Neutral Citation Number: [2023] EWHC 973 (Ch)

Case No: CH-2023-000047

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
ON APPEAL FROM DECISION OF ICC JUDGE PRENTIS
24TH JANUARY 2023

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

Date: Friday 7th April 2023

Before :

SIR ANTHONY MANN

- -

Between :

Mizen Design/Build Limited	**Appellant**
- and -	
Peabody Construction Limited	**Respondent**

- -
- -

Matthew Weaver KC (instructed by **Shoosmiths LLP**) for the **Appellant**
Andrew Mace (instructed by **Devonshires LLP**) for the **Respondent**

Hearing date: Thursday 6th April 2023

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APPROVED JUDGMENT

Sir Anthony Mann :

Introduction

1. This is an appeal from a decision of ICC Judge Prentis dated 24th January 2023 in which he allowed a challenge to a Company Voluntary Arrangement ("CVA") of Mizen Design/Build Ltd ("the Company") at the instance of one of its creditors, Peabody Construction Ltd ("Peabody") (see [2023] EWHC 127 Ch). Having heard the case over the course of 4 days, he delivered his judgment with commendable speed on the second working day after that (with a weekend intervening). He allowed the challenge on the basis that there was a material irregularity and unfair prejudice to Peabody.

2. This appeal by the Company has come on for hearing (pursuant to permission granted by Michael Green J) as a matter of urgency and before ICCJ Prentis actually made a formal order about the fate of the CVA or heard other consequential matters (other than to "grant" the application of Peabody) because of the uncertain position that his order has put the Company in.

3. Mr Matthew Weaver KC appeared for the Company appellant; Mr Andrew Mace appeared for the respondent, Peabody. Their helpful and economical submissions have assisted in the quick resolution of this urgent matter, the pressing nature of which means that this judgment has had to be delivered urgently and is not as full on some points as might otherwise have been the case.

The statutory provisions

4. The CVA in this case is proposed under Part 1 (sections 1-7B) of the Insolvency Act 1986 ("the Act"). It is unnecessary to set out the provisions which provide the mechanism, which the Company has invoked. They can be summarised by saying that a Company can make a Proposal for re-arranging its debts, and a 75% majority of arrangement creditors can bind the other 25% in an arrangement to adjust the recovery of their debts. The Insolvency Rules 2016 set out what the Proposal has to contain.

5. Under Rule 2.1:

"'Proposal' means a proposal for a CVA"

Rule 2.2 sets out general principles for what a proposal is to contain:

"2.2.—(1) A proposal must—

(a) contain identification details for the company;

(b) explain why the proposer thinks a CVA is desirable;

(c) explain why the creditors are expected to agree to a CVA; and

> (d) be authenticated and dated by the proposer."

Rule 2.3 provides for what a proposal must "set out … so far as known to the proposer". It is necessary to refer to only two of those provisions:

> "Liabilities - … (f) how the company's liabilities will be met, modified, postponed or otherwise dealt with by means of the CVA …"

And:

> "Other matters - (x) any other matters that the proposer considers appropriate to enable members and creditors to reach an informed decision on the proposal."

6. The Act itself provides for challenges. Section 6 provides:

> "6. Challenge of decisions.
>
> (1) Subject to this section, an application to the court may be made, by any of the persons specified below, on one or both of the following grounds, namely—
>
> (a) that a voluntary arrangement which has effect under section 4A unfairly prejudices the interests of a creditor, member or contributory of the company;

> (b) that there has been some material irregularity at or in relation to the meeting of the company, or in relation to the relevant qualifying decision procedure."

7. In the present case it is not disputed that Peabody is a person entitled to apply and it does so under both heads (material irregularity and unfair prejudice).

8. Subsection (4) provides for the court's powers:

> "(4) Where on such an application the court is satisfied as to either of the grounds mentioned in subsection (1) or, in the case of an application under subsection (2A), as to the ground mentioned in that subsection, it may do any of the following, namely—
>
> (a) revoke or suspend any decision approving the voluntary arrangement which has effect under section 4A or, in a case falling within subsection (1)(b), any decision taken by the meeting of the company, or in the relevant qualifying decision procedure, which has effect under that section;
>
> (b) give a direction to any person for the summoning of a further company meeting to consider any revised proposal the person who made the original proposal may make or, in the case falling within subsection (1)(b), and relating to the company meeting, a further company meeting to reconsider the original proposal;"

Legal principles

9. I was not addressed extensively on the law because time did not permit it, and the parties seemed to accept the principles applicable and accepted that the judge set them

out (though of course Mr Weaver did not accept that he applied them correctly). I can therefore be relatively brief in setting out the principles which have developed out of the statute and which have a particular relevance to this case.

10. So far as unfair prejudice is concerned, the burden is on the challenger to demonstrate it. It was agreed that the court had to consider all relevant factors, not a single one. However, a key matter is likely to be comparators as referred to in *Re Debenhams Retail Ltd* [2019] EWHC 2441 (Ch) by Norris J, summarising previous authorities:

> "12. The authorities identify two useful heuristics for assessing whether a CVA is "unfairly prejudicial" under section 6(1)(a). The first is commonly called "the vertical comparator". It compares the projected outcome of the CVA with the projected outcome of a realistically available alternative process, and sets a "lower bound" below which a CVA cannot go: see *Re T&N Ltd* [2005] 2 BCLC 488 at [82] per David Richards J and *Prudential Assurance Co v PRG Powerhouse Ltd* [2007] BCC 500 at [75]-[81] per Etherton J. The second is commonly called "the horizontal comparator". It compares the treatment of creditors under the CVA inter se. Whilst there is no prohibition on differential treatment, any differential treatment must be justified; see Powerhouse at [88]-[90].
>
> 13. These comparators are not to be treated as a statutory test; it is necessary to consider the particular facts of each case when deciding whether a given CVA is unfair: see Powerhouse at [74]-[75]."

11. One thing which the court is not entitled to do is consider whether the arrangement was the best that could have been obtained. In *Sisu Capital Fund v Tucker* [2005] EWHC 2170 (Ch) Warren J said:

> "73. Similarly, in my judgment, it is not for the Court to speculate whether the terms of a proposed CVA which were put forward by an officeholder were the best that could have been obtained, or whether it would have been better if it had not contained all of the terms which it did contain. Unless the court is satisfied that better terms or some other compromise would have been on offer, the comparison must be between the proposed compromise and no compromise at all judging matters as of the date of the vote on the CVA. If an administrator or liquidator puts forward a proposal which he considers to be fair then, unless it is established that he acted other than in good faith or that he is partisan to the interests of some only of the creditors, the court should not speculate about what other proposals might have gained acceptance and been capable of implementation (an essential element, since there is not much point in gaining approval unless the resulting arrangement can be implemented). "

12. So far as material irregularity is concerned, the following principles apply (and were referred to by the judge below).

13. First, it is accepted that the burden is on the applicant to establish an irregularity and its materiality.

14. In *Sisu Capital Fund* Warren J dealt with what was material and how that materiality was to be judged. He said:

> "81. Mr Crystal submits that, if the irregularity relates to the information provided to creditors, the correct approach to materiality is to ask the following question, which must be answered objectively: Whether, had the truth been told, it would be likely to have made a material difference to the way in which the creditors would have considered and assessed the terms of the proposed arrangement, adopting the words of Robert Walker LJ in *Cadbury Schweppes plc v Somji* (supra) at para 25, cited with approval by Lewison J in *Re Trident Fashions (No. 2)* [2004] 2 BCLC 35 (see at paras 38, 45-6). I accept Mr Crystal's submission and note (only to agree with) what

> Lewison J says at para 46 after citing the test approved in *Cadbury Schweppes plc:* "
>
> "I do not consider that is the same as asking: would the meeting have been adjourned? It seems to me the real question is: would the revelation of the truth have made a material difference to the way in which the creditors would have considered the terms of the CVA itself? The word "likely" is used in a variety of different ways. It does not necessarily mean that there is more than a 50% chance. It seems to mean, therefore, that the right test is whether there was a substantial chance that the creditors would not have approved the CVA in the form in which it was presented."

15. It is common ground that the provision of inadequate or inaccurate information in the Proposal document is capable of being a material irregularity (though whether it is or is not is obviously fact sensitive to each case). Insolvency Rule 2.3 (above) sets out what has to appear in the documentation, and the relevant provision is the last one, relating to "any other matter". Although that provision is framed in subjective terms, it is not entirely subjective in its operation. In *Lazari Properties 2 Ltd v New Look Retailers Ltd* [2021] EWHC 1209 (Ch) Zacaroli said:

> "300. Unsurprisingly, since CVAs and schemes of arrangement share in common the fact that creditors are invited to vote upon a compromise or arrangement affecting their rights, this overarching obligation is materially the same as that which exists in the scheme jurisdiction. In *Re Indah Kiat International Finance Co BV* [2016] EWHC 246 (Ch), for example, Snowden J said (at [41]):

16. So far as the quality of disclosure is concerned, in the same case Zacaroli J followed Snowden J in *Re Indah Kiat International Finance Co BV* [2016] EWHC 246 (Ch), in which the latter said (at paragraph 41):

> "It is well-established that the scheme company has a duty to place before members or creditors sufficient information for them to make a reasonable judgment as to whether the scheme is in their commercial interest or not."

17. The judge below set out the authorities in more detail, and none of that was challenged at this level. I have read and taken into account the wider references appearing there and have, where appropriate, borne them in mind and applied them.

The arrangement in this case and the voting

18. The arrangement was approved on 19th May 2022. The Proposal, containing the arrangement and other arrangement documentation in this case, is an extensive document running to 118 pages. However, the salient facts and features emerging from those documents for present purposes can be summarised as follows, for the most part avoiding actual quotation.

19. The Company provides construction and property management services to other companies within the Mizen Properties Group, two joint-venture parties and to housing associations across London and the south-east of England. A variety of factors has led to its facing serious financial difficulties and the purpose of the CVA is to enable it to keep trading as a going concern and to avoid the administration which, it is said, would otherwise be likely if not inevitable. The arrangement involves the establishment of a fund which, in aggregate, will amount to £396,000. That fund is to come from the Company or, in default, from its immediate holding company (Mizen Properties Ltd – "the Shareholder"). Certain creditors will be allowed to claim against that fund in lieu of their normal entitlement - at least that is apparently the intention. There is a difficulty about that (what I call a “quirk”) which I elaborate below.

20. The creditors are divided into various types:

(i) Critical Creditors are creditors whom the directors consider should be paid their full sums due because their services are regarded as essential to the operation of the Company's business going forward. They will be paid in full and will not share in the fund.

(ii) Retained Contract Critical Creditors, who are creditors with current and ongoing contracts with the Company which the Company intends to comply with and provide a full contractual package. One of those creditors is Peabody in relation to a particular contract which is not relevant to this appeal; another is a company known as Paragon, to which I will return.

(iii) Non-critical Creditors are, basically, other trade creditors. These creditors will have their contracts terminated, if otherwise ongoing, and will all have a right to share in the fund which is to be constituted.

(iv) Guarantee Creditors. These are creditors who have the benefit of a guarantee from the Shareholder in respect of their individual contracts. They include Peabody, and it is in that capacity that Peabody objects to the CVA. Under the arrangement these creditors will be obliged to give up their claims under the guarantee, in consideration for which they will have an entitlement to prove in the CVA in respect of an additional amount (that is to say additional to the amount of their contractual debt) which will vary from creditor to creditor according to the amount of their guarantee claims.

(v) Compromised Contingent Creditors. This means any contingent creditor, a contingent liability being very widely defined. These are all to have their liabilities compromised at £1, payable on demand.

21. The fund to be constituted (the Compromised Creditors Payment Fund, or "the Fund"), as referred to above, will be a fund in which the Non-Critical Creditors and the Guarantee creditors will be entitled to prove. As well as bearing the burden of those proofs, the Fund also has to bear the costs of the CVA, though it emerged at the hearing (and was probably not drawn to the attention of the judge below) that the Company is obliged to pay them and the Shareholder is to back that. The Fund is to be constituted by the Company making eight quarterly payments of £49,500, presumably funded out of the continuing trading which the CVA envisages. The arrangement provides that if the fund turns out to be insufficient to pay the Supervisors' costs, expenses and disbursements, including those in respect of any CVA challenge, then the fund will be topped up by the Company.

22. The CVA presents potential (and the Company would doubtless say likely) benefits to the Non-Critical Creditors as being that they will get at least something out of the arrangement as opposed to nothing in the event of an administration. An Estimated Outcome Statement shows that the likely effect of an administration would be nothing for any of the creditors, Critical and Non-Critical. The same document shows the effect of the CVA in terms of the assets (including the Fund) and the liabilities, and it projects a recovery for unsecured creditors of 1.3p in the £ (1.3%). The wording of the arrangement indicates that there will be a payment of "approximately 1.2% to 1.3%", while containing no promise that this will actually be payable. One would have thought that this is a mathematical extrapolation from the financial information given, but it turns out that this is not the case, a point to which I return below.

23. In addition the arrangement provides for, and seeks to justify, an additional payment to Guarantee Creditors, such as Peabody. This appears in an Estimated Outcome Statement in respect of the Shareholder ("the Shareholder EOS"). The hypothesis is that if the arrangement were not approved then the various guarantee liabilities in respect of guarantees given by the Shareholder would bring the Shareholder down and require an administration in that company as well. That would yield just 5.3% for the unsecured creditors (including Peabody). The guarantee amounts would not otherwise be recoverable. The explanatory wording of the arrangement documents proposes that the Guarantee Creditors should in effect give up their claims to the principal, and thereby their claims under the guarantee given by the Shareholder, and in lieu will receive 7.5% of their claims (or "approximately 7.5%" as the terms of the arrangement describe it). The apparent intention is that that too will come out of the Fund. If that is right then there is scope for variation in their respective end of day recoveries, depending on the state of the Fund and the other claims on it. I will have to return to the content of the arrangement documents, and in particular the EOS for the Shareholder, below.

24. When the arrangement was presented for voting it was passed by a large majority of those voting. Those voting for acceptance amounted (as calculated at the time) to £13,990,486, which was 88.28% of those voting. Those voting for rejection were £1.577.288, being 9.95%. A large part of that was Peabody, which was admitted for voting in the sum of £1,462,804. One other Guarantee Creditor, Newlon Housing Trust (debt £549,930) abstained. No other Guarantee Creditor voted against the arrangement. Paragon was admitted to vote in respect of its debt and voted For.

25. It has since transpired that the sum voting for the arrangement has been over-stated by some £3m, but there was still a 75% majority on the "correct" figures.

26. The arrangement also provides for a separate Fund called the Valley House Claim Fund, which is said to be a prospect if some litigation succeeds. That fund would, in certain events, be added to the moneys available for creditors, but nobody suggested that it had a material effect on any of the issues that now arise and I shall not consider it further save for the remark in the next paragraph.

27. The Shareholder was to give the guarantee of the funds required for the Fund, and a further £200,000 of working capital and fund the the Valley House Claim. In exchange for its obligations in this respect, the substantial debt (over £4m) which was owed by the Company to the Shareholder would remain on the balance sheet in full.

28. Particular mention needs to be made of one creditor, namely Paragon. That had a substantial ongoing contract, but was also a Guarantee Creditor in the sum of about £4.6m. The Proposal proposes that the Paragon contract be renegotiated, and is in effect dependent on that renegotiation succeeding. If that were to happen then Paragon would cease to be a Guarantee Creditor. Its debt would fall to be taken out of the £11.6m provided for in the Shareholder EOS. This point arises at various stages in the argument below.

29. Thus the arrangement was approved by the required majority. Peabody then mounted its present application. Newlon Housing Trust, having abstained, also mounted an application challenging the arrangement. Judge Prentis rejected that latter application and there is no appeal from that. He found, for reasons to which I shall now come, that Peabody's objection succeeded. Hence this appeal.

A quirk in the arrangement

30. There is one material oddity in the terms of the arrangement which does not seem to have come to the attention of anyone until I raised it on the appeal (unless it is the matter referred to obliquely in paragraph 138 of the judgment, which seems to me to be unlikely because in that event Mr Weaver would have had a quicker answer to the point than he was able to give to me).

31. The point is this. The arrangement clearly presupposes that all proving creditors will be paid out of the Fund which is to be constituted for that purpose. The Company's EOS has a column showing assets and liabilities and has a bottom line figure of a projected outcome for proving creditors of 1.3% (1.3p in the £). However, one cannot work out from the figures given how that figure is arrived at if it is supposed to be derived from the figures in the documents. Apart from anything else, the figures for liabilities include the liabilities of non-proving creditors and there is no way of working out which of the amounts were to be provable. So the 1.3% figure is a figure

which is not justified on the basis of the other figures. Nonetheless it is described as "Estimated Recovery to Unsecured Creditors".

32. Then one comes to the provisions of the Arrangement which relate to the Guarantee Creditors. Clause 22.4 says that the amount payable to the Guarantee Creditors "shall be approximately 7.5%" of their Allowed Claims and clause 22.6 says that that will be payable out of the Fund. One assumes that they are to prove in the Fund along with the other Non-Critical Creditors, and the intention seems to have been that they would be able to prove as Non-Critical Creditors for their 1.3% and then additionally prove as Guarantee Creditors so as get another 7.5%.

33. There are a couple of apparent problems with that. The first is that the arrangement does not seem to contain a mechanism for allowing the Guarantee Creditors to prove twice into the same fund so as to be allowed different amounts on their two claims. The second is that at first (and second) sight the maths do not seem to work. If the 1.3% figure is intended to be what one gets to by taking the fund and dividing it by the total of Non-Critical Creditors, which will include the Guarantee Creditors on their principal debt for these purposes, to get the "Estimated Recovery to Unsecured Creditors" then the fund will be completely exhausted in achieving that leaving nothing left for the Guarantee Creditors' extra amount for being deprived of their guarantees (their 7.5%).

34. When I put this to the parties at the hearing they had no answer at the time, which suggests, quite remarkably, that this had not occurred to anyone before. Mr Weaver took instructions over the lunch adjournment and was able to volunteer a sort of explanation which amounted to some reverse engineering and was not complete. He was not able to show me some proving or other mechanism which explained how this was to work, or how the sums would emerge from the process. Instead he explained that if one takes the non-critical defendants at £2.062m and assumes they get 1.3p in the £, that requires £27,000 to come out of the Fund. That leaves just under £370,000 to cover the Guarantee Creditors' claims, treating them as being £7m and not the 11.6m appearing in the Shareholder EOS . The reduction from £11.6m to £7m is because if the CVA is effective, then the Paragon guarantee debt falls out of the equation because they would no longer have a claim under the guarantee (their contract would continue without a provable guarantee liability). That would give each Guarantee Creditor £5.29p in the £. That £5.29p is almost the equivalent of the vertical comparator - the deemed administration return in the Shareholder EOS (5.3%).

35. Mr Weaver admitted that there is one problem with that analysis, which is that if that is an explanation of how it was envisaged the fund would be divided up, it does not work in accordance with the intention if the intention was to give the Guarantee Creditors the Shareholder EOS equivalent (5.3%) and their CVA basic entitlement (1.3%) because there is not enough money. The fund would be some £91,000 short. He proposed that in order to fix this the Company would agree to pay in that additional sum and vary the CVA accordingly. The Shareholder's guarantee would also be varied to cover the necessary sum.

36. To my eyes there is an additional problem with the calculation involved. What would be required would be sufficient to pay the Guarantee Creditors 1.3% plus 7.5% (ignoring the "approximately"), not plus 5.3%. So more than £91,000 would presumably be required. However, to be fair to Mr Weaver, after the end of the hearing the company produced a proposed amendment which would require the Company to produce enough money to give the Guarantee Creditors 1.3% plus 7.5%. I have not received any submissions on that proposal, and in any event it would seem to be rendered otiose by my decision to dismiss the appeal as appears below.

The findings of the judge below

37. After some introductory and procedural matters Judge Prentis embarked on a consideration of the law. It was not suggested that he got any of the law wrong. The complaint in this case is about how he applied it. Then he set out various terms of the arrangement documentation. Again, nothing turns on what he set out there. It is when he turned to the questions before him - material irregularity and unfair prejudice as alleged by Newlon and Peabody - that the judgment incurs the criticism of Mr Weaver. The criticism is in relation to the findings in favour of Peabody - the judge dismissed Newlon's separate case. He also found against Peabody on certain of its material irregularity arguments which I need not deal with.

38. So far as surviving material irregularity claims were concerned, the judge recorded that the effective case against the CVA focused on 2 aspects of the Shareholder EOS - the assets and the liabilities. He dismissed a case based on the administration costs shown there (see paragraph 120).

39. The judge dealt first with the asset disclosure complaints. In paragraphs 119ff of his judgment the judge sets out the factors relating to this, which can be summarised (so far as relevant to the appeal, and ignoring matters which he did not take into account) as follows:

40. There was no full disclosure of the Shareholder's financial position. Although the Company had put in the EOS of the Shareholder, that was merely a snapshot as at its date (22nd April 2022) from which (it was alleged) one could not ascertain what its financial position was. To ascertain that position one would need a balance sheet, profit and loss account, list of creditors and perhaps a cashflow forecast.

41. It was discovered before the meeting that (as it was then thought) in early March the Shareholder had disposed of its interest in another subsidiary (Mizen Build Ltd) to a connected party. This was not referred to anywhere in the proposal. Questions about that were "batted away" at the arrangement approval meeting on the footing that there were, as far as the Company was concerned, no other Shareholder deals and the company had to rely on information provided by the parent; the questions would have

involved "delving into the parents' sensitive commercial information". Paragraph 122 records:

> "That was not a full and open disclosure of the position of the Shareholder's position [sic]"

Although this paragraph seems to start by recording matters relating to matters which were Peabody's concerns, it is a fair reading of the paragraph to assume that the judge agreed with Peabody.

42. On 25th May, after the Proposal had passed, Mr Tansey, who was a director of both the Company and the Shareholder, wrote in the latter capacity to explain that the disposal of Mizen Build had been on 1st February 2022 and as at 31st January 2022 the management accounts showed it had a net value of £914,664. The Shareholder had received a total of £912,550 in respect of its interest. When cross-examined in these proceedings, Mr Tansey had been unable to say how the consideration had been paid, and whether, for example it was set off against other debts. He thought at least some would have been paid by dividends declared by the Shareholder.

43. The judge found that it was significant that there had been a disposal by the Shareholder of a significant asset, shortly before the Proposal was first circulated. He concluded:

> "126. It is important to recognise in this case that the Shareholder's guaranteed liabilities are being compromised not by its own CVA or

> scheme, but by the Company's. It follows that there are no direct obligations of disclosure on it, and actually its disclosure has been limited to this Estimated Outcome Statement. If it needed it, the lack of disclosure can be proved by considering that the Proposal was one that was put to the Shareholder as well as to the Company's creditors. It is the Company which was providing the information and providing it to the Shareholder in respect of, amongst other things, the guarantee which the Shareholder owed to the various Guarantee Creditors. Whatever, even the Company's obligation was to provide full and frank disclosure of all matters appropriate to enable its Creditors, including the class of Guaranteed Creditors, to reach an informed decision. There is no good reason why, given the release of the Guaranteed Creditors, the disclosure as to the Shareholder ought not to have been the equivalent of a CVA or a scheme had the Shareholder proposed one.
>
> 127. Even if that is too stringent a test, it is impossible to think that any Creditor would have renegotiated a position as to the guarantee based upon the Estimated Outcome Statement alone. No reasonable Creditor would do that. It would seek just the sort of information as to the Company's trading history and forecast which has already been described. That disclosure is disclosure which, it seems to me, falls within rule 2.3(1). Specified in that rule is the obligation on the Company making the proposal to confirm its awareness of circumstances which might give rise to claims under sections 238, 239, 244 and 245. There is no equivalent statement from the Shareholder's directors as to whether that would apply to it, notwithstanding that on this hypothesis the Shareholder is entering administration and the administrators would therefore make investigations into just those sorts of matters.
>
> 128. What we have then, even by itself, is a transaction which requires an explanation and a transaction which would be dealt with explicitly were this the Shareholder's own arrangement."

44. He went on to make some more findings about this, derived from cross-examination of Mr Tansey, the common director, from which he concluded that:

> " … there may well be other transactions which would have to be considered by way of disclosure under [rule] 2.3 or otherwise just under fair disclosure." (paragraph 129)

45. He observed that it was not apparent where, if anywhere, the proceeds of the Mizen Build disposal appeared in the Shareholder's EOS, or what had happened to the money.

46. Paragraph 130 contains his important conclusion:

> "Even stopping there, this was a manifest irregularity as to the disclosure necessary to this arrangement. Further, it was material to the Guaranteed Creditors whose debts were being released because they were not being given full information as to what their position was, because there were indications of prior dealings and therefore the possibility of value and therefore the possibility of their claim being more, and because anyway there would be a generation of enquiries by those who were just to receive pence in the pound in respect of this debt from a different entity and the circumstances in which it was incurred. "

47. Then the judge turned to the attack based on liabilities as disclosed in the Shareholder EOS. At paragraphs 131 and 132 Judge Prentis made observations about the inadequacy of information as to who the Guarantee Creditors were. There was a Schedule (Schedule 14) in the documentation which described itself a List of Guaranteed Contracts (some 25 of them), but insofar as it was intended to be a statement of the Guarantee Creditors it was inaccurate because it contained two entities including Newlon which had no guarantee and another which seemed to be double-counted.

> "132. Making the obvious connection between this Schedule 14 and the contingent legal claims in the Shareholder's Estimated Outcome

> Statement, it follows that no creditor, as Mr. Mace said, would be in a position to determine the value of the Guaranteed Creditor claims. In fact, that was so anyway. The £11.6 million odd figure is entirely unexplained. Schedule 14 has the grand total of £25, £1 for each of those creditors named within it."

48. Treating the Guarantee Creditors as a class, he said:

> " It seems to me that the class is entitled to a full explanation as to how that figure was arrived at, and who was within it. Again, this by itself constitutes a material irregularity."

49. Then he turns to unfair prejudice and makes observations on the figure of £11.6m which was said to be a "prudent and conservative" figure and observed:

> " 135. One can see, just from that, the sort of questions that might have been asked by creditors had they been told the make-up. The £4.6 million Paragon debt was the very debt that the Proposal said was going to be renegotiated to put the Company into a positive position on the contract, in other words, it was going to come out. If we deduct the £4.6 million from the Estimated Outcome Statement then the outcome, leaving all the other figures in place, actually comes out at a tad over 7.5p. It follows on its face, and turning now to unfair prejudice, that the vertical comparator of 5.3p is at the least very doubtful."

50. The reference to Paragon was, as appears from that extract, a reference to the contract which it was hoped would be renegotiated.

51. At paragraph 136 he refers back to *Re New Look Retailers* and says that the Guarantee Creditor class was not ever likely to be large enough itself to affect the vote. At paragraph 137 he refers to "the fair allocation of assets" point and observes that the

Shareholder was contributing for all the creditors and not just the Guarantee Creditors, and the 5.3p estimated outcome in its EOS was not an assured return. The only fund bearing the guaranteed claims was the Fund, which was itself subject to deductions for Supervisors' fees and legal challenges, which might "feasibly" reduce it to zero.

52. He then leads up to his conclusion on unfair prejudice:

> "139. On the nature and extent of different treatment and impact, the impact of outvoting the Guarantee Creditors and the removal of their rights was obviously severe. As to the different treatment, the Guarantee Creditors were losing their contractual rights in a situation where little disclosure was given as to their value and where even if this were to be a negotiation between reasonable businessmen, that would be on the basis of significantly more information than had been provided. The Guarantee Creditors were instead sharing the Fund with certain creditors of the Company, who had had the benefit of the disclosures in the Proposal as to the Company's position; and from which the costs were to be deducted without, as I say, any assurance that their return would even equal that indicated by the Shareholder Estimated Outcome Statement. That was at a time when Critical Creditors, who themselves were pre-proposal creditors for £800,000, were to be paid in full, utilising the benefit of moneys from the Shareholder to support the Company's trade.
>
> 140. The justification point is that it was necessary to compromise the Guaranteed Creditors to prevent the Ricochet Claims, and thereby to prevent the Company from going down. As Mr. Weaver says, I must, and I do, accept that a compromise was necessary, but that does not, without more, justify the relative impact or the lack of votes as a separate class, or the lack of information, or indeed the compromise of the Guaranteed Creditors in this way.
>
> 141. Again by way of addition, what is interesting about the Paragon information which has come out, in other words the information that Paragon is within the £11.6 million of creditors in the Shareholder's EOS, is that if provided earlier it could have been related back to the

> negotiations with Paragon which are adverted to in the Proposal. Therefore, one alternative would have been for the compromise of Guarantee Creditors either to take account of a revised Paragon figure, or to be entered into only after the deal with Paragon, a necessary hypothesis of the CVA to be viable, had been done.
>
> 142. As to the approval by others of the same class point, there was one other voter who had a guarantee. Actually, they voted in favour of the proposal. They were Mizen Nether Street Limited. They were therefore a connected creditor and they were owed just £6,564.
>
> 143. Finally, this result could not have been approved by a Part 26A plan on this evidence. It does not begin to align with the evidence that one would have on such a claim
>
> 144. It follows, in my judgment, that there is clear unfair prejudice to Peabody in the approval of the CVA."

53. He then made some "side observations", including:

> "146. Insolvency of the Shareholder is a necessary hypothesis. But the actuality is that through the compromise of the guarantee claims, the Shareholder was not to enter insolvency. The guarantees were instead to be settled via the third party company. I think the Guarantee Creditors would be interested and entitled to know how the Shareholder would have settled the claims otherwise."

He went on to reject an unfair prejudice claim made by Newlon.

54. Those are his detailed findings. Penetrating them in order to get to their essentials, the essence of his findings seem to be as follows. First, the material irregularity decision against the CVA was based on the following:

(a) There ought to have been more disclosure of matters relevant to the deemed administration of the Shareholder in the EOS. There ought to have been the same level of disclosure as would be appropriate in a CVA of the Shareholder, which would have required disclosure of the possibility of challenge to antecedent transactions. This was particularly the case in the light of the prior sale of a subsidiary, the consideration for which was not at all apparent from the information that was disclosed.

(b) There ought to have been a full explanation of how the class said to make up the guarantee claims in the EOS of the Shareholder was made up - who was in it, and how the figure was arrived at. That disclosure was missing and that too was a material irregularity.

55. The unfair prejudice claim was based on:

(a) The vertical comparator claim arising out the Shareholder EOS was doubtful, because a better view of the guarantee liabilities was that they should be lower with the resulting figure being 7.5p, not 5.3p (paragraph 135).

(b) The judge's assessment that the Guarantee Creditors suffered unfairly because they had to share an overall fund within the Company (not the Shareholder) and were losing their guarantee rights on the basis of a different (worse) quality of information (about their original source - the Shareholder) than that which the other creditors had from theirs (the Company), coupled with further detriment from the possibility of excessive Supervisor costs (paragraphs 139 and 140).

(c) If the information about the Paragon contract had been provided earlier, then the Paragon guaranteed debt could have been taken out of the equation. I confess it is not clear to me how this reasoning works or is significant.

(d) The CVA compromise could not have been achieved within a Part 26A plan.

Post-judgment events

56. In his judgment Judge Prentis indicated that there might be other antecedent transactions requiring investigation in the Shareholder, apart from the Mizen Build transaction. It subsequently turned out that there was indeed at least one other transaction which Mr Mace submitted fell within that category, and it has been made the subject of a respondent's notice and an application to admit further evidence which I allowed (and which Mr Weaver did not oppose).

57. It was apparent from the Proposal that the Shareholder had not filed accounts since 24th December 2021, when it filed accounts for the y/e 31st December 2020. Its accounts for the year ended 31st December 2021 were ready for filing, according to evidence given by the common director Mr Tansey, but they were not filed because of what he described as the uncertainty of the situation. They were not produced as unfiled accounts for the purposes of the challenge to the CVA. Mr Tansey explained that these accounts were not signed off earlier because of the "uncertainty" of the position.

58. The accounts of the Shareholder for the y/e 31st December 2021 were finally signed off on 20th January 2023, which was the last day of the hearing before Judge Prentis but before he delivered his judgment. (I observe it is not apparent what uncertainty

had been resolved by then so as to justify the signing off of accounts which were previously not signed, but that matter was not investigated.) They were apparently filed 7 days later and, a little oddly bearing in mind when they were signed off, they were signed off on an apparent going concern basis. Thus they came into the hands of Peabody, but only after the trial. When they were seen they showed that the company had paid a dividend in that year of just over £1.9m. That was completely unknown to Peabody, and presumably to all non-connected creditors in the CVL (it was not suggested to me that the information was known). The payment is now said to give rise to an obvious disclosure requirement in relation to the EOS of the Shareholder. The dividend was, of itself, a transaction at an undervalue, and in favour of a connected person. The date of its payment is not known, but it is known that from the summer of that year the Company, and presumably the group, had been concerned about the financial position and were talking to the Supervisors' firm about it. No dividend had been declared in the previous year. The failure to disclose this situation is relied on by Mr Mace in support of his maintaining of the material irregularity finding.

The challenge to the material irregularity finding

59. Mr Weaver criticised this finding on two bases - first, the irregularity identified by the judge was not an irregularity and he erred in finding that it was; and second, even if it was, the judge applied the wrong test for materiality.

60. So far as the first element is concerned, Mr Weaver pointed out that nothing in the legislation required disclosure of antecedent transactions in relation to a third party. What was required was that the creditors be given sufficient information to indicate to them (in this case) the likely impact of rejection of the CVA, and in this case it included likely insolvency procedures in the Shareholder with the outcome predicted. That did not require the disclosure of information about potentially challengeable antecedent transactions in that company, as to which there was no real evidence anyway. If one is looking at the Insolvency Act 1986 section 238 (the most likely candidate for any claim) then there was no evidence of insolvency (see section 240) and, in the case of the disposal of the subsidiary, no evidence of undervalue. Nor was there any evidence of what would actually be recoverable, or of the prospects of success. It was necessary for a challenger on this basis not merely to cast aspersions from the sidelines; it was necessary for them enter into the fray and actually produce evidence of a good case for a challenge of the antecedent transactions (see Snowden LJ in *Smile Telecoms Holdings Ltd* [2022] EWHC 740 (Ch) at paragraph 53). On the facts of this case the failure to refer to the possibility of a challenge to antecedent transactions was not an irregularity.

61. Similarly, the absence of an explanation of the make-up of the £11.6m guarantee figure, whether in terms of a failure to identify the beneficiaries of the guarantees or otherwise, was not an irregularity. The figures for guarantees were apparent from the documentation and were arrived at after a bona fide conservative assessment by the Company. It was not an irregularity to fail to provide more. The Guarantee Creditors (who would be the only ones concerned with such matters) had what they needed to

know in order to consider how to vote on the CVA. What matters is whether the £11.6m was accurate, and there was no evidence to suggest that it was not.

62. So far as materiality was concerned, Mr Weaver's point was a short one. If there was any irregularity, and if it was otherwise of significance, it was still not material because it would have made no difference to the availability of a 75% majority supporting the scheme. Materiality arises, in this context, only if it would have made a difference to the voting sufficient to upset the 75% majority. Any information about antecedent transactions in the Shareholder would have been of no relevance to the Critical Creditors who were not also Guarantee Creditors, and they would still have supported the Scheme. Of the Guarantee Creditors (as they were identified at the hearing), NHBC abstained and there is no evidence, or reason to suppose, that it would have voted differently. Paragon would not have voted against the arrangement (they were hoping to get their re-negotiated contract out of it) and there is no reason to suppose that the other £1.6m of Guarantee Creditors (whoever they were) would have voted against with Peabody. Without any voting support from those quarters there would still have been at least a 75% majority in favour of the arrangement, so any irregularity would not have been material within the test suggested in the authorities

63. Mr Mace supported the analysis and conclusion of the judge. He submitted that the Shareholder EOS was presented as giving a proper picture of the position of the Shareholder in certain events (an administration), but it failed to give that picture. A major purpose of the CVA was to relieve the Shareholder of the burden of the guarantees and in those circumstances it behoved the Company to put in a fuller

picture of the possible outcome of an administration of the Shareholder, including some information about antecedent transactions which were vulnerable to at least investigation if not attack. That would have been of key interest to the Guarantee Creditors. In particular, information about the dividend of almost £2m in the year in which the group started to investigate its solvency position would be an obvious target, and recovery of that sum in an administration would have materially swelled the dividend available in the (deemed) administration, a piece of information of obvious significance because it would very materially increase the likely outcome for unsecured creditors, potentially threefold He supported the decision of the judge in this area.

64. So far as the liabilities were concerned, the judge's decision was equally supportable. There was no transparency as to the make-up of the Guarantee Creditors, either in terms of identity or amounts. He submitted it was clear that the Guarantee Creditors had been over-stated in the Shareholder EOS - the figure should not have included £4.6m attributable to Paragon (because the CVA depended on Paragon renegotiating the contract, which would have taken them out of the Guarantee Creditors class) and there was an overstatement of £1.6m of the Guarantee Creditors which, the judge found, were not Company Creditors but were moneys owed elsewhere. This meant that the indemnity claims of the Shareholder in respect of guarantee claims would not be made against the Company in respect of those claims.

Conclusions on material irregularity

65. I consider that the judge below was right on this issue. In coming to this conclusion I consider not only the material he considered and other material before him, but also the additional material about the dividend which only came to light after his decision and as to which I admitted the further evidence.

66. Although neither counsel addressed me on the point, I consider that I should approach this appeal on the footing that it is an appeal from findings that are ultimately evaluative findings (material irregularity and unfair prejudice), and thus impeachable only on the basis of an error of law, omission of relevant facts, a failure to take into account relevant matters or perversity.

67. The irregularity is the failure to advert at all to potential challenges to antecedent transactions in the Shareholder EOS. The obligation on the Company under Insolvency Rule 2.3 is set out above, together with the case law which provides for the objective standard of "sufficient information for [creditors] to make a reasonable judgment as to whether the scheme is in their commercial interest or not". The judge below set out this test in paragraph 17 of his judgment and held that the CVA fell short for want of disclosure of assets (the antecedent transaction point) and liabilities in the Shareholder EOS.

68. I will deal with the assets point first. I do not consider that Mr Weaver's criticisms are ultimately well founded, particularly in the light of matters revealed subsequently. He may have a point when he says that the judge erred in saying that the Company

ought to have provided all the information about the Shareholder which would have been necessary had the Shareholder been providing its own CVA (see paragraph 126). That is probably going a little too far - one would not have expected absolutely everything in Rule 2.3 to be provided because much of it would be unnecessary. However, the judge had his fallback position in paragraph 127, and I consider that reasoning cannot be impeached, and indeed (if it mattered) I would say that I would have reached the same decision. The EOS ought to have disclosed, to an appropriate extent, matters which might give rise to an antecedent transaction challenge under section 238 of the Act.

69. That is because the possibility (if there is a real one) of such a claim impinges on the EOS which in turn impinges on the decisions of Guarantee Creditors. The holding out of the 7.5% claim to Guarantee Creditors (ignoring for the moment difficulties posed by the "quirk") was obviously intended to present to them a better prospect than the 5.3% bottom line in the deemed administration. It is obvious that if there is a prospect which materially increases the assets then that will increase the notional sum available to creditors in a CVA and thus the bottom line comparator in this case (the 5.3p appearing as the likely return in a CVA). If that number is increased a creditor would be likely to expect an appropriately increased return in the CVA of the Company in which the whole basis of the approach of the Proposal is to give the Guarantee Creditors the equivalent or better. Of course, if the amount of an increase is slight, and/or the prospects of success are not at all clear, then a Guarantee Creditor might not seek to oppose the CVA in the hope of a greater return elsewhere, but that is for the creditor to decide. In order to do that the creditor needs information. That is why the information is, of its nature, potentially significant.

70. In the present case the prospects of a claim are not so fanciful as to justify a view that the claim or claims need not be referred to. The judge did not quite say so in terms, but he must have thought that the claim to which he referred (based on the sale of the subsidiary) was sufficiently significant to require it to be brought to the attention of the Guarantee Creditors. That was a view he was entitled to reach, and it is no answer to say that it is unnecessary to do a full CVA disclosure exercise in relation to the Shareholder. It is some of the information which would need to be disclosed in such an exercise, but in the present case its disclosure is necessary not because it would be technically disclosable in a real CVA of the Shareholder, but because, on the facts, the matter is potentially significant to a voting Guarantee Creditor in the CVA of the Company.

71. However, even if there are doubts as to whether the particular disposal transaction alone was sufficient to require disclosure, the judge had in mind the possibility of other transactions, none of which were identified. It is not surprising they were not identified because Peabody had no real material to go on, and is not to be blamed for that. I have referred above to the non-filing of accounts by the Shareholder until after the date of the hearing (and of the judgment, as I understand it). The decision not to sign and file was apparently deliberate. Without it, it is not apparent how Peabody (or any other non-connected Guarantee Creditor) can have known any detail about anything relevant. Evidence given at the hearing suggests that the Company would not have been particularly forthcoming if a question about dividends had been raised, and in any event it is not apparent that Peabody can have known to ask such a specific

question. It turns out that the dividend point would have been financially significant in that if the dividend were recovered it would have trebled the amount available to unsecured creditors in the notional CVA of the Shareholder, and thus trebled the notional dividend of 5.3p. That prospect seems to me to be of obvious interest to the Guarantee Creditors.

72. Of course, it would not be necessary to disclose the matter as being a nailed-on recovery prospect. There might be an answer to a claim to recover the dividend. However, the presentation of the Shareholder EOS as a statement of the likely recovery in an administration required that this possible asset be at least referred to if it were not included in the actual calculation. The EOS was presented as being an estimate that could be relied on as demonstrating the likelihood of recoveries in an administration. The EOS was described in two ways in the Proposal. In the Summary it was said:

> "The Shareholder Estimated Outcome Scenario which appears at Part 2 of Schedule 3 demonstrates that in the event of the insolvency of the Shareholder, the County Creditors would not receive more than 5.3% ... by way of a dividend on their unsecured claims against the Shareholder."

73. In the explanatory notes at paragraph 7.6(b) it is said:

> "The estimated outcome statement in relation to the Shareholder which is set out at Part 2 of Schedule 3 demonstrates that in [the insolvency] scenario, the return to the unsecured creditors of the Shareholder would be 5.3%…"

The EOS was thus presented as being a realistic picture of an administration on which the Guarantee Creditors should rely in giving up their guarantee rights and in assessing their proposed rights in the CVA. If there were decently arguable claims that might swell the assets materially, there ought to have been some disclosure of them because the Guarantee Creditors might well be interested in them if there was a chance of swelling the bottom line dividend figure materially. I would add that if it were known that the particular transaction were a dividend paid in the year in which insolvency discussions were started, and where no dividend had been paid in the previous year, the decision of a given Guarantee Creditor might have been affected by a certain amount of commercial indignation, but that would be rather subjective and is not measurable for present purposes.

74. Mr Weaver did not say that there need never be disclosure of a potentially impeachable antecedent transaction, but he did say that in a case like the present, where it is said that there ought to have been some additional disclosure, that needed to be backed up with some evidence about the claim, and he said in the present case there was none. In particular, he said there was no evidence that insolvency, which was a requirement of a claim under section 238, could be made out. As to that, there are two answers. The first is that in a case like this the applicant is not likely to have the sort of hard evidence which his submission requires. It is the Company (and the Shareholder) that has this information (it must be remembered that there was at least one common director), and it is not apparent how Peabody could get it, especially in the light of the deliberate withholding of filed accounts. One has to measure the absence of evidence against the possibility of getting some more. A challenger in a case such as this is not entitled to indulge in speculation, but it is not to be criticized

as not providing evidence when the evidence lies with the other side and the challenger does not have the ability to obtain evidence to the standard proposed by Mr Weaver. That is not to say that the challenger can rely on mere speculation. A challenge will require some evidence, but one must be fair in viewing the reasons for the lack of any detailed supporting evidence. In the present case it would not be right to hold that the challenge fails for want of evidence. `

75. In this context it is pertinent to point out that the Company did not exactly demonstrate that it was willing to be forthcoming with assistance if it were asked. It is apparent from notes of the arrangement meeting that questions were asked about potentially challengeable antecedent transactions in the shareholder. Someone asked if there were "other shareholder transactions" (ie other than the Mizen Build Ltd disposal) to which a solicitor (not a director) responded:

> "As far as we are aware, no. Have seen nothing in the accounts."

When Mr Tansey (the common director) was asked about this in cross-examination he said:

> "My recollection of that meeting – and obviously it was a very important one, very dramatic – is that I think our solicitor present at the meeting answered to that particular question that the shareholder was not in a CVA so that the question was in some respects inappropriate.
>
> Q. You accept the question had been raised?

> A. The question was raised and I think the answer was given that it was inappropriate."

76. This somewhat unsatisfactory response does not suggest that material would have been forthcoming from the Company if inquiries had been made. It is not known to what accounts the solicitor was referring, bearing in mind that the statutory accounts had not been signed off at that stage.

77. The second is that in circumstances in which insolvency is prayed in aid in the manner in which it has been prayed in aid in this case, there are good grounds for supposing that the Shareholder was insolvent in 2021, and in any event Peabody could point to the presumption of insolvency in section 240(2), which is a good start.

78. Accordingly, I do not think that Mr Weaver's submissions as to lack of evidence succeed.

79. My conclusion thus far is therefore disclosure of at least the dividend transaction and the Mizen Build transaction would have been relevant and significant. However, that does not matter if it would not have been material, and the test for materiality here is whether it would have affected the voting. This was not considered by the judge, and I agree that it ought to have been - see the authorities which say that generally an irregularity will not be material if a regularised version would not have affected the production of a majority vote.

80. However, in my view that should not lead to the appeal simply being allowed on this point without more, allowing the CVA to stand. If I thought that this was an issue which needed to be addressed by the judge I would probably have to remit it to him for further consideration. However, no-one suggested that that ought to happen, and both sides addressed me on the footing that the answer (or their respective versions of it) was clear enough on this appeal.

81. Mr Weaver's submission was that it was apparent that disclosure of the potential antecedent transaction claims would not have materially affected the production of the relevant majority. He accepted (obviously) that Peabody would still have voted against the arrangement, but said there was no evidence anyone else would. Although the judgment is a bit inconsistent as to who the Guarantee Creditors actually were, it appears now that they can be seen to be the following:

(a) Peabody, who had a claim admitted (in round terms) for 1.4m.

(b) NHBC, with a claim for £4m. It abstained in the vote.

(c) Paragon, with a claim for £4.6m. It voted for the arrangement, doubtless because it had an interest in getting a revised contract if the arrangement was approved.

(d) Other creditors with claims of £1.6m.

82. Those claims were said to make up the £11.6m figure for creditors with guarantee claims in the Shareholder EOS, though the judgment is somewhat equivocal in that, whilst it seems to accept that in paragraph 135, it does also suggest that these creditors

included a list set out in Schedule 14 which is not easy to square with it. However, for the purposes of this calculation the parties seemed to work from the breakdown that I have just given.

83. Given that breakdown, and on the maths, Peabody would have to get either NHBC or Paragon onside in order to vote down the arrangement. It is not clear whether getting the totality of the £1.6m other creditors on board would have been enough, but the likelihood of getting them all on board is probably sufficiently remote that they can be put on one side. It can be clearly seen to be unlikely that Paragon would change its vote, so one has to assess whether NHBC would have come off the fence and voted against. Otherwise the disclosure will have made no difference to the voting pattern.

84. As Mr Weaver correctly pointed out, there was no evidence that NHBC would have voted against, or that it was even asked what its position would be had there been proper disclosure. In fact if it had been asked, for the purposes of the proceedings, it would have been asked the question on the wrong premise. It would have been asked whether its vote would have been different if the Mizen Build transaction had been disclosed. The answer to that question may be less clear. However, I have to consider the question of whether its vote might have been different (considered to the appropriate standard, which does not require the balance of probabilities - see above) if both the dividend and the Mizen Build transaction had been disclosed (I am assuming for these purposes that disclosing plausible antecedent transactions would not require the disclosure of anything else). I consider that NHBC's attitude might well have been different because of the nature of the putative claim (the reclaiming of a dividend paid in an insolvency year) and the amounts involved. As I have pointed

out, recovery of the total dividend could potentially treble the estimated outcome in the deemed CVA of the Shareholder, and thus provide a much higher bottom line which the CVA would have to provide to match or beat. I consider that the standard for establishing that the irregularity was material has been met.

85. It follows that I agree that the judge was right to hold that there was a material non-disclosure, but not entirely for the reasons that he gave (partly because my decision is based on matters which only became apparent after his hearing). It is true that the question of the effect of proper disclosure on the (deemed) voting was not formally raised in the respondent's notice, but the point was argued on the basis of the existing material and I consider no injustice arises from that.

86. That conclusion is sufficient by itself to justify dismissing the appeal. The CVA cannot stand in the face of that particular material irregularity. That conclusion makes it strictly unnecessary to consider the other immaterial irregularity finding (because one is enough), or the unfair prejudice point. However, out of respect for the very capable arguments of the parties, mounted at speed in an expedited appeal, I will express short views on them.

87. The other irregularity finding was based on a failure to provide any information about the Guarantor Creditors, or perhaps information which turned out to be confusing until a clearer picture emerged at the trial. My short conclusion on that is that I do not see why a failure to show who was in the class, and how it was made up, was an

irregularity at all, on the facts of this case. It was not clear to me why a detailed list of those creditors would have made a difference to anyone, or that anyone's voting (which for these purposes must be NHBC if sufficient votes are to be moved) would have been affected by it. I consider that there is an insufficient logical underpinning to this allegation.

88. Mr Mace had an associated complaint about the inclusion of Paragon's debt as one of the Guarantee Creditor debts. He raised the point under this head and it returned under the unfair prejudice claim. I will deal with it under the latter head.

Additional conclusions on the quirk as to the adequacy of funds

89. If I had decided otherwise in relation to the material irregularity that I have found above I would have had to consider what to do about the additional "quirk" that emerged in the course of the hearing before me. Although no one had spotted the problem before, it might have been thought to be odd that the arrangement should continue in such an unsatisfactory form. It would seem to be at least arguable that the failure of the wording of the arrangement to live up to the indications given as to its effect, or to provide a proper mechanism for achieving it, and then to provide for inadequate funding to achieve the objective, would be a material irregularity. Mr Weaver's proposed amendments might have fixed most of the problems in a practical way (not least because at first sight they seem to shift the calculation from one which proves into a fund to some sort of guarantee that the proposed returns will be paid) but

whether they actually do has not been debated. I have not received submissions on the consequences of the appearance of the quirk and Mr Weaver's proposed steps for dealing with it, and my finding on material irregularity probably makes it irrelevant. I will therefore say no more about it in this judgment

Conclusions on unfair prejudice

90. If it had mattered, I would have found it difficult to sustain all the judge's reasoning on unfair prejudice because his logic is not always justifiable or correct. The following points arise:

(i) His apparent determination that the EOS creditors were over-stated by the inclusion of the Paragon debt (much emphasised by Mr Mace) seems to me, with respect, to be misplaced. He relied on the fact that under the CVA Paragon would, when its contract was renegotiated, no longer be a Guarantee Creditor (paragraph 135). That is true as a fact, but it does not affect the Shareholder EOS. The Shareholder EOS was intended to show what would happen <u>without</u> a CVA in the company, in which event Paragon <u>would</u> be a Guarantee Creditor. It was therefore appropriately included.

(ii) His somewhat condensed reasoning in paragraph 137 takes a little unpacking, but it seems to be that the Shareholder EOS would have provided 5.3p in the pound, and the thesis of the arrangement is that that is replaced by a similar claim in the CVA. However, that sum had to be found out of the Fund, and the Fund was subject to potential additional deductions for Supervisor's costs and disbursements if they exceeded the predicted level, so the amount intended to compensate for the loss of a right to have 5.3p in the £ was potentially eroded for the benefit of all the proving creditors in the CVA. Unfortunately this point

overlooks the terms of the Arrangement and guarantee of the Shareholder. Clause 27 of the arrangement deals with payments to be made by the Company. Clause 27.2 promises the payment of the £396,000. Clause 27.4 provides that, in addition, the Company will pay the Supervisors' costs and expenses. The guarantee to be given by the Shareholder guarantees this additional sum. So the fund is not to be subject to the depradations of CVA costs, unless the Company and the Shareholder both default on their obligations in this respect. That rather undermines the unfair prejudice finding.

(iii) It is not clear what interesting information about the Paragon arrangements the judge is referring to in paragraph 141. It was always known that the Paragon contract was to be re-negotiated if the CVA was to work, and thus that it would be taken out of the Guarantee Creditor class in that event. The fact that its debt appeared in the Shareholder EOS is a correct approach in that context.

(iv) It is not relevant that the result would not have been approved in a Part 26A plan.

However, none of this matters in the light of my determination on material irregularity.

Conclusions

91. It follows that this appeal falls to be dismissed. I will hear submissions from counsel as to the appropriate order to be made in the light of that and in the present circumstances.

Sir Anthony Mann