Neutral Citation Number: [2019] EWHC 1839 (Ch)

Case No: BR-2015-002338

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS ENGLAND AND WALES
INSOLVENCY AND COMPANIES COURT

Rolls Building
7 Fetter Lane
London
EC4A 1NL

Date: 15/07/2019

Before:

CHIEF INSOLVENCY AND COMPANIES COURT JUDGE BRIGGS

- -

Between:

CFL FINANCE LIMITED	**Applicant/Petitioner**
- and -	
(1) JONATHAN BASS **(2) FREDDY KHALASTCHI** **(3) MOISES GERTNER**	**Respondents**
(4) LASER TRUST	**Opposing Creditor**

- -
- -

STEPHEN ATHERTON QC AND BLAIR LEAHY (instructed by Mishcon de Reya LLP) for the **Applicant/Petitioner**

ANDREW SHAW (instructed by Isadore Goldman) for the **First and Second Respondents**

MARK PHILLIPS QC, JONATHAN KIRK QC, FREDERICK PHILPOTT and HANNAH THORNLEY (instructed by Teacher Stern LLP) for the **Third Respondent**

FELICITY TOUBE QC AND ROBERT AMEY (instructed by Stephenson Harwood LLP) for the **Opposing Creditor**

Hearing dates: 25, 26, 28 June 2019

- -

Judgment Approved

Chief Insolvency and Companies Court Judge:

Introduction

1. This is the final hearing of a bankruptcy petition. It has a long history and considerable sums are involved. The petitioning creditor seeks a bankruptcy order. Its debt arises out of a settlement agreement where proceedings were compromised in the form of a Tomlin Order. The schedule to the Tomlin Order provided for the debtor to pay a sum by instalments. One of the questions asked is do such compromises offend the provisions of the Consumer Credit Act 1974 making the compromised debt unenforceable?

2. An opposing creditor (the "Laser Trust") is an assignee of a debt of £799,360,216 (as at March 2019), far in excess of the petitioning creditor's debt. The opposing creditor seeks an adjournment to allow a meeting to be convened for the purpose of putting proposals for an Individual Voluntary Arrangement to creditors. This raises the question of what principles should be applied to an adjournment application. The context is important. The debtor had previously obtained a voluntary arrangement when the assignor, Kaupthing Bank hf ("Kaupthing") had voted in favour of proposals put to creditors. The voluntary arrangement was revoked by the Court on a challenge by the petitioning creditor. The Court found that the debtor and Kaupthing had agreed to a private agreement whereby Kaupthing would financially benefit from assets outside of the voluntary arrangement. This constituted a breach of good faith. The Court of Appeal agreed and found that there was a material irregularity. This judgment addresses whether the debtor should be given a second chance to put proposals to creditors in such circumstances. The petitioning creditor argues that it is against principle, and an abuse of process to have a "second bite of the cherry". This judgment also takes account of the evidence produced by the petitioning and opposing creditor in order to reach conclusions about the nature and quality of their debts.

The background

3. The background to the debt and the Individual Voluntary Arrangement ("IVA") has been set out in detail in two previous judgments. The first is the judgment of HHJ Keyser QC (sitting as a judge of the High Court) [2017] EWHC 111 (Ch) (the "First Judgment") and the second the Court of Appeal comprising Patten, Floyd and Coulson LJJ [2018] EWCA Civ 1781 (the "Appeal Judgment"). I have been addressed on the background by counsel,

but it is unnecessary to repeat the detail in this judgment. I shall set it out in brief and refer to the First Judgment and Appeal Judgment where required.

4. CFL Finance Limited (CFL) served a statutory demand on Moises Gertner (MG) dated 10 September 2015 demanding he pay £11,128,611. The demand was not met and was not set aside. CFL petitioned for MG's bankruptcy. The petition was adjourned pending the outcome of a creditors' meeting called to consider a proposal made by MG for the IVA. The proposal was approved by 97.85% of creditors in value with Kaupthing constituting 90.43% by value. Two creditors, including CFL, who together constituted 2.15% of the creditors voted against the proposal. If Kaupthing's votes were excluded, the value of the debts of the two creditors who voted against the proposal would have exceeded 50% of the value of unconnected creditors' claims with the result that the proposal would not have been approved.

5. The origin of the debt owed by MG to CFL is succinctly set out by Patten LJ in the Appeal Judgment. In short, the CFL debt arose by reason of a personal guarantee entered into by MG on 13 June 2008 to guarantee a loan made to Lanza Holdings Limited ("Lanza"), a Gibraltaran company, owned by a Gertner family trust. Patten LJ explains (paragraphs 1-5 of the Appeal Judgment):

> "Lanza defaulted and in November 2010 CFL sued Mr Gertner on his guarantee for some £1.7m together with compound interest from June 2008 which was payable under the loan agreement in the event of a default.
>
> In October 2011 the proceedings were compromised on terms recorded in a Tomlin Order under which Mr Gertner agreed to pay £2m to CFL by instalments together with a further £50,000 on account of its costs. It was a term of the settlement that if Mr Gertner failed to make the instalment payments as agreed then the entire amount claimed in the proceedings would become due and payable. By early 2013 that had happened. Later in March 2015 Mr Gertner's solicitors, Teacher Stern, offered CFL the sum of £10,000 in full and final settlement of the debt which was stated then to amount to £2,185,973. With interest this would have increased to £10,857,183 but Mr Gertner disputes his liability for interest even though under the terms of the settlement with CFL interest was payable.
>
> In the event the negotiations came to nothing and on 11 September 2015 CFL served a statutory demand on Mr Gertner in respect of the debt which with interest was then over £11m. An offer was made to settle the debt with a payment of £487,500 which was rejected but no application was made by Mr Gertner to set aside the statutory demand. CFL presented a bankruptcy petition on 6 October 2015 which was served on 22 October 2015 and the hearing of the petition was fixed for 23 November 2015.

> On 20 November 2015 CFL was served with a proposal by Mr Gertner for an IVA. This included CFL as a creditor in a sum of £11,128,611. Although no application had been made for an interim order, CFL agreed to the hearing of the bankruptcy petition being adjourned over the creditors' meeting and it now stands adjourned generally with liberty for it to be restored.
>
> In Mr Gertner's Estimated Statement of Affairs attached to his IVA proposal his father was shown as a creditor in the sum of £28,666,666. The proposal stated that his father had agreed to subordinate his claim for dividend purposes to those of the other unsecured creditors whose claims totalled £582,809,270. Of these the largest debt was £547,261,182 owed to Kaupthing [an Icelandic bank] ……"

6. The Kaupthing debt also arose out of a personal guarantee. Patten LJ explains:

> "Mr Gertner's liability to Kaupthing is based on a personal guarantee dated 19 September 2008 which was given to secure loans made to Crosslet Vale Limited ("Crosslet Vale") which was another Gertner family company. The loans had been made to finance various investments by Crosslet Vale including in September 2008 the purchase of some 18.5m shares in Kaupthing. Crosslet Vale also defaulted and proceedings for the recovery of the loans and under the guarantee were commenced by Kaupthing in October 2010. Mr Gertner was sued for over £300m. The proceedings were stayed by agreement and negotiations took place. Mr Gertner has asserted in evidence that the loan made in September 2008 was part of a fraud on the part of Kaupthing's directors and was therefore unenforceable. But that point has never been pursued in the litigation and no discount was made on account of it when formulating the IVA proposal."

7. I shall be returning to look at the Appeal Judgment in more detail when I consider the debt owned by the Laser Trust and in particular when deciding if the Laser Trust is entitled to vote at a meeting of creditors for the Arrangement (as defined below). For now, the proposals for the IVA included an expected return to creditors of £0.07 in the pound. This was to be achieved by a single payment of £487,500 provided by a third party. It was proposed that MG's tax liability would be paid in full.

8. Prior to the creditors' meeting, Kaupthing entered into a settlement agreement (the "KSA") with MG, his brother Mendi Gertner, Crosslet Vale Limited and the Laser Trust. The KSA was described as being in full and final settlement of the liabilities owed by MG, Mendi and Crosslet Vale to Kaupthing. The Appeal Judgment refers to the creditors noting, at the creditors' meeting "that Mr Gertner was a party to arbitration proceedings in Israel which appeared to include claims for high value assets, and asked for details of the litigation and why any possible recoveries were not included in the proposal".

9. Under the terms of the KSA, Kaupthing would receive $6 million from the Laser Trust by "close of business on 15 December 2015". By clause 3.6 of the KSA "on or before execution of this agreement the parties shall enter into or procure that the relevant parties enter into and adhere to the profit sharing agreements in substantially the form of the draft agreements in Appendices 2, 10 and 11 regarding the future profits of Indus Trading Limited, Maskelyn Limited and Readinise Limited respectively." The profit-sharing agreements gave Kaupthing a "potential share in the recoveries in the Israeli arbitration" (the Appeal Judgment at para 25). This is because the agreements set out in the Appendices to the KSA referred to in clause 3.6 are with three named companies each of which is a claimant in the arbitration. "The claim is being pursued by Mr Gertner and his brother, Mendi, against a Mr Dan Gertler and various of his family trusts and companies. The arbitration includes a cross-claim. The evidence of Mr Gertner is that the claims have been brought by him and his brother on behalf of the Gertner family trusts but the effect of clause 3.6 of the KSA and the profit sharing agreements was to give Kaupthing an entitlement to share in any recoveries made in the arbitration in return for a release of the named companies from certain liabilities to Crosslet Vale and the Gertner family trusts" (paragraph 21 of the Appeal Judgment).

10. By clause 5 of the KSA "the parties shall within 90 days" of the payment made by Laser Trust to Kaupthing in accordance with clause 3.1, "enter into an agreement in substantially the form of the draft agreement in Appendix 6 which transfers the benefit of the Facility Agreement and the Guarantees from Kaupthing to Laser Trust…". Appendix 6 is described in the First Judgment (at 56):

> "The draft agreement in Appendix 6 was an Assignment of Debt and Security to be made between the parties to the KSA. The recitals recorded that the parties to the Kaupthing Proceedings had settled their differences on a binding basis by way of [the KSA]'. Clause 2 provided:
>
> "2.1 The Assignor [ie Kaupthing], with effect from the date of this Deed, irrevocably assigns to the Assignee [ie Laser Trust] absolutely all of the Assigned Assets and the Assignee hereby accepts the assignment. 2.2 With effect from the date of the Deed, the Assignee agrees to assume, perform and comply with the Obligations under the Assigned Assets as if originally named as an original party in the Assigned Assets."
>
> 'Assigned Assets' was defined to mean all of Kaupthing's rights and benefits under or in respect of the Facility Agreement and the Guarantees, save that Kaupthing's security rights were expressly excluded. (cl 3 of the KSA itself made provision in respect of the enforcement of Kaupthing's security.) 'Obligations' was defined to mean all of

> Kaupthing's obligations '(if any)' under or in respect of the Assigned Assets. Other provisions of the Assignment of Debt and Security purported to release Kaupthing from all liability and obligations in respect of the Assigned Assets. Clause 5 of the Assignment of Debt and Security contained a very wide exclusion and waiver of warranties or representations by Kaupthing in respect of the assignment."

11. Before turning to the challenge to the IVA I mention a further debt owed by MG in 2015. Bank Leumi (the "Bank") had presented a bankruptcy petition. The Bank's debt also arose by reason of a guarantee. MG had given a guarantee for £7,500,000 in respect of the borrowings of Fordgate Limited, a company largely owned by Gertner family trusts but in which Mr Gertner personally owned a 10% shareholding. Mendi had provided a similar guarantee. Fordgate Limited failed, and in July 2013 the Bank made demands on the guarantees. A payment of £100,000 was made to the Bank by the Gertner No 1 Settlement on behalf of MG. MG is a discretionary beneficiary of the Gertner No 1 Settlement. No other payment was made but a settlement was reached in July 2014, and the petition was dismissed. That settlement, provided for a further payment of £100,000 from the Gertner No 1 Settlement, and required MG and Mendi to pay £10m to the Bank on 28 November 2014. They failed to make that payment, and the Bank presented a further bankruptcy petition against MG in February 2015. Subsequently MG and Mendi entered into a second settlement agreement with the Bank under which they were required to provide to the Bank (1) £3m, (2) an affidavit containing sufficient information to verify their representation, on which the bank had relied in entering into the settlement, that they had 'negative net assets worldwide', and (3) an irrevocable undertaking to make an 'Uplift Payment', the size of which would be dependent on the amount of money recovered in the Israel Gertler Arbitration. The Bank withdrew its petition. In the proceedings before HHJ Keyser QC, MG explained that the payment of £3m was made from a trust controlled by a family friend, Mr Leib Levison. He reappears in this matter. MG's affidavit of means showed that his only assets were a car worth £25,000 and personal effects worth £25,000 and that his liabilities amounted to some £417m. The undertaking regarding the Uplift Payment concerned the disposition of trust moneys, of which Mr Gertner and Mendi were not trustees.

12. Returning to the IVA, CFL challenged the approval of the IVA pursuant to section 262 of the Insolvency Act 1986. CFL claimed that Kaupthing should not have been entitled to vote.

13. In the First Judgment HHJ Keyser QC revoked the IVA, finding that (i) there had been a telephone call between CFL's solicitor, Kaupthing's solicitor and representatives of Kaupthing in which Kaputhing "confirmed that, having concluded that Mr Gertner had very limited assets personally and that a trustee in bankruptcy would be unable to undermine the Gertner family's trust structure, it had agreed in principle to support an IVA on the basis that it would recover 1% of its debt"; (ii) the principle of good faith applied between a debtor and a creditor, and between creditors *inter se*; (iii) the KSA had put Kaupthing into a position of conflict with other creditors; (iv) the KSA entitled Kaupthing to assets that were to be outside of those available for the creditor class as a whole; and (v) there had been a failure to disclose the side agreement and a breach of the good faith principle. The Court declined an invitation to direct a second meeting of creditors. His decision was upheld by the Court of Appeal which also found that the admission of Kaupthing to vote also constituted a material irregularity.

14. Permission to appeal to the Supreme Court was refused on 11 February 2019. At this time Kaupthing, having been in receipt of the assignment sum of $6m since 2015, had not entered into the assignment with Laser Trust. Four days after permission to refuse an appeal to the Supreme Court, Kaupthing assigned its debt to the Laser Trust. CFL sought to restore the petition and MG sought to summon a meeting of creditors to vote in favour of a second individual voluntary arrangement (the "Arrangement").

The challenge to the CFL debt

15. The CFL debt is challenged on the basis that it contravenes the provisions of the Consumer Credit Act 2006 ("CCA") and is unenforceable. The Court is asked to decide if the Tomlin Order provided MG with "credit" or a "financial accommodation". This requires a true interpretation of the compromise (embedded in the Tomlin Order) and the application of the CCA. There is scant authority on the proposition that instalment payments provided in a compromise are required to comply with the CCA. MG also argues that the interest payments agreed by compromise are so extreme that they constitute a penalty. I start by identifying what type of debt can support a petition for bankruptcy.

16. A creditor's petition must identify a liquidated debt. Section 267 Insolvency Act 1986 provides the grounds upon which a bankruptcy petition may be presented:

> "(1) A creditor's petition must be in respect of one or more debts owed by the debtor, and the petitioning creditor or each of the petitioning creditors must be a person to whom the debt or (as the case may be) at least one of the debts is owed.
>
> (2) Subject to the next three sections, a creditor's petition may be presented to the court in respect of a debt or debts only if, at the time the petition is presented—
>
> (a) the amount of the debt, or the aggregate amount of the debts, is equal to or exceeds the bankruptcy level,
>
> (b) the debt, or each of the debts, is for a liquidated sum payable to the petitioning creditor, or one or more of the petitioning creditors, either immediately or at some certain, future time, and is unsecured,
>
> (c) the debt, or each of the debts, is a debt which the debtor appears either to be unable to pay or to have no reasonable prospect of being able to pay, and
>
> (d) there is no outstanding application to set aside a statutory demand served (under section 268 below) in respect of the debt or any of the debts."

17. There is no argument that subsection (1) is satisfied and subsection (2) (a), (c) and (d) of section 267 of the Insolvency Act 1986 are not contested. MG argues that subsection 2 (b) is not satisfied in that the debt is not for a liquidated sum payable to the petitioning creditor, either immediately or at some certain, future time.

18. As has been explained, the debt owed to CFL arises out of a guarantee for sums lent to Lanza. MG has not denied that the sums were lent to Lanza nor that he guaranteed the loan. He has not denied that Lanza defaulted nor that he was unable to repay the debt himself. In his defence to the Part 7 proceedings he accepted that he owed the capital sum lent to Lanza under the guarantee but argued that pursuant to clause 2.6 of the guarantee the sum did not include interest. The clause reads it "*shall not exceed the sum of £3,500,000*". As he had paid £1,800,000 he argued that he owed no more than £1,700,000. He also argued that the interest provisions in the Lanza Facility were penal or unfair and pleaded in aid section 19 of the CCA (now effectively section 140A). The relevant parts of the defence (that is the parts of the defence that are the same or similar to the arguments before the Court now) are as follows:

"16. Further and in the alternative, the interest and the rates of interest which the claimant seeks to charge under the Facility Letter amount to a penalty in that they do not represent a genuine rate to compensate the Claimant for any default by Lanza and/or in the alternative an unfair credit transaction under Section 19 of the Consumer Credit Act 2006.

17.The interest claimed in paragraph 13.2(c) of the Particulars of Claim is at 2.5% on a compound basis. On this basis, the interest which is purported to accrue on the loan following partial repayment on the 23 September 2008, i.e a period of just over 2 years, amounts to £1,686,232.70 from 14 October 2008 to 7 September 2010 as stated by the Claimant's solicitors in a letter dated 7 September 2010."

19. The proceedings were compromised by way of a Tomlin Order dated 26 September 2011 that by consent provided: "all further proceedings in this action between the Claimant and the Defendant be stayed upon the terms set out at Schedule 1 to this Order, save for the purposes of carrying the said terms into effect for which the Claimant and the Defendant are at liberty to apply". The consent order was signed by solicitors acting on behalf of MG, Teacher Stern LLP. The recitals state that "the parties wish to settle the Proceedings upon the terms set out in this Agreement" in which CFL is the Claimant, and MG the Defendant. The recitals record:

"(2) CFL claims the following sums from Mr Gertner in the Proceedings

(a) The capital sum of £1,700,000;

(b) Simple interest at the rate of 2.25 per cent per month on £3,500,000 from 13 June 2008 to 23 September 2008;

(c) Simple interest at the rate of 2.25 per cent per month on the sum of £1,700,000 from 24 September 2008 to 13 October 2008;

(d) Compound interest on the outstanding balance at 2.5 per cent per month from 14 October 2008 to the date of payment

(3) The Parties wish to settle the Proceedings upon the terms set out in this Agreement"

20. By operative clause 2. "£2,000,000 shall be paid to CFL on the dates and on the terms set out below." Set out are specified dates for payment and the sums that have to be paid on the agreed payment date, such as (a) £325,000 on or before 26 October 2011. The last date for payment was on 26 September 2013. In addition, MG was to pay a contribution to CFL's costs. Clause 5 constitutes a secondary obligation clause. It states:

> "if, in breach of paragraph 2 and 3 above, the sums payable under paragraphs 2 (a), 2 (b) and 3 (b) shall not be paid in cleared funds to the account by close of business on the dates identified in paragraphs 2(a), 2(b) and 3(b) or within seven days of the dates identified in paragraphs 2(a), 2(b) and 3(b) or if the sums payable under paragraph 3(a) shall not be paid in cleared funds to the client account of Mishcon de Reya on the date identified in paragraph 3(a):
>
> 5.1 the following sums claimed by CFL from Mr Gertner in the Proceedings shall become immediately due and owing from Mr Gertner to CFL:
>
> (a) the capital sum of £1,700,000;
>
> (b) simple interest at the rate of 2.25 per cent per month on £3,500,000 from 13 June 2008 to 23 September 2008;
>
> (c) simple interest at the rate of 2.25 per cent per month on £1,700,000 from 24 September 2008 to 13 October 2008; and
>
> (d) compound interest on the outstanding balance at 2.5 per cent per month from 14 October 2008 until the date of payment."

21. It may be observed that clause 5, if triggered, made MG immediately liable for the sums claimed by CFL in the Part 7 proceedings. I infer from this acceptance that MG was no longer contesting the sums pleaded by CFL. The schedule included a non-assignment clause and an entire agreement clause so that CFL and MG "agree and acknowledge that this Agreement fully sets out the terms agreed between the Parties and supersedes all previous agreements. The Parties agree that in entering into this Agreement they have not relied on any representations or warranties...…..".

22. It is accepted by all parties that schedule 1 to the Tomlin Order is a contract (the Contract) between the parties and contractual considerations apply.

23. It is not said that the Contract is vulnerable to attack by reason of duress, undue influence, mistake, misrepresentation, fraud or other vitiating factor, rather Mr Kirk QC and Mr Philpott with Mr Phillips QC and Ms Thornley, acting for MG, argue that there are three reasons that the Court should find that the debt claimed in the petition is not capable of satisfying subsection 2(b) of section 267 of the Insolvency Act 1986 (it was argued that there is a substantial dispute but my analysis of the argument is as set out here):

    23.1. The Contract is a regulated consumer credit agreement under the CCA. CFL has failed to comply with mandatory requirements for such agreements, in particular section 77A and 86B CCA;

    23.2. It constitutes an unfair relationship for the purposes of section 140A-D of the CCA because the default payment provision requiring monthly compounding interest was wholly disproportionate and unconscionable; or

    23.3. The default payment provision was a penalty at common law.

24. Mr Kirk QC did not pursue the penalty at common law issue in oral submissions but informed the Court that he could add no more to his argument, than was set out in the skeleton argument. His primary submission was that the Contract is a credit agreement and a regulated credit agreement within the meaning of the CCA. Section 9(1) of the CCA provides: "In this Act "credit" includes a cash loan, and any other form of financial accommodation".

25. If he is right that it is a regulated credit agreement, CFL does not have an enforceable present debt because of a failure by CFL to obtain a licence from the OFT to cover the carrying on of a consumer credit business by CFL, and serve multiple documents on MG in the period since the Contract began, concerning the debt and the state of the account, as required by the CCA. I shall turn to this in more detail later.

26. If the Contract is an agreement for credit (but not regulated) it brings into play the consumer protection provisions of section 140A-D, on unfair relationship. He argues that the compound interest provisions in the Contract are extortionate or unfair. If the Court finds that the relationship was and is unfair, the Court has broad powers under s.140B to grant relief including the power to reduce interest.

(i) Interpreting the Contract

27. Mr Kirk began his submissions by comparing the debt that had accrued under the personal guarantee and the debt arising from the Contract. Although CFL's schedules compound interest monthly rather than annually, Mr Kirk argued that the sums claimed in the particulars of claim equated to annual compounding and not monthly compounding. He argues that the Contract was an extension of the debt claimed under the personal guarantee. His submission on the interpretation of the Contract was that the recitals "set out the amounts then owed" which amounted to a liability and "discharge" for that liability. The Contract, it is argued gave MG time to pay a debt, acknowledgement by MG, and as such the payment schedule constitutes "financial accommodation" within the meaning of the CCA because it defers payments. If the payment schedule defers payment, it is "credit" within the meaning of the CCA.

28. In support of his argument that the Contract provides financial accommodation within the meaning of the CCA, Mr Kirk relies on the second witness statement of MG (providing some background knowledge) where he states [15] "Due to the threat of a summary judgment application, the proceedings against me were compromised by way of an agreement set out in the schedule to a Tomlin Order". I infer that it was expedient for MG to seek a compromise. His evidence about the reason for entering into the Contract "was to satisfy my personal liability under the personal guarantee I had previously given." He explains that the Contract contained "provisions for payment of the remainder of the debt by instalments and a provision that provided for the payment of compound interest in default". I agree that the part 7 proceedings, which followed the claim under the personal guarantee, form part of the relevant background information which may be used when interpreting the meaning of the Contract.

29. In terms of construing or interpreting a contract, the Supreme Court has dealt with the subject on a number of occasions including recently in *Arnold v Britton* [2015] AC 1619 and *Wood v Capita Insurance Services Ltd* [2017] AC 1173. It is sufficient for these purposes to cite Lord Neuberger in *Arnold v Britton* where he said:

> "When interpreting a written contract the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean"…focussing on the meaning of the

> relevant words…in their documentary, factual and commercial context…but disregarding subjective evidence of any party's intentions." [15]

30. The sums claimed in the Part 7 proceedings were defended by MG with the aid of legal advice and representation. I infer that CFL was confident that it would succeed in its claim and its confidence gave rise to its strategy to press for summary judgment once the defence had been filed. I also infer that CFL has good reason to be confident. The inference is consistent with the evidence that MG compromised the Part 7 proceedings as a result of the threat of a summary judgment application. The Contract does not directly acknowledge the debt due under the guarantee, but states that CFL claims the sums set out in the Part 7 proceedings. The sums set out in the proceedings were the sums due under the guarantee. This is an indirect acknowledgment of the debt. By the Tomlin Order the claims in the proceedings were stayed and the rights of the parties became embodied in the Contract. The obligations of each party are now governed by the Contract. The Contract provided that MG would pay £2,000,000. The sum would not alter over the period of the primary obligations. It is true that the sum was not to be paid in one tranche and was to be paid by way of instalments over a short period.

31. Focusing on the meaning of "credit" Mr Kirk contrasts the position of (i) an agreement where an advance payment for services to be performed in the future does not give rise to the grant of credit as in *McMillan Williams v Range* [2004] 1 WLR 1854 and (ii) deferred payments. Lord Justice Ward commented in *McMillan* [16]: "unless there was a debt, there was no credit". The applicability of the CCA to deferred payments was in issue in *Dimond v Lovell* [2000] 1 QB 216 where a hire company supplied cars on hire to victims following a road traffic accident, but under the relevant agreement, provided that payments for the hire did not become due until finalisation of the accident claim. The agreement was found to be a credit agreement and a hire agreement. The court was required to decide whether credit was in fact given and if the agreement was a "personal credit agreement" within the meaning of s. 8 of the CCA. The court of first instance had attempted to avoid that conclusion by holding that as there was no contractual obligation to pay hire charges until the debtor's claim for damages was concluded, no credit was being given. The Vice Chancellor (as he was) held that that was wrong, stating that: "If payment for goods or services or land is deferred after the time when, if nothing about the time of payment had been agreed, the payment would be due, the payer is being given credit." He quoted with approval from Professor Goode's Consumer Credit Legislation,

Vol 1, para 443, where it is stated: "Debt is deferred, and credit extended, whenever the contract provides for the debtor to pay, or gives him the option to pay, later than the time at which payment would otherwise have been owed under the express or implied terms of the contract." Passages to similar effect were also quoted from *R v Miller* [1977] 1 WLR 1129 and *Grant v Watton* [1999] STC 330, the latter defining credit as "the deferral of payment of a sum which, *absent agreement*, would be immediately payable" (my emphasis).

32. The question asked of this Court is whether credit or a financial accommodation as defined by the CCA was provided by the Contract. The operative clauses of the Contract provided that the payment of £2,000,000 would be due on 26 September 2013. That was the agreement. It was not due immediately as submitted by Mr Kirk. There was no absence of agreement as to when the debt was due. In my judgment a reasonable person having regard to all the background available to the parties would have understood the parties to mean, using the language in the contract, and focusing on the meaning of relevant words in their documentary, factual and commercial context, that no credit was extended beyond the due date for payment. Interpretation of a contract is an iterative process. By employing that process, it is apparent that the debt in the Contract was not deferred, and credit was not extended. An objective observer would understand with knowledge of the background facts would think that the Contract did not provide that the sums due by instalments in the Contract were deferred, and credit thereby extended, as it provides for MG to pay the sum agreed by 26 September 2013. It did not give him the option to pay, later than the time at which payment was to be made under the terms of the Contract. A timetable payment of the agreed debt was provided for to assist MG. This was no doubt negotiated to assist MG in satisfying his contractual obligation. It gave him a structured schedule. If there had been no structured payments agreed, the payment of £2,000,000 would have been due on 26 September 2013 in one lump sum. In my judgment the law does not provide that a structured settlement clause making provision for the payment of a debt over time extends credit or financial accommodation.

(ii) The essential character of the Contract

33. Mr Kirk relies upon *Holyoake v Candy* [2017] EWHC 3397 (Ch), to support the contention that the Contract provided credit and was therefore subject to the rigorous

controls on form and content set out in the CCA. Danger lurks when using the facts of one case as an aid to interpreting a contract in another. In my judgment, *Holyoake* was a very different case which had very specific facts. Unlike the debt said to be due in this case, Mr Justice Nugee explained that the original loan in *Holyoake* was "a credit agreement as defined in s. 140C(1) as it was an agreement between Mr Holyoake, an individual, and CPC by which CPC provided Mr Holyoake with credit (itself defined in s. 9(1) as including a cash loan, and any other form of financial accommodation)". He also found that the "subsequent agreements such as the Supplemental Loan Agreement, the various Escrow Deeds, and the Extension Agreements were all either themselves credit agreements or related agreements". By s.140C(4) and (5) CCA an agreement is "related" to a credit agreement if it is a "linked transaction" in relation to the main agreement and in the case of a credit agreement which is not a regulated consumer credit agreement, a transaction is treated as a linked transaction in relation to that agreement if it would have been had the agreement been a regulated one. The background that informed the Judge's decision when construing the relevant contract was patently different.

34. Mr Justice Nugee paid particular attention to clause 3.1(c) in the settlement deed under scrutiny. That provided a release of the "Second Supplemental Extension Agreement". He found that as that agreement extended time for repayment of the loan debt from 1 May 2013 to 24 January 2014 "financial accommodation" and hence "credit" had been provided. He reasoned "since the effect of cl 3.1(c) was that CPC agreed to enter into the Second Supplemental Extension Agreement (by releasing a signed counterpart to Mr Holyoake), I do not see why that provision did not amount to an agreement by CPC to provide Mr Holyoake with credit, namely the financial accommodation set out in that agreement". Mr Justice Nugee was finding that the settlement agreement did not cast-out the application of the CCA that governed the pre-existing loans. I reject the submission that *Holyoake* provides authority for the proposition that all settlement agreements that contain a provision for payment of a sum over a period of time are subject to the rigours of the CCA. As Mr Atherton and Ms Leahy point out there is a real need for certainty when entering into settlement agreements. There is a need for a bright line. In *McMillan Williams* the Court of Appeal explained [20-23]:

> "Bearing in mind the need to decide at the time the contract is entered into whether it makes provision for credit or not, the approach of the court must, in my judgment, be to

> search for the essence of the contract. So one asks is its *essential character* an arrangement for making loans or for paying remuneration?" (my emphasis)

35. If one applies the "essential character" test to the facts in *Holyoake* where there had been a personal loan providing cash credit to an individual by a lender that was governed by the CCA, related agreements and a settlement agreement that contained clause 3.1(c), few would disagree with the outcome as found by Nugee J. Applying the "essential character" test, which is an objective test, in my judgment the Contract which compromised proceedings for less than the sums claimed in those proceedings, without admission of liability, cannot be characterised as one "for making loans".

36. There is support for my finding in Goode's Consumer Credit Law and Practice at 24.31:

> "Even if there is a deferment of debt, the agreement is not one for the provision of credit where the deferment is not by way of financial accommodation and merely arises incidentally from the parties' accounting arrangements. It is well established that a transaction is not a loan transaction where the credit given is but a normal incident of a wider transaction not involving the lending of money."

37. The proceedings gave rise to the settlement. The settlement included the payment of an acknowledged debt. The payment of that debt was to be made by a date certain. It was, in my view, incidental to the settlement that the payment of the debt was structured over time certain.

The effect of the Contract

38. I was addressed on the effect of the compromise by Mr Phillips QC, Mr Kirk QC and Mr Atherton QC. It was agreed that the compromise that led to the Contract is to be treated as a settlement agreement. Mr Phillips and Mr Kirk argue that the Court may go behind the Contract whereas Mr Atherton argues that it should not as it offends the principle of compromise. Mr Justice Nugee was faced with similar arguments in *Holyoake*. He provides a most helpful analysis of the competing principles, which I set out in full [500-504]:

> "500. Mr Lord's third submission was that the Settlement Deed was a bona fide compromise of the CCA claims and if it could be unpicked, it would never be possible to settle a CCA claim. That cannot have been intended by the legislature. There appears to be no relevant authority on the CCA itself, but he referred, by way of analogy, to *Binder v Alachouzos* [1972] 2 QB 151. The plaintiff had sued the defendant on a number of loans, the defendant defending the action on the grounds that the plaintiff was an unregistered moneylender. The action was compromised shortly before trial, the

defendant agreeing to abandon the contention that the plaintiff was a moneylender and to pay the plaintiff various sums. When he defaulted and the plaintiff sued him on the compromise agreement, the defendant contended that it was not binding, again relying on the Moneylenders Acts. The Court of Appeal held that he was bound by the agreement. Lord Denning MR said that the Moneylenders Acts were for the protection of borrowers and the judges would not therefore allow a moneylender to use a compromise as a means of getting round the Act; but it was important that the courts should enforce compromises agreed in good faith between lender and borrower (at 158A-B, D-F):

> "If the court is satisfied that the terms are fair and reasonable, then the compromise should be held binding. For instance, if there is a genuine difference as to whether the lender is a moneylender or not, then it is open to the parties to enter into a bona fide agreement of compromise. Otherwise there could never be a compromise of such an action. Every case would have to go to court for final determination and decision. That cannot be right….In my judgment, a bona fide compromise such as we have in the present case (where the dispute is as to whether the plaintiff is a moneylender or not) is binding. It cannot be reopened unless there is evidence that the lender has taken undue advantage of the situation of the borrower. In this case no undue advantage was taken. Both sides were advised by competent lawyers on each side. There was a fair arguable case for each. The case they reached was fair and reasonable. It should not be reopened."

Phillimore and Roskill LJJ agreed. Phillimore LJ said that it was plain that it was a bona fide compromise, the terms of the agreement were not to be described as colourable, and the court (at 159D):

> "ought to be very slow to look behind an agreement reached in circumstances like these."

Roskill LJ said that while it has always been the policy of the courts not to allow the Moneylenders Acts to be evaded (at 160B-C):

> "it is the law of this country, as Lord Denning MR has said, where there is a bona fide compromise of an existing dispute and that compromise includes a compromise of what, as Mr Joseph said, is basically an issue of fact, namely whether there had in fact been unlawful moneylending, especially where the compromise has been reached under the advice of counsel and solicitors, that that compromise is enforceable against the party seeking subsequently to repudiate it."

501. There is an obvious danger in holding that any agreement settling CCA claims is effective to oust the Court's powers under ss. 140A-C of the CCA , as it would open the way to lenders routinely requiring borrowers to settle any possible CCA claims, which would run the risk, as Mr Stewart submitted, of driving the proverbial coach and horses through the protection afforded by the CCA .

502. Moreover, in *Binder* the Court of Appeal appears to have laid emphasis on the fact that what was involved was a bona fide compromise of a genuine issue of fact as to whether the Moneylenders Acts applied at all. That principle has been applied to other statutory provisions: *cf* Foskett on Compromise (8th edn) at §7-32 (although parties

cannot contract out of the protection of the Rent Acts, that does not prevent a bona fide compromise of a genuine dispute of fact as to whether a statutory provision applies); *A-G v Trustees of the British Museum* [2005] EWHC 1089 (Ch) at [28] per Morritt V-C (a bona fide compromise could be made of the question whether a statutory prohibition on disposal of objects vested in the trustees as part of the museum's collection applied); and *FPH Law v Brown* [2016] EWHC 1681 (QB) at [29] per Slade J (a bona fide compromise of an issue as to the enforceability of a CFA). But if that is the principle, it does not directly assist CPC. There was no issue, or none at any rate that has been identified, as to whether the agreements preceding the Settlement Deed were credit agreements such that the CCA applied. What was compromised was not any genuine issue of fact which went to the applicability of the CCA . What was compromised was any claim that Mr Holyoake had under the CCA .

503. I proceed therefore on the basis that the Settlement Deed does not act as a jurisdictional bar to the Court considering whether the relationship between the parties was unfair, both in the period up to and including the entry of the Deed and in the period thereafter.

504. On the other hand that does not mean the Settlement Deed is just to be ignored as if it did not exist. The policy considerations referred to in *Binder* – that it is the policy of the Court to encourage good faith compromises, and to enforce compromises when they are made – seem to me to continue to apply. In considering whether the relationship between the parties is unfair, or in considering what order, if any, to make in the exercise of the discretion in s.140B, it seems to me highly relevant that the parties have reached a compromise of that issue, and for this purpose the matters referred to by the Court of Appeal in *Binder* – was there a genuine dispute, was there a fair arguable case on each side, was the compromise bona fide or were its terms colourable, are the terms fair and reasonable, has the lender taken undue advantage of the borrower, were both sides advised by competent lawyers – are just as applicable. Roskill LJ gave an example at 160D-E of a liquidator seeking the sanction of the court to a compromise where there is a moneylending defence:

> "Is the court to investigate the whole matter, or can it look at the matter broadly and see whether a bona fide compromise should be arrived at or has been arrived at? In such a case it seems to me clear that the court should encourage and when appropriate enforce any bona fide compromise arrived at, especially one arrived at under legal advice."

39. Having set out the circumstances leading to the "Settlement Agreement" in *Holyoake* Mr Justice Nugee said [509]:

"In those circumstances, I am satisfied that the Settlement Deed was a bona fide compromise. In my view it should be given effect to and not disturbed. Taking the matters I have referred to above from *Binder*: there was indeed a genuine dispute whether Mr Holyoake had any viable CCA claims, there was a fair arguable case on each side, the compromise was bona fide and its terms were not colourable, and Mr Holyoake entered into it after receiving legal advice. Lord Denning MR also refers to whether the agreement reached was fair and reasonable, but this cannot require the Court to undertake a detailed examination of the underlying merits of the claims, as the

> whole purpose of the compromise is to avoid the necessity for that. That is why Roskill LJ referred to taking a broad view, and, taking a broad view, I consider that the terms were fair and reasonable. In return for giving up his CCA claims, Mr Holyoake not only obtained CCA's release of its claims under the existing contracts, but also the withdrawal of the proceedings (in which, as Mr Lord submitted, the Qualifying Contract deception would have come to light) and a significant extension of time to sell GGH."

40. Like *Holyoake* the sum lent to Lanza and guaranteed by MG was high value lending between commercial parties. CFL was known to MG as a "lender of last resort" and it was known to him that a loan from CFL would attract high interest. It was agreed by MG that Lanza would repay the sum and interest in four months from the date of the loan. MG explains that he expected one of the discretionary trusts to repay the debt in full in the four-month period. His expectation was not met, and his personal guarantee called upon. The Part 7 claim set out in full the claim made pursuant to the personal guarantee. A defence was filed. A strike-out application threatened, and the proceedings settled. None of these steps were taken by MG alone. He had the benefit of legal advice and in particular solicitors acted for him when he agreed to the Tomlin Order.

41. MG decided that the pleaded defence, that the sums due under the personal guarantee were governed by the CCA, that no interest was due or that the terms were penal would be compromised; and CFL agreed not to pursue the whole debt but to take part-payment of the sums claimed in full satisfaction. Both parties agreed to give up an entitlement to have their positions determined by a Court. It has not been said that the issues were not compromised. It has not been argued that what was compromised was not any genuine issue of fact or law which went to the enforceability of the debt. There is no claim for rectification and, as I have mentioned, no vitiating factor has been advanced. It is common ground that MG acted on the Contract and satisfied some of his obligations under clause 2 of the Contract. It is unlikely that he would have done so if the Contract had not been a genuine attempt to compromise the Part 7 proceedings.

42. The Contract was made at arms-length in circumstances where MG agreed, with the assistance of legal advice, that its terms superseded the guarantee: it "fully sets out the terms agreed between the Parties and supersedes all previous agreements".

43. Taking account of public policy considerations referred to in *Binder* that (i) there should be finality, (ii) the same party should not be subject to the same claims by the same

person more than once, and (iii) encouraging, and when appropriate enforcing any bona fide compromise, especially one arrived at under legal advice, I find that the terms of the Contract were fair and reasonable and I am satisfied that the Contract constituted a bona fide compromise and the Court should not, in the absence of vitiating factors, go behind the agreement.

44. My findings make it unnecessary for the Court to consider whether there has been a breach of sections 77A, 86B or section 140A of the CCA.

(iii) Penalty

45. It is not in dispute that clause 5 of the Contract is a secondary obligation. It is said that the Contract was drafted so that any default, however minor, would result in the debt immediately multiplying to millions. An example of this is that Mr Gertner was 8 days late in making the first instalment payment and this placed him in default such that paragraph 5 required him immediately to pay approximately £5 million. The monthly compounding provision in paragraph 5 has caused the debt to reach £33 million. Mr Kirk argues that this is "out of all proportion" to the legitimate interest of CFL, which has already recovered £3.34 million from the original commercial loan of £3.5 million.

46. The law of penalties was recently reviewed by the Supreme Court in *Cavendish Square Holdings v Makdessi* [2016] AC 1172 where previous authority that an agreed damages clause must be a genuine pre-estimate of loss in order to be enforceable was reconsidered. The Supreme Court considered that the inquiry should be whether the relevant clause is justifiable and not unconscionable. The relevant clause has to be a secondary obligation. Lord Neuberger explained [32]:

> "The true test is whether the impugned provision is a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation. The innocent party can have no proper interest in simply punishing the defaulter. His interest is in performance or in some appropriate alternative to performance. In the case of a straightforward damages clause, that interest will rarely extend beyond compensation for the breach, and we therefore expect that Lord Dunedin's four tests would usually be perfectly adequate to determine its validity. But compensation is not necessarily the only legitimate interest that the innocent party may have in the performance of the defaulter's primary obligations."

47. As the purpose of most or a good deal of penalty clauses is to compensate the loss resulting from the breach, if the level of damage is exorbitant or disproportionate to a great extent with "the highest level of damages that could possibly arise from the breach" it is likely to be a penalty. *Makdessi* considers the position where compensation is not sufficient to compensate for the loss caused to the innocent party because the innocent party has a particular interest in performance. In these circumstances, the parties may agree compensation that goes beyond what may objectively be considered proportionate. The Supreme Court has recognised that arms-length contracting parties may legitimately agree compensation that is extraordinary and is not a genuine pre-estimate of loss. An example of a legitimate interest in the performance of the defaulter's primary obligations can be gleaned from one of the appeals in *Makdessi*, *ParkingEye Ltd v Beavis*. Lord Neuberger explained [99]:

> "In our opinion, while the penalty rule is plainly engaged, the £85 charge is not a penalty. The reason is that although ParkingEye was not liable to suffer loss as a result of overstaying motorists, it had a legitimate interest in charging them which extended beyond the recovery of any loss. The scheme in operation here (and in many similar car parks) is that the landowner authorises ParkingEye to control access to the car park and to impose the agreed charges, with a view to managing the car park in the interests of the retail outlets, their customers and the public at large. That is an interest of the landowners because (i) they receive a fee from ParkingEye for the right to operate the scheme, and (ii) they lease sites on the retail park to various retailers, for whom the availability of customer parking was a valuable facility. It is an interest of ParkingEye, because it sells its services as the managers of such schemes and meets the costs of doing so from charges for breach of the terms (and if the scheme was run directly by the landowners, the analysis would be no different). As we have pointed out, deterrence is not penal if there is a legitimate interest in influencing the conduct of the contracting party which is not satisfied by the mere right to recover damages for breach of contract."

48. There is little guidance on what may constitute a legitimate interest, save that there can be no legitimate interest in punishing the defaulting party. The high interest rates that were imposed as a condition for lending to Lanza with very high defaulting rates were in keeping with (i) the nature of the lending that was urgent and very short term and (ii) the nature of the lender which was known as a lender of last resort. Such a lender is only approached in circumstances where the lending is for short term and a borrower is unable to obtain finance elsewhere. I infer that MG was unable to obtain finance for Lanza from other sources. The failure of MG to respond positively in repaying the debt due under his guarantee and submitting to the Tomlin Order as a result of a threat to issue an application

for summary judgment many years later may go some way to legitimising CFL's particular concern or interest in MG's performance. Although not expressly stated by MG, the argument must be that CFL had no such legitimate interest and therefore the high interest rates found in the secondary obligation contained in Clause 5 of the Contract were intended to punish MG. By accelerating payment and requiring compound interest, Clause 5 went beyond mere compensation for breach of operative clause 2 of the Contract. The full background and legitimacy issue has not been covered by the evidence, but in my judgment find that the observation made by Lord Hodge JSC in *Makdessi* [266] pushes the penalty argument below the threshold test of a serious and genuine dispute. This is because "the extent of the disproportion is likely to depend on the bargaining power of the parties and their access to legal advice…..the greater the equality of bargaining power, the greater the access to legal advice, the less likely it is that the clause will be held to be a penalty": *Goode on Commercial Law* 3.136. As I have mentioned Mr Kirk did not advance the penalty argument in oral submissions but has cited *Makdessi* to advance his case. There has been no submission that there was inequality of bargaining power. MG must accept that he had access to legal advice and was advised by skilled lawyers. In my judgment these factors lead me to conclude that it is not genuinely arguable that there is any disproportion between the parties, or that the Contract was not entered into with eyes wide open and on careful legal advice.

49. In reaching my conclusion I have in mind that "the power to strike down a penalty clause is a blatant interference with freedom of contract and is designed for the sole purpose of providing relief against oppression for the party having to pay the stipulated sum. It has no place where there is no oppression": *Elsey v J.G. Collins Insurance Agencies Ltd* (1978) 83 D.L.R. (3rd) 1, 15. There is no obvious oppression where parties freely enter into a contract at arms-length following litigation and where the challenging party had the benefit of legal advice. This is sufficient to put pay to the argument insofar as it was advanced, but there is an additional reason why I find in favour of CFL on this issue.

50. HHJ Keyser QC observed at paragraph 27 of the First Judgment that "on 18 November 2015 affidavits by and on behalf of Mr Gertner were served on CFL in opposition to the bankruptcy petition. Although the written evidence disputed the debt relied on in the petition, they did not show any convincing reason why Mr Gertner should not be bound by the settlement agreement; their function seems to have been tactical". The grounds set

out in the evidence mentioned by HHJ Keyser QC included (i) there was an agreement that no interest would be payable and (ii) the interest rates were penal.

51. I agree with the learned Judge's observation and adopt his reasoning for finding that the argument is not genuine or substantial. MG has a history of running arguments and then not proceeding with them. One such instance deserved comment from Patten LJ in the Appeal Judgment: "Mr Gertner has asserted in evidence that the loan made in September 2008 was part of a fraud on the part of Kaupthing's directors and was therefore unenforceable. But that point has never been pursued in the litigation and no discount was made on account of it when formulating the IVA proposal." The argument set out in the 18 November 2015 affidavits directly challenged the petition debt despite the Tomlin Order. As HHJ Keyser QC observed when construing the KSA, "the Gertner Parties were precluded from asserting any right of claim or counterclaim against Kaupthing; their rights, too, lay only in enforcement of the terms of the KSA under the Tomlin Order".

52. I make the same observation in respect of the IVA proposals as Patten LJ, when formulating the proposal, the debt due to CFL under the Contract was accepted in full (calculated at value). The failure to run the penalty claim or not to pursue it by way of a defence when MG had a chance to do so in the Part 7 proceedings, the compromise and the acceptance of the CFL debt in proposals to creditors preclude MG from reopening the issue now. I mention that it is also submitted by Mr Phillips QC that the issue of whether or not the interest and/or the compound interest were penalties, has been raised by Mr Gertner in response to the bankruptcy petition and has not yet been ruled upon because the bankruptcy petition was stayed pending the outcome of the section 262 challenge. That does not diminish the reasoning I have provided above, but in any event the argument of Mr Phillips has only a superficial attraction. There was no challenge to the CFL debt in the section 262 matter. The defence had been compromised in the Part 7 proceedings, and the rights and obligations of MG are now governed by the Contract. One of the rights that he gave up when entering into the Contract was to forfeit the right to defend the claim to interest on the ground it contravened the common law on penalties. That ignores the principle in *Johnson v Gore Wood & Co (No 1)* [2002] 2 AC 1. The whole picture is needed to be considered. To permit him to re-open that argument at the hearing of a bankruptcy petition in order to argue that the debt contained in the petition is not liquidated, and after failing to contest a statutory demand which set out the same debt,

is to argue, in substance, that he may contravene the principle in *Turner v Royal Bank of Scotland* [2000] BPIR 683 at 687,688, 693-694; and *Coulter v Dorset Police (No 2)* [2006] BPIR 10 at para 22; *Harvey v Dunbar Assets plc* [2017] EWCA Civ 60. The fact that the petition for bankruptcy was stayed is not relevant.

53. I repeat my observations (where relevant) made in paragraph 43 above. There are no vitiating circumstances and "prima facie everybody would suppose that a compromise means that the question is not to be tried over again" (*Plumley v Horrell* (1869) 20 LT 473, 474). I am of the view that MG cannot, some 8 years after entering into the Contract, claim that the secondary obligations constitute a penalty.

The Laser Trust debt- nature and quality

(i) The Laser Trust

54. There is a difference of view as to how to interpret the Appeal Judgment where it dealt with the issue of good faith. I shall deal with this below. In this section of the judgment I shall also consider the evidence provided by the Laser Trust. This is essential when determining the nature and weight to be given to a creditor's view at the hearing of a petition.

55. As regards the Laser Trust, its origin and identity is not in doubt. It was established by a trust deed ("Trust Deed") dated 1 July 2003 on the instruction of Mrs Yael Levison. Mrs Levison is the wife of Mr Leib Levison, a businessman in the care home and real estate sectors (it is estimated that the assets in Mr Levison's nursing home portfolio are over US$100 million). It was Mr Levison who was to make the one-off payment to the IVA. Since 10 December 2018, the sole trustee of the Laser Trust has been Mr Yitzchak Steinberg ("Mr Steinberg"), a lawyer and notary practising in Israel. In his witness statement Mr Steinberg states that the Laser Trust does not have an investment advisor or administrator or any similar service provider. Nor does the Laser Trust have any financial statements or accounts.

56. It is asserted that the Laser Trust is not an associate of MG and no issue is taken on this, although Mr Atherton sought to differentiate an associate and independence for voting purposes. He submitted that although he was not seeking to:

> "extrapolate the idea that if you take an assignment, say, from an associate, you are an associate. That is not the point at all. It is not the difference between associate and non-associate; it is the difference between independent and non-independent. There are many ways that you can have a relationship between debtor and creditor, which is not formally connected for the purposes of the Act, not formally an associateship for the purposes of the Act, that nevertheless require the court to consider the nature of that relationship in terms of the question of independence"

57. Mr Atherton was pursuing the position that Mr Levison was the person who had been involved in the IVA and is either directly or indirectly connected with the Laser Trust. As such he invites the Court to infer that he is not and neither is the Laser Trust, wholly independent. He also raises the issue of whether MG or one of the family trusts been involved financially in the KSA through the Laser Trust. I shall turn to the evidence later, and in the usual way consider it against the background of all the other admissible evidence and material in order to judge if these allegations can be made good.

58. One beneficiary only is named in the Laser Trust deed, that is Ponevez Institutions, Israel. Mr Steinberg's evidence is that the Ponevez institution is an educational organisation that comprises a chain of institutions including Ponevez Yeshiva, which was founded over 80 years ago and is one of the leading (and largest) yeshivas in the world. The institution is very highly regarded within the Orthodox Jewish community, and Mr Steinberg has confirmed that it is entirely independent of MG and his family. Mr Steinberg as trustee, is given wide discretionary powers so that the Ponevez institutions need not be the only beneficiary. He is provided with an express power to make "any investment although of a speculative nature … as the Trustees shall in their absolute discretion think fit" and "to gift all or any part of the Trust fund". Clause 5 of the Trust Deed sets out the trusts upon which the assets of the Laser Trust are to be held. Subparagraph (e) provides that the Trustees shall hold the Trust Fund "subject to the foregoing trusts upon trust … for such charitable purposes as the Trustees shall determine and in default of and subject to such determination for charitable purposes generally".

59. In the First Judgment the Court found that "the purpose of the KSA was to assist Mr Gertner by buying off a creditor, not to enable Laser Trust to sue him". The Judge was required to construe the KSA. In order to do so he had to take account of the whole

document, setting out the relevant clauses. He considered that the definition of "Related Parties" was relevant and noted that Clause 3.1 provided that: "Laser Trust shall pay Kaupthing the total sum of US$6 million by close of business on 15 December 2015". He explained that it was common ground that the Laser Trust had made the payment of US$6 million in accordance with clause 3.1. and noted that Clause 3.6 provided "On or before execution of this agreement the parties shall enter into or procure that the relevant parties enter into and adhere to the profit sharing agreements in substantially the form of the draft agreements in Appendices 2, 10 and 11 regarding the future profits of Indus Trading Limited, Maskelyn Limited and Readinse Limited respectively." He said that "each of the three companies mentioned in Clause 3.6 is a claimant in the Gertler Arbitration, and the principal effect of the profit-sharing agreements is to give Kaupthing a share in any recoveries made in that Arbitration in exchange for release of the respective companies from liabilities said to have been owed to Crosslet Vale, the Moises Gertner Trust and the Mendi Gertner Trust. In each of the profit-sharing agreements the recitals mentioned the Dispute and the Proceedings and the parties to them and recorded: "Those parties have settled their differences on a binding basis by way of a settlement agreement dated 11 December 2015."

60. The Judge found that "the definition of Related Parties was wide enough to include Laser Trust as assignee" and that Kaupthing was no longer a creditor at the time of the meeting of creditors as the KSA, despite including saving provisions, on his interpretation, prevented its debt from being enforced. He found that if he was wrong and it could be enforced then the debt was contingent and therefore unliquidated or unascertained. He also found, importantly for the matter before the Court now, that there was a breach of good faith because the KSA enabled Kaupthing to receive collateral benefits that were not available to other creditors.

61. In the Appeal Judgment Patten LJ reached a different conclusion to the first instance Judge and found, that there was no reason in law to find that the Kaupthing debt could not remain live. The saving provisions kept the debt alive for purpose of voting: "I can see no reason in law why a creditor cannot preserve the existence of a debt owed to him whilst at the same time agreeing to take no steps himself to enforce the liability". He also found that the debt was liquidated and ascertained.

62. At paragraphs 47-48 Patten LJ explained:

> "I agree with the judge that the KSA was not conditional in the sense that neither party came under any contractual obligations on the execution of the agreement and clauses 6 and 7 had no operation at the time of the creditors' meeting. At the time when the KSA was signed on 11 December Kaupthing was undoubtedly a creditor of Mr Gertner and had commenced proceedings against him under the guarantee. Although Mr Gertner had formally contested liability, there is nothing to indicate that he had any serious defence to the claim and Kaupthing as his largest creditor was in the position to pursue him into bankruptcy unless satisfactory arrangements could be made for the compromise of its claims".

63. At paragraph 54 of the Appeal Judgment Patten LJ explained "there is nothing in the KSA which limits the rights of Laser Trust to enforce the liability post assignment of the debt. All that clause 6 and 7 do is to protect Mr Gertner against Kaupthing by restricting its right to enforce the guarantee".

64. His observation in respect of the Laser Trust was that "there is no suggestion that the funds which Laser Trust will provide to finance the KSA are in any sense assets that belong to Mr Gertner or would otherwise be available to his general creditors including CFL".

(ii) The Appeal Judgment – a difference of view

65. There is a difference of view as to how the good faith principle and the identified breach was applied in the Appeal Judgment. Ms Toube QC argues that paragraph 80 of the Appeal Judgment should be read as if it were dealing with the *Kapoor* case, so that the words "the vote of the creditor who is a party to the collateral arrangement falls to be excluded" (the "exclusion rule") were being used to contrast *Kapoor* with the present case. It is not part of the law, argues Ms Toube, that whenever a creditor has a collateral agreement, that creditor will be automatically excluded. Mr Atherton argues that the Appeal Judgment was addressing the *Kapoor* position and applying the exclusion rule to the circumstances of the case before it. He argues that the Appeal Judgment reviewed the jurisprudence relating to good faith in the context of individual voluntary arrangements, and found it was not restricted to a failure to disclose a collateral agreement.

66. The Appeal Judgment upheld the decision of HHJ Keyser QC analysing the extent of the principle by reference to *Cadbury Schweppes v Somji* [2001] 1 WLR 615, and *Kapoor v*

National Westminster Bank plc [2011] EWCA Civ 1083. Etherton LJ (as he was) explained in *Kapoor* at paragraphs 67 and 68:

> "it was expressly provided in r 5.23(4) of the 1986 Rules that the resolution approving the IVA would be invalid if more than half in value of the independent creditors, that is non-associates of the debtor, voted against the resolution…. The arrangement given effect by the assignment in the present case was patently intended, and intended only, for the purpose of subverting that legislative policy. The contrary is not asserted on behalf of Mr Kapoor. It is at one extreme end of a spectrum of transactions of questionable legitimacy, that is to say consistency with the legislative policy underlying r 5.23(4)."

67. And he explained why there was a subversion of the policy on the facts of that case:

> "Not only was the arrangement wholly uncommercial, from Mr Chouhen's perspective, in that it inevitably involved him paying more for the assignment than he would ever realise and retain in respect of the assigned debt, but, as Mr Smith forcibly submitted, the obligation to return to Crosswood 80% of the distributions received by Mr Chouhen under the IVA meant that in reality Crosswood only ever parted with a small part of its economic interest in the assigned debt. The assignment was designed to confer voting rights on Mr Chouhen with a value of £4m, but to part with only a fraction of the true financial value of the assigned debt".

68. And at paragraph 69 Etherton LJ concluded:

> "I agree with Mr Smith that the well-established good faith principle applicable to agreements between a debtor and creditors is capable of colouring, and should colour, the meaning of that expression. That reflects the approach of the Court of Appeal in Somji's case. In my judgment, interpreting s 262(1)(b) against the background of the good faith principle and the legislative policy reflected in r 5.23(4), it was a 'material irregularity at or in relation to … [the] meeting' approving Mr Kapoor's IVA to take into account Mr Chouhen's vote for the purposes of r 5.23(4) when to do so would give effect to an arrangement solely, patently and irrefutably designed to subvert the legislative policy underlying that provision and without any commercial benefit intended or claimed for Mr Chouhen. It was an uncommercial arrangement inconsistent with any notion of good faith between Mr Kapoor and his independent creditors, or between Mr Chouhen and Crosswood, on the one hand, and the independent creditors, on the other, and was designed solely to subvert a critical principle of legislative policy as to the conditions for approval of an IVA. That is a perfectly apposite example of 'irregularity', giving the word one of its normal meanings as something which is lacking in conformity to rule, law or principle".

69. At paragraph 78 of the Appeal Judgment Patten LJ quoted paragraph 74 of the decision of in *HMRC v Portsmouth City Football Club Ltd* [2010] EWHC 2013 (Ch) where Mann J observed: "If it were the case that these creditors had no real interest in the CVA at all then there might be something in it. Why should those with no interest in the CVA at all,

and who were being paid outside it, be entitled to force unwilling creditors into a CVA which is not approved by a requisite majority of that smaller class?"

70. The mischief identified in the Appeal Judgment is described at paragraph 79:

> "Putting aside for the moment questions of non-disclosure, what Kaupthing received under the KSA was a significant financial advantage over what Mr Gertner had offered to his other creditors under the proposal. There has been much argument and not a little evidence about whether the terms of the KSA were intended, so to speak, to buy Kaupthing's vote. *But it is in my judgment obvious, as I have already said, that, looked at objectively, the additional consideration was intended to act and must be presumed to have acted as an inducement to Kaupthing to support an arrangement which would avoid Mr Gertner's bankruptcy. Although Kaupthing was not in terms required to vote in favour of the proposal, it had every incentive to do so* and the KSA was deliberately drafted in such a way as to enable Kaupthing to remain a creditor at the time of the meeting. The *remaining creditors by contrast would be limited to the dividend provided under the proposal and any further investigation of Mr Gertner's asset position (including, for example, in relation to the claims in the arbitration) would be effectively stifled*." (my emphasis)

71. The undisclosed presumed inducement may have been sufficient in itself to find that there had been a breach of good faith. But it was not the only factor as Patten LJ considered the effect the IVA would have on other creditors (the last sentence of paragraph 79) and went on to cite, with approval, the reasoning of HHJ Keyser QC in the First Judgment that supported the breach of good faith principle:

> "First the KSA radically alters the commercial significance of the Proposal for Kaupthing as compared with the other creditors. For CFL and others, the opportunity offered by a bankruptcy was to be replaced by a return that might be regarded as *de minimis*. Upon the approval of the Proposal, those creditors would, for example, lose any chance to investigate whether potential benefits of the Gertler Arbitration would be the beneficial property of Mr Gertner. Instead they would have a share in what was left of the £487,500 after HMRC had been paid off and the costs of the IVA had been discharged. Kaupthing, by contrast, was to receive a share of whatever proceeds were recovered in the Gertler Arbitration. Mr Gertner confirmed his expectation as to the scale of the benefit that Kaupthing would receive: "The offers to settle [in the Gertler Arbitration] are into the hundreds of millions that have been made, so therefore what I say to you is that any amount that the bank will receive is a substantial amount. It's not a small amount that the bank is keeping…How much will be out of litigation, I have no

> idea, but I do not think that it will be whole [i.e. full payment of the amount claimed by Kaupthing], but it will be substantially more than other creditors who borrowed at such a time of very high assets would have repaid the bank, so I hope and I pray that it will be a substantial amount." *The consequence seems to me inevitably to be that Kaupthing's commercial interests in the outcome of the creditors' meeting were quite different from those of the other creditors. Indeed, the fact that approval of the Proposal would tend to put investigation of the beneficial interest in the Gertler Arbitration out of the reach of the other creditors indicates the clear conflict that arose between Kaupthing's interests and those of the general body of creditors. I regard this as a breach of the principle of good faith*". (my emphasis)

72. Patten LJ was unequivocal in stating, at paragraph 81 of the Appeal Judgment, "I agree with this".

73. He then proceeded to differentiate the football creditor cases from this matter and described the KSA as "an *ad hoc* private arrangement designed to give the largest and most influential creditor an additional financial advantage not made available to any other creditor in the IVA." In my judgment an arrangement designed to give the largest and most influential creditor an additional financial advantage not available to other creditors is highly relevant, if not critical.

74. The good faith principle described by Bingham LJ (as he was) in *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 433, 439-445 is consistent with the findings of HHJ Keyser QC, adopted in the Court of Appeal. He said that the principle "does not simply mean that they should not deceive each other …; its effect is perhaps most aptly conveyed by such metaphorical colloquialisms as "playing fair," "coming clean" or "putting one's cards face upwards on the table." It is *in essence a principle of fair* and open dealing …" (emphasis supplied).

75. The *ad hoc* private arrangement described by Patten LJ, meant that the largest and most influential unsecured creditor could vote for an outcome for which it had little or no interest because it had recourse to assets outside of those which were available for all unsecured creditors. The effect was to create different classes of creditor even though the creditors had no pre-transactional bargain to sit in a different class (such as secured creditors). Creating classes through the medium of a private arrangement, was manifestly unfair and would have serious consequences on the less influential creditors restricted to share a much smaller and distinct pool of assets. In my judgment this is the true interpretation of the Appeal Judgment. The Court of Appeal found that notwithstanding

the KSA there was no requirement for Kaupthing to vote in support of the proposal for the IVA. There is no suggestion that that is different in respect of the Laser Trust. The incentive to vote in favour of the proposal was to avoid bankruptcy, and investigation into the affairs of MG and the potential to set aside any antecedent transactions that may include rights provided to support his avoidance of bankruptcy.

76. This is consistent with the description given in *Kapoor*, where Etherton LJ cited with approval *Marc v Sandford* (1859) 1 Giff 288 at 294. In that case Stuart V-C said that the principles employed are "consistent with ordinary principles of morality" and inform us that reference to public policy is significant.

77. The need for transparency goes hand-in-hand with the good faith principle. Without transparency there can be no good faith. As was observed by Judge LJ in *Somji* at para 40, voluntary arrangements attract the application of the good faith principle as every proposal for an individual voluntary arrangement should be characterised by "complete transparency *and* good faith" (emphasis added). And "section 276 and the Rules encapsulate the principles of transparency and good faith" at para 44.

78. I now turn to the evidence and have in mind the clear guidance provided by Judge LJ in *Somji* at para 43 that MG has an obligation to provide accurate information in the period up to the date and during a meeting of creditors and that the "information that is provided must be complete". MG relies on the evidence of Laser Trust to demonstrate that the proposals for the Arrangement provide transparency and fair dealing.

(iii) The evidence

79. The main evidence from the Laser Trust comes from Mr Steinberg, the sole trustee. He says that when he exercises any discretion as trustee, he has regard to the wishes of Mr and Mrs Levison, but he uses his own independent judgment in the best interests of the trust when making decisions. No reason is provided why he has regard to the wishes of Mr Levison who was not the settlor of the trust. His evidence is that the KSA was entered into prior to his appointment as trustee when Mr Hassan was the "decision-maker". He therefore relies on evidence provided by Mr Hassan.

80. Mr Hassan has not provided a witness statement, but Mr Steinberg exhibits a letter from Mr Hassan. In his letter dated 30 May 2019, carrying the heading "Finsbury Trust", he

explains that he was "aware of the debt owed to Kaupthing by Crosslet Vale, (ultimately owned by the Gertner Family Trusts), for which I also act as corporate director for this (sic) company I was also aware that Moises and Mendi Gertner had given personal guarantees on the company's debt. With the knowledge shared by Mr Levison, it was evident that the Crosslet Vale creditors had a reasonable chance of being repaid a sum in the hundreds of millions. On this basis the opportunity to acquire this debt through the Kaupthing Agreement for just $6m seemed to be a fair value given the possibility of earning a very large profit for the Laser Trust".

81. Mr Steinberg says that the letter "indicates, the decision to enter into the KSA was made primarily for commercial reasons". Mr Hassan does not stop there as he goes on to say "in addition to the profit motive, I should also make clear that I hold the Gertner family in very high regard, especially for their considerable charitable works over many years. I took the view that, even in the event the Trust fails to recoup its investment, the use of the Trust's resources to intervene in this matter is nonetheless reasonable because the Trust was established for the benefit of an institute of religious education." This is followed by: "Given the assistance afforded to such institution (sic) over the years by the Gertner family, the replacement of Kaupthing by a more patient creditor is a just recompense for the Gertner family's works and as a result the Laser Trust had a strong motivation to acquire the debt from Kaupthing."

82. There are some obvious gaps and internal inconsistencies in the letter. There is no explanation given as to what was and what was not taken into account when reaching the conclusion that there was a "reasonable chance" or as Mr Steinberg later states (paragraph 23) a "real possibility" of a good return or that the "Crosslet Vale creditors" would be "repaid a sum in the hundreds of millions". At paragraph 18(1), his statement refers to Mr Hassan's letter which he says "notes the circumstances in which Mr Levison became aware of the prospect of "earning a very large profit from the Laser Trust. Mr Hassan's letter refers to Mr Levison informing him that there had been some "settlement offers" in relation to a dispute between the Gertner Family Trusts and corporate entities established for the benefit of Dan Gertler and his family. Mr Steinberg comments in his witness statement that Mr Hassan says that he "made his own independent assessment of the value of the rights" but Mr Hassan says no such thing in his letter. Mr Hassan has failed to provide any reasoning or analysis of how he reached his decision in 2015 or gives any

evidence that he had obtained professional advice when making his assessment. This is surprising since Mr Hassan was acting as sole trustee. Mr Steinberg in his witness statement [para 20] refers to "an additional reason why the Laser Trust was willing to enter into a transaction with such a high level of risk". The term "reasonable chance" or "real possibility" of recovery is inconsistent with "high level of risk".

83. Mr Hassan's position that Laser Trust was established for the benefit of an institute of religious education is inconsistent with purchasing a debt to assist a debtor on grounds that it would be more patient. The charitable purposes are educational although the trust instrument does provide for funds to be used for "charitable purposes generally". It is not explained how the purchase of a debt with the intention of enforcing the debt even though patience may be shown, or voting in favour of an individual voluntary arrangement, falls within "charitable purpose generally" or what charitable purpose was intended. It has not been said that money was given to a charity for the destitute or even given to MG (Mr Steinberg explains that the Trustee has a right to make a gift under subparagraph 28 of the first schedule). That is unsurprising as a "person" must be nominated under paragraph 24. There is no evidence of a nomination. In any event it is not the case of Mr Steinberg that he gifted any money to MG or that was the intention. Mr Steinberg disavows the notion that the "Laser Trust's decision to enter into the KSA" was to provide "a mere gift". None of this explains the charitable purpose of purchasing the debt from Kaupthing. Furthermore, no evidence is provided to demonstrate that Kaupthing was impatient or why the Laser Trust would be more patient than Kaupthing. Indeed, the evidence is that Kaupthing was prepared to be patient, was not commercially interested in a dividend within the IVA and content to obtain a return elsewhere.

84. Mr Steinberg's witness statement next deals with issues raised by Ms Blom-Cooper (solicitor in charge of this litigation at Mishcon de Reya acting for CFL). He asserts that "that Mr Gertner's proposed IVA represents a better deal for the Laser Trust…than bankruptcy…" He fails to explain why there is in his view no prospect of asset recovery if a bankruptcy order were to be made or give any consideration to the possibility of the claw-back provisions. An objectively-minded commercially orientated creditor is more likely than not to consider alternatives when such a low dividend is proposed. His lack of concern or comment about a financial loss for the Laser Trust in terms of the time-value

of money (as I have mentioned $6m was paid to Kaupthing in 2015), capital and a dividend is surprising for a sole trustee and unexplained.

85. The evidence regarding the ability of Laser Trust to recover "large sums" is unsatisfactory because it carries no analysis or reason for why the Laser Trust believes it will recover "large sums". Mr Steinberg explains in his statement that the assignment of the Kaupthing debt includes not just the rights against MG but rights against Crosslet Vale and Mendi Gertner. It is said that the Laser Trust intends to pursue those claims. I asked Ms Toube QC (and Mr Amey) if any claims had been made against either of these parties. I was informed that instructions would be given. Yet Crosslet Vale has not recovered from the Israel arbitration and Mendi is said to be insolvent. Mr Steinberg states: "I also understand that Mr Mendi Gertner is a wealthy man….". Ms Toube said that he was insolvent in 2015, but things change. There is no evidence that there has been a change to Mendi's financial affairs. The statement that he is wealthy remains inconsistent with the evidence before the Court. It is known that Mendi Gertner was a guarantor of the Crosslet Vale debt and that debt has not been repaid. The lack of detail from Mr Steinberg is consistent with his lack of analysis as to the merits of the claims and consistent with Laser Trust not having "an investment advisor or administrator or similar service provider [nor]…financial statements or accounts".

86. In any event no proceedings had been issued. Laser Trust relies on the ability of Crosslet Vale to recover sums owed by Pitchley Properties Limited which are said to amount to a considerable sum. In order for that sum, or I infer any sum, to be recovered, Pitchley Properties Limited has to be successful in the arbitration. The arbitration has been proceeding for 10 years. It is surprising, in these circumstances that there has been no analysis or update of the arbitration proceedings and surprising that no detail has been provided in the evidence of Mr Steinberg. In respect of a claim against Mr Gertler (in the arbitration), the height of the evidence produced to demonstrate that he is worth pursuing, comes in the form of a magazine.

87. Mr Steinberg says that he "categorically" denies that MG used any of his own money to buy the KSA debt or "that the Laser Trust is being used as a conduit to pay Mr Gertner's own money to the trustees". He asserts that the "funds held by the Laser Trust were provided ultimately by Mrs Levison". There is no explanation for the use of the word "ultimately". There is no evidence from Mrs Levison and the assertion is contradicted by

MG who states in his witness statement that the settlor was Mr Levison: "Laser Trust was established by Leib Levison…[who] is a friend who was prepared to provide me with limited funds to assist me during my financial difficulties" (para 42 of his statement dated 31 May 2019). In his proposals to creditors he states that the trust was "established by Mr Levison". In fact, the settlor is named as a company known as Mutual Trust Management [Gibraltar] Limited and no details are provided about this Gibraltar Trust. With a trust fund that has no accounts or financial statements his failure to provide a source for his evidence is in, and of itself, extraordinary. This is not just pedantic. The circumstances leading to this petition, the revoked IVA and proposals for the Arrangement militate towards transparency and the obligation of MG who relies on this evidence is to provide a "complete" picture.

88. In her second witness statement dated 10 June 2019 Ms Blom-Cooper makes the following observations that, in my judgment, have force:

> "Mr Steinberg now says in his witness statement that the KSA was entered into, "primarily for commercial reasons" and that Laser Trust potentially stands to make a very healthy profit in return for its $6m investment. This is wholly inconsistent with what was said in paragraph 2 of Mr Steinberg's letter to Teacher Stern dated 16 April 2019 which put forward a primary charitable purpose for the assignment"
>
> "The Trust appreciated that the money they provided might not be recoverable but was intended by Laser Trust to reflect the efforts that Mr Gertner and the Family Trusts had made over the years to support worthy causes internationally."
>
> "It is tolerably clear that this change of case has been introduced in a last-minute attempt to answer CFL's legal arguments in relation to the applicability of the Court of Appeal decision in *Kapoor* to the facts of this case. This is clear not only from the timing of this change of case, but also from the fact that the alleged commercial upside now relied upon makes no sense at all:

(i) The alleged commercial upside is said to be the ability of the Laser Trust to recover the Kaupthing debt from Crosslet Vale and Mr Mendi Gertner (Mr Gertner's brother). Mr Steinberg asserts that Crosslet Vale will (indirectly) receive a large portion of the proceeds of the Arbitration and that Mendi Gertner is a,

"wealthy man in his own right" and that the Laser Trust intends to pursue both Crosslet Vale and Mr Mendi Gertner for repayment of the assigned Kaupthing debt;

(ii) It seems extraordinary that Laser Trust is willing to help one brother escape insolvency (for reasons that include his and the Family Trust's contributions to charity) to then pursue the other brother (and indeed a company allegedly owned by the Family Trusts) for what are extremely large sums of money;

(iii) It is impossible for CFL to verify the (new) claim that Crosslet Vale does indeed stand to receive some or all of the proceeds of the Arbitration (if successful). In any event Crosslet Vale was a party to the KSA. In my view, it would have made no commercial sense for Crosslet Vale (which is allegedly owned by one of the Family Trusts) to agree that Kaupthing should have an upside from the Arbitration, which Mr Gertner said on oath in the First Challenge would be "a substantial amount", the offers to settle having been "into the hundreds of millions" and that the Laser Trust could also enforce the Kaupthing debt to obtain another very substantial share of the proceeds of the Arbitration;

(iv) Mr Mendi Gertner's asset position as at 10 December 2015, according to an affirmation which appeared at appendix 4 of the KSA was negative in the sum of £590,644,750…."

89. Mr Atherton QC and Ms Leahy argued that the evidence from Laser Trust does not make commercial sense as Crosslet Vale would receive little by agreeing to share the fruits of the Arbitration:

"In oral submissions, Laser Trust attempted to meet CFL's point by saying that Kaupthing and Crosslet Vale will both receive a share of the Arbitration proceedings. This does not answer CFL's point. Crosslet Vale and the three parties to the profit-sharing agreements are all Gertner family companies. It would have made no sense for these companies to agree to pay the same debt twice over.

What also makes no sense is the suggestion that Kaupthing gave up its claim against Crosslet Vale (which already had an indirect entitlement to a large share of the Arbitration proceeds) for a right to a share of the profits of the three other

> Gertner companies (which also have an entitlement to a share of the Arbitration proceeds). Further, had Kaupthing given up its claim against Crosslet Vale for an (in substance) equivalent claim against three other Gertner companies, then this is a point that would have been made very forcibly during the course of the section 262 challenge in support of R3's position that Kaupthing had not received a collateral advantage, and had not been induced to enter into the KSA by a promise of a payment outside the IVA."

90. To counter these powerful submissions Ms Toube QC and Mr Phillips QC point to the evidence from Mr Steinberg that if the assignment bears no return the Laser Trust will be content. This is because the Gertner family had given support to Jewish charities over the years. I have set out the evidence above and shall turn to its reliability now.

91. Ms Toube QC argues that the Court may not go behind the evidence of Mr Steinberg and should accept the evidence of Mr Hassan without more. The Court may not find the evidence unreliable or make a finding of dishonesty without having heard cross-examination: *The Burden Group Limited* [2017] BPIR 554. That the Court should not find a person dishonest without cross-examination is undeniable. That a Court may not find assertions made in a witness statement unreliable is not. Ms Toube further relies on *Long v Farrer & Co* [2004] BPIR 1218 where Rimer J said there are only limited exceptions when a Court should go behind statements of fact without cross-examination but where written evidence is manifestly incredible the Court may find it unreliable. In *Portsmouth v Alldays Franchising Limited* [2005] BPIR 1394 [12] Patten J (as he was) observed: "So far as the evidence is concerned, the mere fact that a party in proceedings not involving oral evidence or cross-examination asserts that certain things did or did not occur, is not sufficient in itself to raise a triable issue. That evidence inevitably has to be considered against the background of all the other admissible evidence and material in order to judge whether it is an allegation of any substance." This has been followed in numerous occasions, for example See *Smith Stylist Ltd v Harte Solutions Limited* [2017] EWHC 2971; *Dowling v Promontoria (Arrow) Ltd* [2017] BPIR 1477. None of these cases were cited in *The Burnden Group Limited* where the Court was asked to decide a conflict of evidence (different to the exercise undertaken by Patten J (as he was). The Court's practice of looking at all the evidence to weigh its credibility in the absence of cross-examination is long established. In *National Westminster Bank Plc v Daniel* [1994] 1 All

ER 156, Glidewell LJ, giving the judgment of Court, referred to *Standard Chartered Bank v Yaacoub* [1990] CA Transcript 699 in which "Lloyd LJ, giving the decision of the Court with which Nicholls LJ agreed, said: 'it is sometimes said that in an application under Ord 14 the court is bound to accept the assertion of a defendant on affidavit unless it is self-contradictory or inconsistent with other parts of the defendant's own evidence, and that the court cannot reject an assertion on the simple ground that it is inherently incredible.' Lloyd LJ then referred to Webster J's decision in *Paclantic Financing Co Inc v Moscow Norodny Bank Ltd*, saying that it was not approved by the Court of Appeal. He then referred to the judgment of Bingham LJ in *Bhogal v Punjab National Bank* and continued: 'In the present case I ask myself whether it is credible that an oral agreement was made in mid-January of 1985 as alleged by Mr Naidoo in his third affidavit. I have come to the conclusion that it is not.' This led Glidewell LJ to agree with the decision in *Standard Chartered Bank v Yaacoub* where "Lloyd LJ posed the test: is what the defendant says credible? If it is not, then there is no fair or reasonable probability of him setting up a defence." This, Glidewell LJ said, is a wider test that posed by Webster J who thought that affidavit evidence could only be rejected if it "contained in it …. evidence, [that] is inherently unreliable because it is self-contradictory, or if it is inadmissible, or if it is irrelevant…..[The Court can] reject a defendant's evidence when there is affirmative evidence which is either admitted by the defendant or unchallengeable by him, and which is unequivocally inconsistent with his own evidence". None of these cases were cited to the Judge in *The Burnden Group Limited*. Accordingly, I reject the submission made by Ms Toube QC that the Court must accept the assertions made in the witness statement of Mr Steinberg without more.

92. In this matter I am not seeking to determine a conflict of evidence but whether the evidence is reliable. Weighing the evidence of the Laser Trust against the background of all the other admissible evidence and material in order to judge whether it is of any substance I find that the Laser Trust has provided little visibility, little or no analysis, and the evidence amounts to unsubstantiated assertion, carries internal inconsistencies, external inconsistencies or contradictions, has unresolved questions, relies upon evidence such as a magazine that carries little or no evidential weight, and relies on a letter from a previous trustee which itself carries little weight. The criticisms levelled by Ms Blom-Cooper and Mr Atherton in oral submissions are justified. The lack of explanation, the internal inconsistencies and failures I have outlined lead me to conclude that the evidence

is unreliable. It cannot be described as evidence of substance or sufficient to "raise a triable issue".

93. The unreliable evidence does not undermine the debt assigned to the Laser Trust. It does affect the evidence to support (i) the explanation given for purchasing the debt from Kaupthing; (ii) the assertion that the Laser Trust has a commercial interest in the proposed Arrangement; and (iii) "that Mr Gertner's proposed IVA represents a better deal for ……Mr Gertner's other unsecured creditors than bankruptcy" as stated by Mr Steinberg. As the evidence is unreliable it does not support the assertion that the Laser Trust is free from the influence of MG or a Gertner Family Trust (or independent as Mr Atherton put it).

94. I observe in his witness statement MG explains that he has a current salary of £75,000 which is paid to charity or to his wife for "family expenses". The proposal for the Arrangement is dependent upon a payment of £450,000 being made from the Rosenberg Family Trust and "no other assets will be made available and no guarantees are offered in support of this arrangement". There are two observations to make. First, as said by Ms Blom-Cooper in her witness statement there is no independent evidence that the contribution is third party money. Having regard to the background to this matter, the First Judgment and Appeal Judgment, it may be said that the Rosenberg Family Trust would have been keen to provide such evidence. Secondly as MG's salary is given away to charity or sometimes used for expenses it is surprising, regardless of the size of the debts, that it, or a proportion of it, is not available to creditors over several years. In these circumstances there is no evidence to support the statement of MG that "the only way that my creditors will receive any monies is in an IVA". I turn to the role of the nominees.

The role of the nominees

95. Mr Khalastchi and Mr Bass of Menzies LLP are joint nominees for the Arrangement. Mr Khalastchi has provided a witness statement in which he explains the proposals and gives an account of the investigations he has carried out. He says that he was instructed following the decision of the Supreme Court to refuse permission to appeal on 11 February 2019 and set about reading the First Judgment and the Appeal Judgment. He informs the Court that he understands and knows his duties as joint nominee and is aware of SIP 3.1. He is satisfied that although his principal source of information was MG, "he

has taken all reasonable steps to verify the information he has received and has seen two boxes of documents provided by Teacher Stern LLP but did not review them on the basis that the funds available to the Nominees were insufficient to undertake any detailed analysis or consideration of those papers".

96. Mr Shaw acting for the nominees explains that the nominees are neutral as to the outcome of this hearing but urges the court to find that they have carried out their duties and taken reasonable steps to confirm that MG's financial position was not materially different from that represented by him.

97. Mr Shaw refers me to the well-known case of *Greystoke v Hamilton-Smith* [1997] BPIR 24 (at 28-29) where Lindsey J set out some guidance for nominees:

> "But within the scheme of the Act as discernible from the powers and duties given to the nominee it is, in my judgment, to be expected, as a minimum, of the nominee, at least in those cases where the fullness or candour of the debtor's information has properly come into question, that the nominee shall have taken such steps as are in all the circumstances reasonable to satisfy himself and shall have satisfied himself on three counts. Leaving aside compliance with the formal requirements of the Act and rules they are, first that the debtor's true position as to assets and liabilities does not appear to him in any material respect to differ substantially from that which it is to be represented to the creditors to be. Secondly, that it does appear to him that the debtor's proposal as put to the creditors' meeting has a real prospect of being implemented in the way it is to be represented it will be. A measure of modification to proposals is possible under s 258 so this question is to be approached broadly. Thirdly, that the information that he has provides a basis such that (within the broad limits inescapably applicable to what have to be the speedy and robust functions of admitting or rejecting claims to vote and agreeing values for voting purposes) no already-manifest yet unavoidable prospective unfairness in relation to those functions is present.
>
> Reverting, then, to only the three counts I have mentioned, what steps are reasonable in the circumstances for a nominee to satisfy himself will, inevitably, depend on a host of variables such as the strength of the grounds for such questions or doubts as shall have arisen, their materiality to the propriety or feasibility of the debtor's proposals, the quality of the debtor's answers to the nominee in intended resolution of those doubts, the ease or difficulty with which independent inquiry by the nominee may resolve any continuing doubts, the expense entailed in such further inquiry and the availability of funds to meet that expense. Plainly, the less inquiry the nominee undertakes, the more important, in terms of reliance upon it, becomes the fullness and candour of the information provided by the debtor. If, for whatever reason, the nominee's inquiries in questionable cases have been so restricted or unsatisfactory that the nominee would be unable to assure creditors that he had satisfied himself that those three minima were met, then he should not unequivocally report, under s 256(1)(a), that in his opinion a meeting of creditors should be summoned. Where such doubts have reasonably arisen it cannot be right for the nominee unquestioningly to accept whatever it put in front of

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

98. Mr Khalastchi states that his investigations show that MG's financial position is not manifestly different from that contained in the proposal; that from the information he has, he does not conclude that the IVA is manifestly unfair; and if Laser Trust are entitled to vote, the IVA will be approved and implemented. In reaching these conclusions he has had regard to the Appeal Judgment which informs him that the Laser Trust debt is an enforceable debt; information provided by MG; land registration documents for the property disclosed by MG; the Laser Trust deed, confirmation from the Laser Trust that it is not connected to MG and, that he had received the sum promised by the Rosenberg Family Trust for distribution to creditors if the proposals are passed at a meeting.

99. I agree with Mr Shaw that the nominees were entitled, without more, to rely on the information they obtained for the purposes they obtained it. It is rarely necessary to conduct a full investigation prior to a meeting and common sense and authority dictate that limited investigations are ordinarily justified. The nominees have gone further than the nominee had for the IVA. In that case Mr Rubin was recorded as accepting that his investigations were "thinner than they should be". That was insufficient. This is an extraordinary case and required more than the usual amount of investigation. I find that the investigations undertaken by the nominees were reasonable in the circumstances. I have regard to the fact that three days of Court time has been taken to decide if the information provided by MG is cogent, whether the debt owed to CFL is enforceable, the weight to give to the evidence of the Laser Trust, as opposing creditor, the application of good faith to the facts of this case, the exercise of discretion to adjourn the hearing of the bankruptcy petition for the purpose of permitting a meeting of creditors, and the limited resources available for investigation.

100. That a nominee has carried out reasonable investigations within the ambit of her duties as nominee, those investigations being limited by funding and time, and taking account of a nominee's inevitable reliance on information provided by a debtor, does not mean that a Court should be bound by the opinion of the nominee. The fact of a nominee who acts and reports in accordance with SIP 3.1, as I find the nominees have here, does not mean that the results of those investigations are sufficient for all purposes. There are undoubtedly further investigations that can be made into the asset position of MG and how the side agreements (KSA and Bank Leumi settlement agreement) came about.

101. Where there is independent evidence before the Court that contradict the views of a nominee or after a closer degree of scrutiny the Court finds that the evidence provided is insufficient, the Court may reach a different conclusion to that of the nominee.

Adjournment- the arguments summarised

102. Mr Atherton and Ms Leahy argue that the Court should not permit a meeting of creditors as: (i) a breach of the good faith principle taints any future proposal and MG should not be permitted to have a "second bite of the cherry"; (ii) the Court of Appeal refused to give a direction to hold a second meeting and this Court should follow suit- "collateral attack"; (iii) the Laser Trust debt is not admissible for voting purposes and (iv) taking into account the above factors the Court should, in its discretion, refuse permission to adjourn.

103. Laser Trust's case is more easily stated: (i) Laser Trust did not vote for the IVA; (ii) Laser Trust should not be treated as if it were Kaupthing; (iii) the second proposal to creditors should be treated as new and Laser Trust should have an opportunity to vote if it thinks it is its best interests; (iv) the estimated outcome of £00.4 makes commercial sense to Laser Trust and (v) Laser Trust is receiving no collateral benefit outside the second proposal. MG's position can also be summarised as: (i) there is no authority for the proposition that the revocation of the IVA means that he cannot put forward a second proposal; (ii) it is accepted that MG did not disclose the KSA to creditors and they were blind, as a result, that Kaupthing had commercial benefits not available to the other creditors. That failure does not taint the assignee of the debt.

Second bite of the cherry

104. The contention is that as a result of the revocation of the IVA on the ground that there had been a breach of the good faith principle, MG should not be permitted to put proposals to creditors a second time: no "second bite of the cherry". It is grounded on an abuse of process argument. It is of note that Laser Trust and MG reject the argument that MG is precluded from having a second bite of the cherry because Laser Trust should be treated as independent of Kaupthing. The focus of the abuse of process, however, is on MG's entitlement to put proposals to creditors. The principle put forward by Mr Atherton QC and Ms Leahy is summarised in their skeleton argument:

> "Where a debtor invokes the voluntary arrangement machinery, but then abuses that process by breaching the good faith principle, he acts in a manner which is inimical to the process which he has purported to invoke and must therefore be taken to have forfeited his right to a second IVA, at least in relation to the debts that the subject of the first IVA which his creditors have successfully impeached."

105. To make good the submission an analogy is drawn with litigation where a litigant does something or fails to do something with the consequence that there can be no fair trial: *Arrow Nominees Inc v Blackledge* [2001] BCC 591. An analogy is also drawn with cases where there had been a strike out for inordinate and inexcusable delay. Mr Atherton took me to *Securum Finance Ltd v Ashton* [2001] Ch 291, 301-302 and in particular 309 C-H:

> "For my part, I think that the time has come for this court to hold that the "change of culture" which has taken place in the last three years—and, in particular, the advent of the Civil Procedure Rules—has led to a position in which it is no longer open to a litigant whose action has been struck out on the grounds of inordinate and inexcusable delay to rely on the principle that a second action commenced within the limitation period will not be struck out save in exceptional cases. The position, now, is that the court must address the application to strike out the second action with the overriding objective of the Civil Procedure Rules in mind—and must consider whether the claimant's wish to have "a second bite at the cherry" outweighs the need to allot its own limited resources to other cases. The courts should now follow the guidance given by this court in the *Arbuthnot Latham case [1998] 1 WLR 1426, 1436-1437*:
>
> "The question whether a fresh action can be commenced will then be a matter for the discretion of the court when considering any application to strike out that action, and any excuse given for the misconduct of the previous action: see *Janov v Morris [1981] 1 WLR 1389* . The position is the same as it is under the first limb of *Birkett v James*. In exercising its discretion as to whether to strike out the second action, that court should start with the assumption that if a party has had one action struck out for abuse of process some special reason has to be identified to justify a second action being allowed to proceed."

35. It follows from the preceding paragraphs of this judgment that I am satisfied that the judge adopted the wrong approach to the question whether the claim in the present action (or any part of it) should be struck out on the grounds of abuse. Although he recognised (correctly) the important public interest in the use of court time, he failed to give any weight to that interest in reaching the conclusion which he did. In those circumstances it is for this court to exercise its own discretion".

106. The rationale for the rule under consideration is provided by Chadwick LJ at paragraph 52:

> "If that claim stood alone it could be said with force that to seek to pursue it in a second action when it could and should have been pursued, properly and in compliance with the rules of court, in the first action is an abuse of process. *It is an abuse because it is a misuse of the court's limited resources. Resources which could be used for the resolution of disputes between other parties will (if the second action proceeds) have to be used to allow the bank "a second bite at the cherry". That is an unnecessary and wasteful use of those resources.* The bank ought to have made proper use of the opportunity provided by the first action to resolve its dispute in relation to the claim for payment." (my emphasis).

107. I accept that to put proposals to creditors for a second time, where the proposals are substantially the same as the first proposals can be viewed as a "second bite of the cherry". I reject the analogy with abuse of process. The reason for my rejection is the rationale for the abuse rule is not to prevent a debtor from seeking to come to terms with his creditors but to prevent an abuse of the Court process. The Court provides a public service for dispute resolutions, has limited resources, and parties have to wait in order to avail themselves of the Court procedure. The Court resource should be jealously guarded and not wasted. In my judgment the *Securum Finance Ltd* type of abuse does not assist even if: (i) the outcome of the meeting may lead to a challenge to a creditor approved arrangement; (ii) such a challenge is resolved through litigation and (iii) there is a prospect of an appeal from the first instance decision.

108. What is addressed now is if the Court should adjourn to permit an out-of-court process run its course. To extend the abuse of (Court) process doctrine to out-of-court processes would be to stretch the rationale for the doctrine beyond reasonable limits. I accept the submission of Ms Toube QC that the statutory framework does not permit a debtor to make more than one application every twelve months for an interim order but is silent as to advancing more than one proposal. This is not to say that the "second bite of the

cherry" argument will not have some relevance to the exercise of discretion, as is recognised by Mr Atherton and Ms Leahy in their written submissions.

Collateral Attack

109. Section 262 of the Insolvency Act 1986 provides:

> "(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 approved by a decision of the debtor's creditors pursuant to section 257 unfairly prejudices the interests of a creditor of the debtor;
> (b) that there has been some material irregularity in relation to a creditors' decision procedure instigated under that section…….
>
> (4) Where on an application under this section the court is satisfied as to either of the grounds mentioned in subsection (1), it may do one or both of the following, namely—
> (a) revoke or suspend any approval given by a decision of the debtor's creditors;
> (b) direct any person to seek a decision from the debtor's creditors (using a creditors' decision procedure) as to whether they approve—
> (i) any revised proposal the debtor may make, or
> (ii) in a case falling within subsection (1)(b), the debtor's original proposal.
> (5) Where at any time after giving a direction under subsection (4)(b) in relation to a revised proposal the court is satisfied that the debtor does not intend to submit such a proposal, the court shall revoke the direction and revoke or suspend any approval previously given by the debtor's creditors.
> (6) Where the court gives a direction under subsection (4)(b), it may also give a direction continuing or, as the case may require, renewing, for such period as may be specified in the direction, the effect in relation to the debtor of any interim order."

110. In the First Judgment HHJ Keyser QC considered what order to make under subparagraph 4 of section 262:

> "Mr Fraser QC submitted that, if the foregoing conclusions were reached, a further hearing ought to be held to consider how the statutory discretion should be exercised. However, in agreement with Mr Atherton QC I consider that such a course is neither necessary nor appropriate. Without Kaupthing's support, the Proposal would not have been approved. A further creditors' meeting would necessarily result in the rejection of

> the Proposal, unless Laser Trust were able to vote in favour of it on the basis of the KSA. However, for reasons appearing above, Laser Trust is not entitled to vote on that basis."

111. The Court of Appeal did not disagree, but it is unclear whether an appeal was advanced on the ground that the Court should have permitted a further creditors' meeting. The issue now advanced is that as the Court did not order a further meeting it equally did not direct a fresh meeting. That being the case a further meeting would contravene the principle of barring a collateral attack upon a final decision. The White Book, volume 1 at 3.4.3.3 refers to *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 which is cited for the proposition that it is an abuse of process to initiate "proceedings in a court of justice for the purpose of mounting a collateral attack upon a final decision against the intending (claimant) which has been made by another court of competent jurisdiction in previous proceedings in which the intending (claimant) had full opportunity of contesting the decision in the court in which it was made."

112. The argument based on a collateral attack is, at first sight attractive, since the proposals for the Arrangement are in such similar form to the proposals for the IVA, and the KSA continue to benefit a creditor who can make the final decision at a creditors' meeting. In my judgment, the argument must fail. First there is no discernible attack on the First Judgment as his order was to revoke the IVA not to accede to the request to convene a further meeting in relation to the proposal that led to the IVA. Secondly, the Arrangement is based on a different (albeit marginally different) proposal.

113. In my judgment it is also clear from the First Judgment that Kaupthing was disabled from voting due to a breach of the good faith principle. At that time there had been no assignment to Laser Trust. The only party who could vote in respect of the Kaupthing debt was Kaupthing. That is why the Court observed that a further creditors' meeting "would necessarily result in the rejection of the Proposal" but went on to say, "unless Laser Trust were able to vote in favour of it on the basis of the KSA". The similarity of the proposals and the benefits available to the Laser Trust but not the other creditors are matters that should be considered when exercising discretion.

Discretion principle

114. There is agreement that the court has a discretion to exercise at the hearing of a bankruptcy petition. The parties disagree as to how the discretion should be exercised, and what should or should not be taken into account. Mr Phillips QC and Ms Thornley argue that the Court should give priority to the wishes of the largest creditor who opposes bankruptcy. The opposing creditor is independent, there is no challenge that it has taken an assignment of the Kaupthing debt and paid good consideration for it. The wishes of the opposing creditor are not, it is argued, based on sentimentality but on commercial reality. There is a greater chance of a return, albeit a modest return, through the vehicle of a voluntary arrangement.

115. The discretion is provided by section 266(3) of the Insolvency Act 1986 which provides:

> "The Court has a general power, if it appears to it appropriate to do so on the grounds that there has been a contravention of the rules or for any other reason, to dismiss a bankruptcy petition or to stay proceedings on such a petition; and where it stays proceedings on a petition, it may do so on such terms and conditions as it thinks fit."

116. In *Aabar Block Sarl v Maud* [2018] 3 WLR 1497 Mr Justice Snowden was asked to determine, in the context of a bankruptcy petition and on complicated facts, whether to make a bankruptcy order in circumstances where two petitioning creditors were relying on a joint debt but they disagreed as the making of such an order. Snowden J held that if the debt was joint, both creditors had to agree before the Court would make an order. If by resisting an order for bankruptcy one party was acting in breach of duties, the Court would not stand-by but would make an order. In the course of his judgment the learned judge referred to *Re Leigh Estates (UK) Limited* [1994] BCC 292. At page 294, where Mr. Sykes QC said,

> "Although a petitioning creditor may, as between himself and the company, be entitled to a winding-up order *ex debito justitiae*, his remedy is a 'class right', so that, where creditors oppose the making of an order, the court must come to a conclusion in its discretion after considering the arguments of the creditors in support of and opposing the petition: see *Re Crigglestone Coal Company Ltd* [1906] 2 Ch 327 , in particular the statements of principle of Buckley J at first instance, and s. 195 of the Insolvency Act 1986 …
>
> It is plain from the well-known authorities on the subject that, where there are some creditors supporting and others opposing a winding-up petition it is for the court to decide as a matter of judicial discretion, what weight to attribute to the voices on each side of the contest…"

117. In summarising an earlier judgment on the same matter, in which Snowden J granted an appeal against a decision to make a bankruptcy order, he said [at para 45-46]

> "Thirdly, I explained by reference to *Sekhon v Edginton* [2015] 1 WLR 4435 that the court's own discretion to adjourn a bankruptcy petition in relation to an undisputed debt where the debtor asked for time to pay would only be exercised in the debtor's favour if the debtor could produce credible evidence that there was a reasonable prospect that the petition debt would be paid in full within a reasonable time. However, I held that this type of discretionary decision for the court in the exercise of its case management powers was not a substitute for the consideration by the court of the separate question of the views of the members of the class in a case in which the petition was opposed by other creditors. Finally, I referred to a number of cases which appear to indicate that the court might, in exceptional circumstances, exercise its general discretion to decline to make a bankruptcy order or a winding-up order if it is satisfied that the order would serve no useful purpose because there would be no assets available in the insolvent estate for creditors. That was the main point of decision in *Crigglestone Coal* and also appears to have been the basis for the dismissal of the bankruptcy petition in *Re Malcolm Robert Ross (a Bankrupt)* (No 2) [2000] BPIR 636. I concluded, however, that a debtor faces a heavy burden in persuading the court not to make an order on that basis: see e.g. re *Field (a debtor)* [1978] Ch 371 at 375, and *Shepherd v Legal Services Commission* [2003] BCC 728".

118. In my judgment these observations may in part be applied to the exercise of discretion to make a bankruptcy order, alternatively to adjourn for the purpose of convening a meeting of creditors to vote on proposals for a voluntary arrangement. First among the principles is that the proceedings are a class action. And where there are creditors opposing a bankruptcy order it is for the court to decide as a matter of judicial discretion, what weight to attribute to their voices and those of the petitioning creditor. I have been taken to *re P & J Macrae Limited* [1961] 1 WLR 229 which is more apposite. It concerned a petition based on a judgment that was opposed by a majority in number and value of the creditors. But no evidence was filed as to the grounds of opposition. Upjohn LJ observed (page 238):

> "Although the statute provides that it is the wishes of the creditors to which the court may have regard, it is quite clear that, as the statute gives a complete discretion, the weight to be given to those wishes in determining whether a winding-up order ought to be made varies according to ' the number and value of the creditors expressing wishes, and the nature and quality of their debts. I certainly do not accept for one moment the proposition that it is merely a matter of counting heads and that a majority of 51 per cent, opposing a petition will outweigh the views of the 49 per cent, who support the petition. In such a case where the wishes of the creditors are so evenly balanced (and there is no reason to distinguish between creditors as mentioned below) the weight to be given to the majority view is obviously negligible. No judge, in my judgment, could possibly be criticised if, in the absence of other relevant circumstances, he chooses to

> exercise his discretion by giving effect to the prima facie right of the petitioning creditor to a winding up order. At the other end of the scale there is the case where an overwhelming proportion of the creditors in number and value oppose the petitioner who is virtually alone. In that case clearly the weight to be given to those creditors, unless there is some reason for disregarding them, must be very great, and *in the ordinary case in the absence of special circumstances* will be decisive. All one can say as between those two *limits is that the weight to be given to the wishes of the opposing creditors must necessarily depend on all the circumstances of the case*, but other things being equal, will increase in the mind of the judge as the majority of opposing creditors increases
>
> …. In my view Buckley J. *cannot have intended to mean that the voice of the majority of creditors was decisive on whether a winding-up order should be made*. I think he meant that, *when weighing all the circumstances* in deciding whether to wind up the company, the voice of the creditors must either ultimately be for or against, and that is in the *ordinary case determined by the majority*; but the power of the voice must necessarily depend on all the circumstances. If he meant more his words were obiter and I would respectfully not agree with them. But *it is not merely a matter of calculating percentages in value.* Apart altogether from prospective or contingent creditors whose position may be difficult to assess, a judge may properly take the view that greater weight should be given to the wishes of a large number of small creditors against the wishes of one or two very large creditors, even though the latter are larger in amount in the aggregate. *Then there may be differences in the quality of the creditors.* The *circumstances may be such that the court is rightly suspicious of the opposing creditors and of the motives which are actuating them. In such a case the court may desire to have evidence before it of their reasons for opposing. It must be a question of discretion in each case whether creditors should be asked to file evidence to support the views they have expressed or not. I do not think it is possible to lay down any prima facie rule one way or the other. The judge may prefer to convene a meeting to ascertain their wishes*"

119. In my judgment these authorities provide useful guidance. The Court should take into account (i) the class remedy nature of insolvency (ii) if a meeting of creditors is held, whether it is likely that a majority by reference to the value of votes will pass the proposals (iii) the proposal in the context of the claims to identify if a commercial return would be provided to creditors and (iv) all the circumstances of the case. This is not intended to be an exhaustive list. In *Re Bayoil SA* [1999] 1 WLR 909, 911 Lord Justice Ward warned against laying "down almost as a statement or proposition of law that discretion has to be exercised in any particular direction", and any guidance should not fetter discretion. I am mindful that although discretion must be exercised judicially, its very existence means that the rules should be flexible: *Southard and Co Ltd* [1979] 1 WLR 1198, 1204-5 per Buckley LJ. Although these cases concern winding up such an approach is consistent with the language of section 266(3) of the Insolvency Act 1986. The factors I set out above, and in particular factors (i), (ii) and (iii) are matters which are

routinely taken into account as a matter of practice in the Companies Court, where a debtor company seeks to adjourn a winding up peitition for the purpose of putting proposals to creditors. Factor (iv) is founded on authority: *re P&J Macrae* (*supra*) and *Re Langley Mill Steel and Iron Works Co* (1871) LR 12 Eq 26 pp 29-30.

120. I briefly record a late submission from Mr Phillips QC and Ms Thornley. They argue that the Court should adjourn for the outcome of a meeting because, if the meeting is passed, the petitioning creditor will be paid a dividend and its debts erased. As Mr Justice Snowden was at pains to state, the jurisprudence does not favour such an approach. An adjournment may be given where the debtor can produce credible evidence that there is a reasonable prospect that the petition debt would be paid in full within a reasonable time. That is not the case here. At best what can be said is there is a reasonable prospect that CFL will be paid £0.0028p in the pound. And CFL takes a different view; a voluntary arrangement based on the proposals will permit a cramming down of the petitioning creditor's debt, leaving it without recourse and without a voice.

The exercise of discretion

121. I start with the proposals which will deal with factors (ii) and (iii). The proposals for the Arrangement incorporate the standard conditions produced by the Association of Business Recovery Professionals, but if there is a conflict between the proposals and the standard conditions the proposals prevail. The introduction provides background information and a statement that there has been an assignment of the Kaupthing debt to the Laser Trust. Exhibited to the proposals is a letter to Mr Khalastchi said to be from the "Trustees of the Laser Trust". It is a curious document as: (i) there is only one trustee; (ii) it is not signed (at least the photo copy does not obviously bear a signature) but even if it is signed; (iii) it fails to identify the author and (iv) it bears a Lawrence Stephens Solicitors logo at the bottom of the page but carries a Jerusalem, Israel address at the top. The letter is short and states that the Laser Trust is not obliged to vote in favour of the proposals, and it has received no inducement to do so.

122. The proposal is simple. The Rosenberg Family Trust will pay the sum of £450,000 to the joint nominees which will be available to creditors and no "other assets will be made available and no guarantees are offered in support of this Arrangement". The proposals then deal with his assets stating that MG owns two watches, he is a beneficiary of a

discretionary trust "known as the Gertner No 1 Settlement" and to "the best of my knowledge I am not a beneficiary, discretionary or otherwise, of any other trust whether family or otherwise." Despite this statement it is accepted by the nominees that he is a beneficiary under Gertner No 12 trust. He claims to possess or own very few other assets. The property in which he lives is owned by his wife as is the furniture in the house.

123. As an arrangement will provide a class remedy (factor (i)) the Court should consider the effect on the creditors as a whole. I have mentioned that the Rosenberg Family Trust money has now been paid. There is no reason to doubt that if the appropriate resolution is passed and there is no challenge or any challenge fails, that money paid by the trust will not be distributed in accordance with the proposal.

124. Two creditors have agreed to defer their claims. The first (an associate as defined by the Insolvency Act) his father and the second the Laser Trust which has agreed to defer any distribution for the first £150,000. On the basis of the Laser Trust's debt as at 29 March 2019, when it stood at £799,360,216, the return from the Arrangement will be, as Mr Shaw helpfully submitted, approximately £280,000 or £0.035p in the pound. A comparison with bankruptcy based on the disclosed assets is that creditors (save for the deferred creditors) will receive a dividend of £0.0043 (although following the submission of CFL's proof of debt, this sum has been recalculated to £0.0028) if the Arrangement is passed and nothing in bankruptcy. It is on this basis that Laser Trust "considers that [the] proposal represents the best prospect of a return to creditors…. And intends to vote in favour of the IVA….". As the Laser Trust holds "around 90% of the unconnected indebtedness" and intends to vote in favour of the Arrangement, the proposals will be passed at a meeting.

125. The sums to be paid to the creditors through the proposal have been described as *de minimis*. CFL forcefully argue that the acceptance of the proposals by the passing of a resolution voted on by Laser Trust will force it to accept a *de minimis* payment when it has been out of its money for 8 years. It contends that is unreasonable having in mind, first there has been no objective investigation into the affairs of MG and secondly the unexplained ability of MG to settle with some creditors by directing that the proceeds of the arbitration be shared among a few. Ms Blom-Cooper explains in her second witness statement that in addition to the KSA there has been:

> "a settlement agreement entered into with Bank Leumi whereby that bank was to receive the upside from the Arbitration if it agreed to withdraw its bankruptcy petition against Mr Gertner…..Following the Bank Leumi settlement, as far as I am aware, CFL was the only creditor pressing for payment. When CFL refused to accept Mr Gertner's offer of settlement, Mr Gertner did a deal with Kaupthing (in the form of the KSA) and put forward the First Proposal, which, in my view, was for the sole purpose of cramming down CFL's debt."

126. Ms Blom-Cooper observes that the contribution to the Arrangement was the same as the sums that were offered to CFL after the service of the statutory demand.

127. I take account of the class views. The deferred creditors are in favour of an adjournment for the purpose of holding a creditors' meeting. The majority of non-deferred creditors are against. The quality of the CFL vote has been called into question by MG. It is a form of defence by attack. I have found that the CFL debt is not impugned by reason of the arguments advanced that it is unenforceable by reason of a failure to comply with the rigours of the CCA, or that it fails because it the rates of interest constitute a penalty. Nothing is said about the other creditors save for the Laser Trust.

128. The Laser Trust is in the same or nearly the same position as Kaupthing. It seeks to benefit from an *ad hoc* private arrangement as described by Patten LJ. That benefit will mean that it, as the largest and most influential unsecured creditor, will vote for an outcome for which it had little or no interest. This is evident from the KSA, and I infer, from the agreement that Laser Trust will rank as a deferred creditor in the Arrangement for the distribution of the first £150,000 reducing any dividend in the IVA below that of other unsecured creditors. To vote in favour of the Arrangement where it has been said that the assignment was made on commercial grounds is extraordinary. The Trust's voting intentions are explicable on these grounds alone but, I infer, are explicable on the basis it may indirectly share in the fruits of the arbitration by enforcing against Crosslet Vale. The share of the arbitration fruits stands to benefit the Laser Trust substantially but not the other unsecured creditors able to vote at a creditors' meeting. In my judgment the mischief identified in earlier proceedings remains, namely, upon "the approval of the Proposal, those creditors would, for example, lose any chance to investigate whether potential benefits of the Gertler Arbitration would be the beneficial property of Mr Gertner".

129. In my judgment the return offered in the proposals for the Arrangement is so small as to be properly regarded as *de minimis*. In the absence of a side agreement an objective creditor would not be able to, without any or any proper investigation that extends beyond what is ordinarily required by a nominee, conclude that the Arrangement will provide the best outcome for creditors (as stated by MG). There is little proportionate economic benefit to be gained by agreeing to the Arrangement. The effect of an adjournment for the purpose of allowing the proposals to be voted upon will be to create different classes of unsecured creditor. Laser Trust will benefit from assets not available to the general body of creditors. That is manifestly unfair and would have serious consequences on the less influential creditors restricted to share in a much smaller and distinct pool of assets. I agree with Mr Atherton and Ms Leahy, Laser Trust is outside of a homogenous group of creditors, and it may be inferred that it has illegitimate motives; that is an uncommercial motive for seeking to vote in favour of the Arrangement because it is looking to other sources outside of any arrangement to make good its investment. To permit an adjournment for the purpose of voting on the proposals for the Arrangement would be to permit the Laser Trust to cram-down CFL or act in a way that is detrimental or unfair to its interests and prejudicial. This analysis shall be a factor when exercising my discretion.

130. The evidence of Mr Steinberg and Mr Hassan is not reliable, and I have said is of little or no substance. The evidence cannot be relied upon to give a true account of the reasons for paying $6m for the Kaupthing debt, the reason given for the desire to vote in favour of the Arrangement or that the Laser Trust is free from the influence of a Gertner Family Trust or of MG. In these matters there has been a failure to provide a "complete picture"; a good faith requirement. There has been a failure to provide any records, any account as to the source of the $6m or an analysis of the Trust's accounting position that, on its own evidence, leads it to conclude that its deferred return from the proposed Arrangement is a good return. The reason for this absence of evidence is that the Laser Trust has no accounts or financial statements. I repeat my observations in paragraph 87 above. If there is a true commercial reason for the Laser Trust voting in favour of the Arrangement I infer there to be a desire to safeguard its investment, prevent an objective investigation and reduce the risk against Crosslet Vale's ability to recover in the arbitration. If there is not a true commercial reason, I infer that MG has influence over the Laser Trust causing it to act in his best interests and in my judgment the observations made by Etherton LJ, as set out in paragraphs 67 and 68 above, are apposite.

131. In taking all the circumstances into account it is relevant to weigh the proposed outcome of the Arrangement, the voting creditors, the evidence and the pertinent observations made by HHJ Keyser QC in the First Judgment and Patten LJ in the Appeal Judgment.

132. The debts of MG are long in existence. MG failed to meet his obligations under the personal guarantee provided to CFL and failed to meet his agreed obligations in the Contract. The presentation of the petition was met with a proposal to creditors for an IVA. The IVA was revoked, an appeal dismissed and soon after the petition was restored a second proposal made on substantially the same basis.

133. It is not unreasonable for the Court to ask, when exercising its discretion, if anything has altered save for the assignment? Has the assignment to a new entity prevented (i) the strict application of the good faith principle and (ii) the major creditor receiving a collateral advantage not available to other creditors? In my judgment questions (i) and (ii) should be answered negatively. In addition, I infer that the Laser Trust is not wholly independent (or free from the influence) of MG or a Gertner Family Trust.

134. In these circumstances I do not undertake a simple accounting exercise and adjourn on the basis that the largest creditor entitled to vote seeks an adjournment. The nature and quality of Laser Trust leads me to discount its influence, and to give greater weight to the wishes of the independent petitioning creditor, CFL. I reach the conclusion, exercising and my discretion, after considering the arguments of the creditors in support of and opposing the petition that I should refuse the adjournment application and make an order on the petition.

Summary of conclusions

135. In my judgment the CFL debt is not disputed on genuine and substantial grounds. Neither is the debt impugned. The provisions of the CCA do not apply to the Contract. On a true interpretation of the Contract the debt in the Contract was not deferred, and credit not extended. In my judgment the law does not provide that a structured settlement clause making provision for the payment of a debt over time extends credit or financial accommodation (paras 27-32).

136. The "essential character" of the Contract cannot be characterised as one "for making loans" (paras 33-35). In any event the Contract compromised proceedings where MG defended a claim by CFL for the debt, now under consideration. One of the defences pleaded was that the CCA applied. Applying *Binder v Alchaouzos*, I find that the terms of the Contract terms were fair and reasonable, and I am satisfied that the Contract constituted a bona fide compromise and the Court should not, in the absence of vitiating factors, go behind it (paras 40-44).

137. The purpose of most or a good deal of penalty clauses is to compensate the loss resulting from the breach, if the level of damage is exorbitant or disproportionate to a great extent with "the highest level of damages that could possibly arise from the breach" it is likely to be a penalty. There is little guidance on what may constitute a legitimate interest, save that there can be no legitimate interest in punishing the defaulting party. The high interest rates imposed as a condition for lending to Lanza with very high defaulting rates were in keeping with (i) the nature of the lending that was urgent and very short term and (ii) the nature of the lender which was known as a lender of last resort. There is no argument that there was any disproportion between the parties and MG must accept that he had the benefit of skilled legal advice when entering the Contract. There is no obvious oppression where parties freely enter into a contract at arms-length following litigation and where the challenging party had the benefit of legal advice. The claim that the CFL debt amounts to a penalty does not raise a genuine or substantial dispute: *Cavendish Square Holdings v Makdessi* [2016] AC 1172 (paras 46-49).

138. The failure to run the penalty claim or not to pursue it by way of a defence when MG had a chance to do so in the Part 7 proceedings, the compromise the acceptance of the CFL debt in proposals to creditors, and the failure to argue the penalty when an opportunity arose at the statutory demand stage preclude MG from raising the issue now. The fact that the petition for bankruptcy was stayed is not relevant. The rights and obligations of MG are governed by the Contract. One of the rights that he gave up when entering into the Contract was to forfeit the right to defend the claim to interest on the ground it contravened the common law on penalties. To permit him to re-open that argument at the hearing of a bankruptcy petition in order to argue that the debt contained in the petition is not liquidated is to argue, in substance, that he may contravene the principle *Johnson v Gore Wood & Co (No 1)* [2002] 2 AC 1 in respect of the Part 7

proceedings and *Turner v Royal Bank of Scotland* [2000] BPIR 683 in relation to the bankruptcy petition. The CFL debt, KSA and the position of Laser Trust need to be looked at as a whole (paras 51-53).

139. The Appeal Judgment found that there would be a breach of good faith where one creditor voted in favour of a proposal in which it had quite different commercial interests from those of other creditors. The fact that approval of a proposal would put investigation of a debtor's interests to an end and out of the reach of other creditors is indicative of a conflict between that party and other creditors entitled to vote. The principle goes hand-in-hand with the need for transparency (paras 71-77).

140. The evidence provided on behalf of the Laser Trust is not credible and unreliable. The evidence may not be relied upon for: (i) the explanation given in relation to the reasons for purchasing the debt from Kaupthing; (ii) the assertion that Laser Trust has a commercial interest in the proposed Arrangement; or (iii) that Mr Gertner's proposed IVA represents a better deal for ……Mr Gertner's other unsecured creditors than bankruptcy". The evidence cannot be relied upon to support the assertion that the Laser Trust is free from the influence of MG (paras 79-93).

141. I reject the submission that the doctrine of abuse of process operates to preclude a debtor from putting proposals to creditors following a successful court challenge to an earlier approved voluntary arrangement. The similarities of the proposals, and the collateral advantage to the majority creditor outside of an arrangement are factors to be taken into account when exercising discretion (paras 104-113).

142. When exercising discretion to adjourn a hearing of a bankruptcy petition, the Court should take into account (i) the class remedy nature of insolvency (ii) if a meeting of creditors is held, whether it is likely that a majority by reference to the value of votes will pass the proposals (iii) the proposal in the context of the claims to identify if a commercial return would be provided to creditors and (iv) all the circumstances of the case (paras 115-119).

143. In exercising discretion in accordance with the identified principles I refuse the application to adjourn to enable the Laser Trust to vote on the draft proposals for the Arrangement (paras 121-134).

144. The Nominees had complied with their obligations to investigate. Those investigations are inevitably limited by funding and time and take account of a nominee's inevitable reliance on information provided by a debtor. The Court is not bound by the opinion of the nominee. The results of a nominee's investigations are not sufficient for all purposes (paras 98-100).

145. I refuse the application to adjourn and make an order on the petition presented to the Court on 6 October 2015.