 14.11. I acceded to that application which was in my judgment appropriate and sensible bearing in mind that the Former Administrators had vacated office and had been released. Equally there had been no distribution in the administration under which proofs of debt would be sought. Therefore, the Joint Liquidators were the appropriate office holders to reply, if so advised, to the Revised Rule 14.11. I reject that there was any finding by me at that directions hearing that the Loan Note Instrument did constitute an adjudication of a proof of debt. Mr Phillips referred me to the transcript of that hearing where there is no such finding by me. I reject this assertion made by Mr Hammersley.

35. In conclusion, the revised Rule 14.11 application has no real prospects of success for the reasons set out above. Accordingly, I grant summary judgement in favour of the Joint Liquidators and dismiss the Revised Rule 14.11 application. There is, in those circumstances, no need for me to deal with Mr Hammersley's application for summary judgment in his favour because the Revised Rule 14.11 stands dismissed by reason of this judgment on the grounds that it has no prospects of success. I will hear the parties as to the appropriate order and also in relation to any other consequential applications and declarations.

Postscript

36. Although I have referred above to correspondence from Mr Hammersley which was sent after I had reserved judgment, by application dated 15 July 2021, Mr Hammersley issued an application for permission to adduce new evidence. Having heard and considered the evidence which was relied upon before me in relation to the summary judgment dismissal application, I do not propose to re-open the hearing by considering an application made after I had reserved judgment. Mr Hammersley's application can be dealt with, as appropriate, at some stage after this judgment has been handed down. I should add that I am making no comment as to the merits or otherwise of his new application.

Dated