Neutral Citation Number: [2020] EWHC 1648 (Ch).

Case No: 759 of 2017

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

Leeds Combined Court Centre
1, Oxford Row
Leeds LS1 3BY

Date: 26/06/2020

Before :

HIS HONOUR JUDGE DAVIS-WHITE QC
(SITTING AS A JUDGE OF THE HIGH COURT)

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IN THE MATTER OF NORTH POINT GLOBAL LIMITED
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Between :

(1) LOUISE MARY BRITTAIN **(2) MATTHEW JOHN WAGHORN** **(Joint Liquidators of Baltic House Developments Limited)**	**Applicants**
- and –	
MICHAEL CHAMBERLAIN **(Supervisor of a voluntary arrangement relating to North Point Global Limited)**	**Respondent**

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Ms Joseph Curl (instructed by **Fieldfisher LLP**) for the Applicants
Mr Steven Fennell (instructed by **Clarion Solicitors Ltd**) for the Respondent

Hearing dates: 2 June (reading) and 3 June 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

....

HIS HONOUR JUDGE DAVIS-WHITE QC (SITTING AS A JUDGE OF THE HIGH COURT)

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His Honour Judge Davis-White QC :

Introduction

1. On 7 September 2017, a company voluntary arrangement between North Point Global Limited (the "Company") and its creditors (the "CVA") came into effect pursuant to Part I of the Insolvency Act 1986 ("IA 1986"). The Respondent, Mr Chamberlain, formerly the nominee, thereupon became the supervisor of the CVA pursuant to s7(2) IA 1986 (the "Supervisor"). The question before me is whether the applicants are bound by, and able to participate in, such CVA as contingent creditors of the Company.

2. On 17 May 2018, Baltic House Developments Limited ("BHD"), a subsidiary of the Company, was ordered to be wound up by the court on a petition presented to the Court on 6 February 2018. On the same date an application dated 6 March 2018, for the making of an administration order in relation to BHD, was dismissed. The applicants before me are the joint liquidators of BHD (the "Liquidators"). They were appointed by the Secretary of State on 24 May 2018. They are partners in the firm of Wilkins Kennedy LLP.

3. The Liquidators have submitted a proof in the CVA dated 18 February 2020 (the "Proof"). The proof is based upon a claim under s239 IA 1986, on the basis that certain payments by BHD to the Company, in a total sum of just over £841,000, amount to unlawful preferences of the Company. The Supervisor has rejected that Proof. Under the terms of the CVA, that rejection is now brought to the Court by the Liquidators, by way of appeal against the decision.

4. The main issues that I have to determine are as follows:

   (1) Are the Liquidators bound by the CVA under s5(2) IA 1986?

   (2) If they are so bound, are the Liquidators entitled to prove as creditors under the CVA? and

   (3) If they are entitled to prove, should the Court determine the value to attribute to the Liquidators' proof or should the matter be remitted back to the Supervisor to decide, with the possibility that this might result in a further appeal if the Liquidators are not content with his decision?

5. The main issue is the first one. It turns upon the construction to be given to s5(2)(b)(ii) IA 1986 which provides that a CVA binds every person who in accordance with the rules "*would have been… entitled* [to vote in the qualifying decision procedure by which the creditors' decision to approve the CVA was made] *if he had had notice of it*".

6. The Supervisor submits that, at the time of the decision procedure, the individuals who are now the liquidators of BHD, were not liquidators. If notice had been given to them at that time, they would not have had any entitlement to vote, hence they are not bound by the CVA. The Liquidators submit that they are bound by the CVA and do

fall within s5(2)(b)(ii). They say that the section is to be construed as looking at them not simply as individuals at the decision date, but as being individuals with the claims that they now have in their capacity as liquidators and asking on that hypothesis whether they would have been bound had notice been given to them in those circumstances.

7. The second issue turns upon the construction of the CVA (as varied). On the third issue the Liquidators rely, in part, upon the manner in which the Supervisor is said to have conducted himself in relation to the claim of BHD and, for that reason, I therefore need to examine the correspondence between the parties in more detail than would otherwise have been the case.

8. Both Counsel appeared before me remotely by video link. Mr Curl appeared for the Liquidators. Mr Fennell appeared for the Supervisor. I am grateful to both of them for their written and oral submissions and for the practical and commonsense manner in which they dealt with the application. As I shall explain, each took all the points that could properly be taken but Mr Fennell also made some concessions which, in my judgment, were entirely proper.

The Background facts

The Company and BHD

9. At the time of the CVA the directors of the Company were Craig Griffiths (appointed April 2015) and Anthony Marriott (appointed December 2016). Its holding company was LJS Corporate Projects Limited.

10. The report of the Supervisor to the court in his then capacity of nominee and dated 18 August 2017 (the "Nominee's Report") describes the Company's business as follows:

> " *The Company was incorporated as the parent company of a property development group. Over time the group became involved in four developments within Liverpool and one development in Manchester….The Company built up a worldwide network of property sales agents in order to sell long leasehold interests off plan to Investors…. Each development was owned by a specific corporate entity for the purpose of developing that specific project with the Company being the sole shareholder of each of these special purpose vehicles, creating the group structure.*"

11. BHD was one of these subsidiary companies referred to in the Nominee's Report. It appears to have been the special purpose vehicle for the holding of, and making sales in relation to, Baltic House, Norfolk Street, Liverpool. At this stage of the liquidation of BHD, the creditors of BHD are predominantly individuals who paid up to 70% of the purchase price as deposits for 294 student apartments that were to be built at Baltic House. Although not all claims have yet been lodged, the Liquidators have received claims totalling just over £6 million from just over 100 investors and there are non-investor claims of over £700,000. It appears that the majority of BHD's funds were paid to connected companies prior to liquidation and that it is heavily insolvent.

12. In terms of the assets of BHD, the relevant real property has been sold by receivers and the proceeds will or have been used to pay secured creditors. In short, apart from the current proceedings and other ongoing litigation there are no significant assets in the estate.

The CVA: 7 September 2017

13. The Nominees Report reported (among other things):

> "*The essence of the CVA is that the directors consider there is a viable business which they wish to continue and are offering to contribute the entire net proceeds received from the sale of a subsidiary expected to amount to £1.5m, a tax refund of approximately £93,000 and the sale of 2 motor vehicles for approximately £6,000 which in total will provide creditors with an estimated return of 34p in the £, which is a substantial improvement on that available, estimated at 21p in the £, if the Company were to be placed immediately into liquidation*".

14. Although it was said that the directors wished to continue the business, the Nominee also made clear that (as clause 8.1 of the CVA provides):

> "*The company will continue to trade in the sense that its management team and consultants will endeavour to arrive at a satisfactory exit from each of its development subsidiaries. The aim being to realise as greater profit as possible from each of these assets with a view to returning a greater return to creditors where at all possible*."

15. Paragraph 7.9 of the CVA provides that no assets are to be excluded from the CVA, other than the benefit of tax losses which may be carried forward. The part of the Nominee's report referred to in paragraph 13 above has to be read in that context and therefore as including all the assets, not just proceeds of sale of one of the subsidiaries.

16. The CVA was approved by creditors by a decision process provided for under the IA 1986 and the Insolvency (England and Wales) Rules 2016 (the "IR 2016"). It took effect from 10am on 17 September 2017.

17. As is common, the CVA comprises a number of specific provisions supplemented by standard conditions (the "Standard Conditions" or "SCs"). The SCs themselves incorporate various provisions of the IR 2016.

18. Clauses 7.2, 7.3, 7.4 and 7.5 of the CVA deal with, respectively, (a) the net proceeds of sale of the Company's interest in its subsidiary, China Town Development Company Limited); (b) the investments in its 4 other subsidiaries (including BHD); (c) a net credit with HMRC and (d) chattel assets, all of which are to be placed into the CVA.

19. Clause 7.14 provides that "the Company's liabilities are divided into various categories of creditor" as set out in identified SCs. Clause 7.16 provides for the application of the CVA assets in a specified order of priority. The different categories of creditor are to be dealt with in accordance with specified SCs.

20. The CVA is to continue for two years with additional time being added at the discretion of the Supervisor to allow him to collect in the net proceeds of sale and to pay any final distribution (clause11.1). On issue of a certificate of completion, the Company is released from all liabilities to persons bound by the CVA (clause 11.2).

21. The SCs make clear that where there is conflict between the SCs and the proposal then the proposal will prevail (SC. 4).

22. The provisions in the SCs which deal with creditors are extensive. Secured creditors, preferential creditors, connected creditors, leases and hire purchase agreements, retention of title claims and tax liabilities are all covered.

23. SC. 12 to 14, 22, 23 and 77 provide:

> *"Unsecured Creditors*
>
> *12. Once preferential creditors have been paid in full, unsecured creditors (including for this purpose secured creditors to the extent that there is a deficiency or shortfall in the amount recovered or recoverable under their security) shall be entitled to be paid a dividend or dividends from the remaining funds available to pay a dividend(s) together with any monies set aside as the Prescribed Part under clause 10.*
>
> *13. Creditor claims will be calculated by reference to the value of their claim as at the date upon which the CVA is approved.*
>
> *14. The Rules 14.21 to 14.26 (concerning: debts in a foreign currency; payments of a periodical nature; interest, mutual dealings and set-off) shall apply to this CVA in the same manner as it applies in a liquidation. The date for determining rights of set-off shall be the date of approval of the Proposal.*
>
> ….
>
> *22. Any creditor who Is bound by the CVA, by virtue of Section 5(2)(b)(ii) of the Act, as amended, who becomes aware that the CVA has been approved shall …participate in the CVA on a pari passu basis with all other creditors of the same category. If a dividend or dividends have already been paid to the creditors, such that there are no or insufficient funds to enable a dividend to be paid to the new creditor equal to the aggregate of dividends already paid to other creditors of the same category then, if the Company has assets which are not included within the CVA Proposal, the Company will upon receipt of a written notice from the Supervisor pay such further sum to the Supervisor as shall be sufficient to ensure that such creditor is paid the same dividends as all other creditors of the same category. If all of the Company's assets are included in the CVA or the Company's assets are insufficient to pay the amount required by the Supervisor to pay a full equalising dividend to the new creditor, then such a creditor shall be paid such funds as are available to distribute (if any) and the new creditor shall be bound by the CVA notwithstanding the Supervisor is unable to pay the creditor a full equalising dividend.*
>
> *Payment of Dividends*

> *23. Part 14 of the Rules, which relate to claims by and distributions to creditors in Administration, Winding Up and Bankruptcy shall apply to this CVA - (with any necessary amendments) -R14.21- R14.25*
>
> ....
>
> *77. Unless and until such time as a Certificate of Termination is issued by the Supervisor, creditors will be bound by the terms of the CVA and shall be taken to have accepted their participation in the CVA in full and final settlement of all of their claims against the Company at the date of approval of the Proposal (whether such claims are present or future, contingent, ascertained, unascertained or otherwise). In the event that the Supervisor issues a Certificate of Termination, he shall advise creditors in writing of the issue of such notice and creditors shall be entitled thereafter to pursue the Company in relation to the debts which they had compromised up to the date of issue the Certificate was issued.*"

24. Before me it was accepted by Mr Fennell that (save to the extent specifically excluded or modified by the SCs) the rules contained in Part 14 of the IR 2016 are incorporated into the CVA under the SCs. It follows that the rule containing definitions, r14.1 IR 2016, is included.

25. The CVA was approved by the creditors by decision made by virtual meeting on 7 September 2017 at 10am. There were no votes cast against. The votes in favour included those of BHD in the sum of £1,025,537.61. This sum was said to represent "*development management costs, accounted for as loans*". However, even if connected creditors were left out of account, approval was overwhelming with, as I have said, no votes cast against approval. The votes of unconnected creditors in favour of the CVA amounted to £222,579.65 in value.

26. As I have said, on 17 May 2018, BHD was placed into compulsory liquidation, an administration application being dismissed on the same day.

27. By email dated 3 August 2018, the Liquidators informed the Supervisor of their appointment and sought information about the proof they understood to have been submitted by BHD, including relevant documents held in respect of the claim. By a reply dated 16 August a copy of the proof lodged by BHD for voting purposes was provided by the Supervisor as well as copies of the proposal and the chairman's report. The email referred to an attached email from the director dated 30 January 2018 which is described as stating that the claim of BHD should be treated as:

> "*deferred and potentially disallowed pending the investigations of HMRC into transactions that were treated as loans which HMRC consider should be treated as an expense and therefore not due to be repaid.*"

28. In his Progress Report to 6 September 2018, dated 5 November 2018, the Supervisor reported, among other matters:

> *"2.4 Following discussions with the Company's director, l have been advised that the Company's annual accounts have been amended for the entire period of trading following advice given by a specialist tax advisor. The*

amendments relate to the treating of the transactions between the Company and the development subsidiary companies ("SPVs"). The Company's only income was payments received from the SPVs and were originally accounted for as taxable income in the Company and a taxable expense in the SPVs. Following tax planning advice from its Tax advisor at the time the treatment of these transactions were amended to account for them as loans to the SPVs. Two of the SPVs companies have fallen into insolvency and a third has had a Receiver appointed. The Company has sought further specialist tax advice and it is their view that the Company should now raise invoices to clear the intercompany loans to rectify the position as they simply constituted recharges of head office expenses and overheads.

2.5 The Company is in the process of raising the appropriate invoices in respect of the recharges and the SPVs creditors will be removed from the company voluntary arrangement."

29. Note 6 to the Estimated Outcome Statement stated that the anticipated claims of over £3.9 million from "*the associated company*" had been withdrawn.

First variation to the CVA: 30 November 2018

30. The Progress Report to 6 September 2018 also gave notification of a proposal to amend the CVA, made by the Company, "*in order that the arrangement can be brought to a conclusion*". The proposed changes (the "First Variation") were as follows:

"(a) That the Company shall pay sufficient funds into the arrangement for the benefit of non-connected creditors in order that a dividend of 100p in the £ can be distributed to the non-connected creditors and the costs and expenses of the voluntary arrangement will be met in full. The payment is to be made within 28 days of the approval of these modifications.

(b) That clauses 7.2, 7.3 and 7.5 will be removed from the Company's voluntary arrangement upon receipt of the funds detailed in resolution 1 above.

(c) The following clause will be inserted into the proposal "Creditors are to submit claims in writing within 1 month of approval of the CVA. Should the Supervisor make three requests for a claim to be submitted or request supporting documentation in relation to a claim and receive no response from the creditor, any such claim against the Company will be rejected. The Supervisor will follow the procedures set out in the Rules at 14.7 to 14.9 (admission and rejection of proofs, appeal against decision on proof and office holder not liable for costs under rule 14.8) in the same manner as applies in an administration or liquidation."

31. Under the procedure provided for by the CVA, the First Variation was made to the CVA by decision of the creditors made on 30 November 2018. It appears that notice of the proposed variation by creditor decision was not sent to the Liquidators because

an outdated registered office address of BHD was used by the Supervisor for notice purposes.

Notice of breach of the CVA: 11 February 2019

32. On 11 February 2019, the Supervisor, in accordance with the terms of the CVA, issued a notice of breach of its terms (as modified) as a result of the Company's failure to provide financial statements as required by the CVA and its failure to pay sufficient sums into the CVA in accordance with the First Variation. On 15 March 2019, the Company paid some £150,000 into the CVA. This sum was insufficient to remedy the breach.

Liquidators' first proof for BHD 30 July 2019

33. By email dated 7 June 2019, the Liquidators sought information as to how and when BHD's claim was "*withdrawn*" as reported in the Supervisor's progress report to 6 September 2018, pointing out that the Liquidators were the only persons with authority to withdraw a claim of BHD. They also sought confirmation as to whether modifications had been approved.

34. By letter dated 26 July 2019, the Supervisor explained that a claim had been submitted by BHD for just over £1.025 million but that he had been advised by the director of the Company that the accountant had advised that the sums previously shown as loans should be re-categorised as income rather than inter-company loans. He also confirmed the First Variation was approved on 30 November 2018.

35. By letter dated 2 August 2019, the Liquidators chased the unanswered question as to how and when the claim of BHD had been withdrawn. They also lodged a revised proof for BHD, dated 30 July 2019, in the sum of £1,250,737.61 in respect of "*inter-company payments*".

36. By letter dated 8 August 2019, the Supervisor informed the Liquidators that the position was being investigated following the departure of the individual previously dealing with the matter from his firm. He also sought documentary evidence to substantiate the claim by way of proof. This information was chased by further letters dated 5 September and 16 September 2019. The latter asserted that if the information was not provided within the following 7 days then there would be no alternative but to reject the proof.

Second Variation to the CVA: 12 September 2019

37. By report dated 19 August 2019, the Supervisor reported that the Company had sought a further modification to the CVA (the "Second Variation") to extend its operation until 30 November 2019 to enable monies to be introduced into the CVA to remedy the breach. The proposed modification was in the following terms:

> "(a) *That the CVA be allowed to continue and that the Company be allowed until 30 November 2019 to remedy the breach's* [SIC] *identified in the Supervisors breach* [SIC] *letter dated 11 February 2019.*"

38. The August 2019 report also referred to the claims from (amongst others BHD) and stated that:

> *" 4.2 …. Claims from associated creditors amounting to £3,968,363.40 have been received.*
> *As detailed in previous reports it is understood due to changes in treatment of the amounts due between associated companies these claims are now withdrawn. I am currently awaiting advice from the Company's tax advisor regarding the same."*

39. At a vote on 12 September 2019, creditors voted to accept the Second Variation.

40. By Progress Report dated 16 September 2019, covering the year 7 September 2018 to 6 September 2019, the Supervisor (among other matters) referred to the changes in the treatment of the amounts due between associated companies and asserted that "*these associated companies no longer have a claim in the CVA*". He also referred to his intention to pay a first dividend to unsecured creditors once all creditor claims had been finalised and said that he would be "*obliged if you would inform me if you have no claim in the CVA*".

41. By letter dated 24 September 2019, the Liquidators enclosed certain documents in support of the proof that they had submitted. They indicated that further information had just been received from the Company, which would need to be forwarded. They also chased the question of withdrawal of BHD's claim.

42. By letter dated 25 September 2019, the Supervisor dealt with the question of withdrawal of BHD's claim by saying that a review of the file showed that the note on withdrawal related to "the submission of revised accounts and their effect upon the claims of the associated companies." He confirmed that the Liquidators' proof was being considered.

43. By letter dated 11 October 2019, the Liquidators again chased the question of the withdrawal of BHD's claim and also enclosed invoices from the Company to BHD in support of BHD's claim.

44. By letter dated 18 October 2019, the Supervisor re-iterated his previous position regarding "*withdrawal*" namely that the consequence of the position now put forward by the Company was that there was no claim by BHD.

The Third Variation put forward, rejection of BHD proof: December 2019

45. On 2 December 2019, the Company paid a further £50,000 into the CVA. (The total payments in were, at this stage and as a result, £360,000. This compares with the original estimate of over £1.6 million).

46. By report dated 16 December 2019, the Supervisor put forward a further variation (the "Third Variation") to the CVA proposed by the Company's director, namely:

> "(a) *that the CVA be allowed to continue and that the Company be allowed until 28 February 2020 to remedy the breach's* [SIC] *identified in the Supervisor's breach letter dated 11 September 2019.*

(b) *that the supervisor's remuneration be capped at £68,000* [with further provisions about the circumstances of the cap and when it would not apply]

47. The report of 16 December 2019 also reported that:

> *"As detailed in previous reports it is understood due to changes in treatment of the amounts due between associated companies these claims are now expunged. I am currently reviewing the claims of the associated creditors and hope to be in a position to adjudicate on these shortly."*

48. By letter dated 19 December 2019, the Supervisor rejected the proof of BHD lodged by the Liquidators. Essentially, his reasoning was that the sums shown in the relevant accounting records relied upon by the Liquidators did not in fact represent loans by BHD to the Company but rather payments by BHD to the Company in respect of expenses incurred by the Company on behalf of BHD and development costs due to the Company from BHD. Appropriate invoices from the Company to BHD had been issued and the Company accounts altered and re-filed. According to a report of the Supervisor dated 28 February 2020 (as referred to below) on 19 December 2019 the Supervisor rejected claims of associated creditors in the sum of circa £4.2 million, which suggests that proofs from other connected (subsidiary) companies were rejected at the same time.

The Liquidators prove for preference claim: January 2020

49. By letter dated 9 January 2020, the Liquidators expressed surprise that BHD's claim had been rejected given that internal decisions by the Company to re-characterise debts did not bind BHD. However, they pointed out that the debts in question were satisfied by payments made between November 2015 and December 2017 and asserted that such payments between associated companies within two years of the petition to wind up BHD were challengeable as preferences. They therefore asserted a claim of £502,043.44 in respect of such alleged preferences and asked that either the loan claim be accepted or the preference claim be accepted.

50. By letter dated 10 January 2020, the Supervisor refused to reconsider the rejection of the loan claim of BHD. As regards the asserted preference claim he said:

> "*In relation to your possible preference claim, the relevant date for the crystallisation of a preference does not occur until a liquidator is appointed, given that Baltic House entered liquidation after the approval of the CVA, this would amount to a post-CVA debt and therefore is not provable in the CVA.*"

51. By letter dated 20 January 2020, the Liquidators wrote to the Supervisor asserting that the preference claim was contingent and unascertainable at the date of the CVA, but that it had now crystallised at an actual figure. They asked for an enclosed proof in the sum of £502,043.44 to be admitted. The proof was submitted in the name of BHD.

52. The Third Variation was approved by creditors on 24 January 2020.

53. By letter dated 29 January 2020, Fieldfisher LLP, solicitors for the Liquidators, referred the Supervisor to *Hellard v Chadwick* [2014] EWHC 2158 (Ch), and asked that the Supervisor re-consider his position in the light of it.

54. By letter dated 4 February 2020, Clarion Solicitors Limited ("Clarion"), acting for the Supervisor said that they were considering the matter further with the Supervisor but that in the meantime details of the claim were sought. Unless the Liquidators could prove each of the elements of the claim "beyond doubt" the Supervisor would be unable to accept it.

55. Further correspondence followed, during February 2020, in which Clarion asked for evidence of intention to prefer (notwithstanding the presumption of the same) and evidence of insolvency at the time of the payments. They also asserted that the preference claim was by an "*associated creditor*" within the terms of the varied CVA (in fact the variation refers to "*non-connected creditors*"). The response of Fieldfisher LLP was that the liquidators were not "*connected*". As regards insolvency, they asserted insolvency from inception but in any event enclosed the proof of HMRC in the liquidation of BHD showing outstanding sums from 2015 onwards.

56. By letter dated 19 February 2020, the Liquidators of BHD submitted a revised proof dated 18 February 2020 in the sum of £861,544.44 (the "Proof"). As later explained to the Supervisor, the reason for the change was that the earlier proof had calculated the relevant 2 year period applicable to s239 IA 1986 from the date of presentation of a (later) administration application (which had been dismissed) rather than the (earlier) date of presentation of the relevant winding up petition. Clarion wrote to say that the evidence was regarded as not being "conclusive" and seeking further evidence.

March 2020: the Fourth variation to the CVA and discussion regarding the proof

57. By report dated 28 February 2020, the Supervisor reported a further proposed variation to the CVA (the "Fourth Variation"). He referred to the review of the Liquidators' claim received on 19 February 2020. Given the uncertainty over this claim affecting the "*level of creditors in the CVA. The Company is not able to remedy its breaches*" as it was uncertain what amount was required to be paid into the CVA to enable a dividend of 100p in the pound to be paid. It was therefore proposed that there be a further extension of time to enable the claim to be resolved and the Company then to remedy its breach. The proposed modification was:

> " *That the CVA is allowed to continue and that the Company is allowed until the earlier of the following:*
>
> *a) 31 July 2020 or*
>
> *b) within 30 days of establishing the final position in respect of creditors' claims, as decided by the Supervisor*
>
> *to remedy the breaches identified in the Supervisors breach* [SIC] *letter dated 11 February 2019 and*
>
> *c) the Company pay into the CVA the sum of £50,000 within 14 days of the approval of the variation."*

58. The Fourth Variation was approved by creditors on or about 30 March 2020.

59. Meanwhile, in March 2020 the Supervisor referred the matter of the Proof to Counsel.

Rejection of the Proof: 1 April 2020

60. By letter dated 1 April 2020 the Liquidators' Proof was rejected on the basis of Counsel's advice that the Proof was incorrectly in the name of BHD not the names of the Liquidators, that the Liquidators did not have a claim at the date of the approval of the CVA and therefore were not bound by it and that accordingly it was not necessary to investigate the merits of the claim or adjudicate on its value.

61. The current application before me is dated 22 April 2020. On 23 April 2020 the Court made an order of its own motion for directions leading to the hearing before me.

Procedural matters

62. As brought, the application was in the name of one only of the liquidators, Ms Brittain. This was on the basis that the Liquidators have power to act jointly or severally. I expressed doubts that this altered the usual rule that parties in whom a claim is vested must all be parties to relevant legal proceedings. An application was made to amend to join the other joint liquidator and was unopposed. I therefore ordered joinder of the other Liquidator, Mr Waghorn. Accordingly, the underlying legal issue of whether one Liquidator could bring the appeal does not now arise and I do not have to rule upon it.

63. There was some question as to whether the Company should be joined. The Company has been given notice of the hearing. It was invited to take part but failed to do so. I will consider after judgment in this matter whether the Company should be joined, either as a matter of convenience or necessity, and whether I can do so after judgment. I invite the existing parties to address me on this issue after judgment is handed down.

64. No point was taken by Mr Curl before me that, at least for the purposes of the hearing before me, any of the Variations are invalid.

65. As the letter of 1 April 2020 states, one reason for the rejection of proof was said to be that the proof was in the name of the Company and not of the Joint Liquidators. Mr Fennell confirmed that on this appeal the Supervisor does not take this point. I consider that that concession is correct. It has always been clear from the time of the lodging of each of the two preference proofs that the claim relied upon was under s239 IA 1985 and one brought by the Liquidators.

66. It was also raised by the skeleton argument of Mr Fennell that the claim was out of time, the proof not having been lodged within the one month provided for by the First Variation. Before me, however, Mr Fennell, indicated that he was not persisting in this point. In my judgment he was correct not to do so. It is quite clear that the proof was adjudicated upon (at least as regards the points of law before me) and that the Supervisor had not summarily rejected it on a timing basis. Quite apart from anything else, R14.32 IR 2016 provides for a discretion in the Supervisor to consider proofs even where they are lodged after the last date provided for proving in a notice of intended distribution. It is accepted Part 14 of the IR 1986 is incorporated into the CVA. I am not aware that any notice has been given under r14.29, but even if it had, the discretion under r14.32 has clearly been exercised. The question of whether these provisions are inconsistent with the First Variation was not canvassed before me. In that context, there is in any event a question as to whether the First Variation creates a

bar to proving after one month. This is because no bar is expressly laid down in distinction with the following provision of the Variation regarding three requests for information. In relation to such requests the Variation clearly does purport to lay down a bar. I need not, however, consider this aspect further in the light of the concession made.

67. The last issue I should mention at this stage, which has been raised but now disposed of by agreement, is the question of the jurisdiction of this Court. By the time of the hearing before me it was conceded that Part 14 IR 2016 applies and that accordingly I am operating under r14.8. In any event, it is clear from the First Variation that r14.8 applies. Various extensions of time have been granted historically and, in any event, I do not understand that it is suggested that the application was outside the 21 day period provided for by r14.8(2) IR 2016. In any event, the Court has a wide jurisdiction under s7(3) IA 1986.

The main authorities

68. Before turning to the issues and the submissions made upon them, it is helpful to consider the two main authorities relied upon before me so as to enable the submissions to be placed into context.

T&N Limited

69. In summary, the Liquidators rely upon the case of *In Re T&N Limited* [2005] EWHC 2870 (Ch), [2006] 1 WLR 1728 for three main propositions: first that contingent debts are capable of being bound by a cva, even if the debts are not provable in a liquidation; secondly, that contingent debts are generally provable in a liquidation and thirdly, that provable debts are capable of being bound into a cva.

70. In the *T&N* case, the company and other English and American companies in the same group were involved in asbestos mining and the manufacture and distribution of asbestos products. Personal injury claims by employees regarding exposure to asbestos dust were such that the affected companies sought the protection of insolvency proceedings, administration in England, Chapter 11 of the US Bankruptcy Code in America. Various schemes of arrangement or company voluntary arrangements ("cva's") were proposed. A central feature of the proposals was the binding in of future claimants. For present purposes, the key questions facing David Richards J (as he then was) were, first, whether a claimant in respect of a future asbestos claim could be a "creditor" of a UK debtor, and therefore a party to and bound by either a scheme of arrangement sanctioned under what was then s425 Companies Act 1985 or a cva approved by the court under Part 1 of the Insolvency Act 1986 and, secondly, whether, if the companies were to be wound up, a future asbestos claimant would have an admissible claim for the purposes of proof on a winding up pursuant to the then Insolvency Rules 1986 ("IR 1986"). The reason for asking the question in relation to liquidation was not because liquidation was envisaged but because it might be relevant to the constitution of classes and issues of fairness in relation to schemes under s425 Companies Act 1985. In relation to each issue the definition of future asbestos claimant was the same, broadly a person either without an accrued cause of action as at the relevant date or with one that accrued

after the relevant date. The relevant date was either the date the scheme in question was proposed or the date the company went into liquidation.

71. The difficulty arose, in part, because of the potential long period that could elapse between exposure to asbestos and the development of resulting asbestosis disease and/or symptoms of the disease. In the case of a tort claim, the cause of action is only complete and constituted once damage has been suffered.

72. As regards the first issue, David Richards J determined that the future tort claimants were indeed contingent creditors and therefore "creditors" for the purposes of cva's and s425 schemes.

73. In reaching this conclusion he remarked as regards s425 Companies Act 1985 that:

> "*[40] In my judgment, "creditors" in section 425 of the Companies Act 1985 is not limited to those persons who would have a provable claim in the winding up of the company, although it clearly includes all those who would have such a claim. As was submitted by Mr Snowden and other counsel, one of the recognised purposes of section 425 is to encourage arrangements with creditors which avoid liquidation and facilitate the financial rehabilitation of the company: see, for example, Sea Assets Ltd v PT Garuda Indonesia [2001] EWCA Civ 1696 at [2]. This suggests that as wide a meaning as possible should be given to "creditors" in the section. Having said that, it is important to bear in mind that section 425 is designed as a mechanism whereby an arrangement may be imposed on dissenting or non-participating members of the class and such a power is not to be construed as extending so as to bind persons who cannot properly be described as "creditors"."*

74. Considering the position of "creditors" falling within the cva regime, he concluded that the term should be as wide as that used in the context of s425 CA 1985. He concluded:

> ***"[46]*** *The present state of the authorities therefore shows that (i) the holder of a contingent claim is a creditor for the purposes of the provisions governing both schemes of arrangement and CVAs and (ii) the claim need not be a provable debt. The nature of contingent claims is such that a creditor for these purposes need not have an accrued cause of action."*

75. He then went onto consider the nature of a "contingent creditor", in the context of the question whether "*a person who has suffered no loss and who therefore has no claim in tort is a "creditor" because he may in the future suffer loss, giving him then a cause of action in tort*"?

76. Having considered the decision of the House of Lords in *Re Sutherland, decd* [1963] AC 235, he concluded:

> *"[60] If the principles established by In re Sutherland, decd [1963] AC 235 and Secretary of State for Trade and Industry v Frid [2004] 2 AC 506 are applied to this case, it is right in my judgment to conclude that T & N is subject to contingent liabilities to pay damages to those who have already been carelessly exposed to asbestos by the actions of T & N and who later suffer compensatable*

loss, resulting in claims for damages in negligence against T & N. The creditors in respect of those contingent liabilities are the persons who have been carelessly exposed to asbestos and who will have claims in negligence if they suffer loss as a result. Reverting to Lord Reid's speech, the contingent liability to pay damages is a liability which, by reason of something done by the person (i e the use or distribution by T & N of asbestos or asbestos products) will necessarily arise or come into being if one or more certain events occur (i e the onset of asbestos-related conditions in persons previously exposed to asbestos by T & N). Lord Guest referred specifically to the contingent debtor being "automatically involved by the operation of law in the payment" of the debt once the contingency occurred. That precisely describes the situation here. The careless exposure of persons to asbestos by T & N will automatically by the operation of the law of negligence lead to the liability to pay damages, assuming the existence of the other necessary elements of a claim in negligence."

77. He therefore determined the first issue as follows:

> *"[66] I conclude therefore that T & N is subject to contingent liabilities in respect of future asbestos claims, as defined in the administrators' application and that the future asbestos claimants, being those persons who have been exposed to asbestos and who will have claims in negligence against T & N if they develop asbestos-related diseases, are "creditors" of T & N for the purposes of section 425 of the Companies Act 1985 and Part I of the Insolvency Act 1986 dealing with CVAs."*

78. There were, in his judgment, limits to the principle. however,

> *"[67] In reaching this conclusion, I emphasise that I do so on the basis of the facts relevant to asbestos claims, principally that the relevant acts or omissions of T & N are complete, the potential claimants have been exposed to asbestos and the existence of a claim in tort depends solely on whether a relevant asbestos condition develops. I have not considered circumstances where all the relevant events excluding damage have not occurred, as, for example, where a company has negligently made a product but the putative claimant has not acquired it or used it. By way of extreme example, if aero-engines are negligently manufactured and are in use but have not (yet) caused an air crash, it could hardly be supposed that there exists a contingent liability to the victims of a possible future crash: for facts of this sort, see In re R-R Realisations Ltd [1980] 1 WLR 805."*

79. Turning to the second issue, the conclusion was that the future asbestos claims were not provable debts in a winding up of T&N. This turned on the provisions of the then IR 1986.

80. What was then r12.3 IR 1986 was wide enough on its face to include contingent claims, such as those of the future asbestos claimants. But the rule referred to claims provable "as debts" which brought in r13.12. Rule 12.3 is now r14.2 IR 2016. Rule 12.3 IR 1986 at that time provided:

> "*Provable debts*

12.3.

(1) Subject as follows, in both winding up and bankruptcy, all claims by creditors are provable as debts against the company or, as the case may be, the bankrupt, whether they are present or future, certain or contingent, ascertained or sounding only in damages.

(2) The following are not provable—

(a) in bankruptcy, any fine imposed for an offence, and any obligation arising under an order made in family or domestic proceedings;

(b) in winding up or bankruptcy, any obligation arising under a confiscation order made under section 1 of the Drug Trafficking Offences Act 1986

"Fine", "domestic proceedings" and "family proceedings" have the meanings given by section 281(8) of the Act (which applies the Magistrates' Courts Act 1980 and the Matrimonial and Family Proceedings Act 1984).

(3) Nothing in this Rule prejudices any enactment or rule of law under which a particular kind of debt is not provable, whether on grounds of public policy or otherwise."

81. This rule however had to be read with the provisions of the then r.13.13 dealing with the definition of "debt":

" *[112] However, it is not possible to read rule 12.3(1) on its own. The broad range of claims to which it refers are provable "as debts". Necessarily this brings in the definition of "debt" in rule 13.12, for the purposes of a winding up: see In re Toshoku Finance UK plc [2002] 1 WLR 671, para 24, per Lord Hoffmann. It is only if claims fall within that definition that they are provable. It is by no means unusual for interpretation provisions to have a substantive effect. It does not follow from the presence of exclusions in rule 12.3 that the definition of "debt" will not also contain restrictions. The specific exclusions and qualifications contained in rule 12.3 all relate to debts which fall within the definition in rule 13.12 and it is, I think, for this reason that they are dealt by exclusion in rule 12.3."*

82. Rule 13.13 IR 1986 is now largely replicated by r14.1(3) IR 2016, though it has been amended, not least to reverse the result in *Re T&N* by making tortious claims more widely provable. In its then form, r13.13 provided as follows:

""*Debt", "liability" (winding up)*

13.12.

(1) "Debt", in relation to the winding up of a company, means (subject to the next paragraph) any of the following—

(a) any debt or liability to which the company is subject at the date on which it goes into liquidation;

(b) any debt or liability to which the company may become subject after that date by reason of any obligation incurred before that date; and

(c) any interest provable as mentioned in Rule 4.93(1).

(2) In determining for the purposes of any provision of the Act or the Rules about winding up, whether any liability in tort is a debt provable in the winding up, the company is deemed to become subject to that liability by reason of an obligation incurred at the time when the cause of action accrued.

(3) For the purposes of references in any provision of the Act or the Rules about winding up to a debt or liability, it is immaterial whether the debt or liability is present or future, whether it is certain or contingent, or whether its amount is fixed or liquidated, or is capable of being ascertained by fixed rules or as a matter of opinion; and references in any such provision to owing a debt are to be read accordingly.

(4) In any provision of the Act or the Rules about winding up, except in so far as the context otherwise requires, "liability" means (subject to paragraph (3) above) a liability to pay money or money's worth, including any liability under an enactment, any liability for breach of trust, any liability in contract, tort or bailment, and any liability arising out of an obligation to make restitution."

83. David Richards J decided that the effect of r13.12(2) was to exclude, as provable debts, tort claims where the loss has not accrued (and therefore the cause of action in tort has not accrued) prior to the date of liquidation:

" *[128] The language of rule 13.12(2) is, as all counsel agreed, most obviously linked to rule 13.12(1)(b). As I have already held, unliquidated claims in tort for loss already incurred at the liquidation date are probably covered by paragraph (a). Once it is accepted that unliquidated tort claims are to be provable at all, there is no difficulty in saying that claims for loss already incurred at the liquidation date are admissible to proof. The difficulty arises in relation to loss which has not then been incurred but may be incurred at a later date. Contingent claims are the subject of paragraph (b). All contingent claims are admissible to proof provided only that they arise "by reason of any obligation incurred" before the liquidation date.*

[129] The question requiring a clear answer is how those words are to be applied, for the first time, to tort claims. The purpose of rule 13.12(2) is to provide the answer. The obligation is incurred "when the cause of action accrued". That provision can then be applied to answer the question posed by rule 13.12(1)(b): was the obligation incurred before the liquidation date? The result is that contingent tort claims are provable, provided that the cause of action accrued before the liquidation date."

Hellard v Chadwick

84. The Liquidators also rely upon *Hellard v Chadwick* [2014] EWHC 2158 (Ch), [2014] BPIR 1234.

85. In *Hellard v Chadwick*, Mr Charles Hollander QC (sitting as a Deputy High Court Judge) was dealing with an appeal from ICC Judge Barber. M and T had carried on business together in partnership. An agreement was made between them in 2006 regarding T's entitlement in future fees from various matters. On 30 June 2008 M assigned his loan account and shares in a company to T in settlement of his liability to T under the 2006 agreement. On 17 April 2009, a bankruptcy petition was presented against T and on 5 November 2009 a bankruptcy order was made. On 15 January 2010, a petition was presented against M and a bankruptcy order made on 24 July 2012. The applicants, M's trustees in bankruptcy, sought to impugn the 2008 assignment as a preference or a transaction at an undervalue. There were various procedural complications which I need not go into. However, the first issue was whether or not the claim of M's trustees in bankruptcy was a claim provable in the bankruptcy of T as a bankruptcy debt. For those purposes, a key issue was whether the claim could be provable in T's estate given that T had gone into bankruptcy prior to M going into bankruptcy.

86. In similar terms to what was r13.12 IR 1986, s382(1) IA 1986 provided:

> " *"Bankruptcy debt", in relation to a bankrupt means (subject to the next subsection) any of the following-*
>
> > *(a) any debt or liability to which he is subject at the commencement of the bankruptcy,*
> >
> > *(b) any debt or liability to which he may become subject after the commencement of the bankruptcy (including after his discharge from bankruptcy) by reason of any obligation incurred before the commencement of the bankruptcy ....* "

87. S382(4) IA 1986 set out the meaning of "liability" for the purposes, inter alia, of s382(1) as follows:

> "*In this Group of Parts, except in so far as the context otherwise requires, "liability" means ... a liability to pay money or money's worth, including any liability under an enactment, any liability for breach of trust, any liability in contract, tort or bailment and any liability arising out of an obligation to make restitution*".

88. The submission that, on the facts, the claims under the preference or transaction at an undervalue provisions were not provable, was in reliance on the definition of bankruptcy debt in s382 and especially sub-paragraph (b). As recorded by the Judge the submission was:

"*Because a preference or transaction at an undervalue could not be impugned other than upon bankruptcy, and an order under s339 or s340 only had effect for the future, requiring the restoration of property passing under a transaction prospectively rather than declaring the transaction void (see* Stonham v Ramrattan *[201 I] I WLR 1617, at [37]) and not having retrospective effect, he submitted there was no "obligation" incurred before the commencement of bankruptcy.*"

89. This submission was rejected by the Judge in reliance on passages from the judgments in the Supreme Court in *Re Nortel GmbH* [2013] UKSC 52, [2014] AC 209. The same passages were relied upon before me so I set them out in full below.

90. The issue in *Nortel* was whether or not financial support directions ("FSDs") or contribution notices ("CNs") subsequently served in each case under the Pensions Act 2004, were provable debts or fell to be treated in a different manner, for example, as expenses of the relevant administrations and subsequent liquidations. The Supreme Court held that they were provable debts.

91. The particularly relevant category that the court considered was that of FSDs issued after the relevant insolvency event of the company in question (i.e. the entry into liquidation or administration). FSDs could be issued in certain circumstances but their effect was simply to require that the target company secured that financial support for a pension scheme was put in place. If there was non-compliance then the regulator could issue a CN. A CN put the target company under a liability to pay the scheme trustees or managers a specified sum which by statute was then treated as a debt due from the target to the trustees or managers of the pension scheme.

92. Lord Neuberger (with whose judgment Lords Mance, Clarke and Toulson agreed) identified the relevant issue as being whether r13.12(1)(b) IR 1986 applied. He concurred with the approach of David Richards J in *Re T&N* as to the respective roles of r13.12(1)(a) and (1)(b) and that the latter was confined to liabilities to which a company might become subject at the date of the insolvency event (see paragraph [70]). The question was whether the liability flowing from a FSD, issued after the relevant insolvency, arose "by reason of any obligation" incurred before that event. The liability arose because the company was a member of a group of companies which, put loosely, fell within the scope of the statutory regime (because the group included a company which had a pension scheme and that company was a service company or insufficiently resourced) (see paragraph [73]). Were such circumstances sufficient to amount to an "obligation incurred" within the meaning of r13.12(10(b)?

93. Lord Neuberger's answer was as follows:

"*[77] However, the mere fact that a company could become under a liability pursuant to a provision in a statute which was in force before the insolvency event, cannot mean that, where the liability arises after the insolvency event, it falls within rule 13.12(1)(b). It would be dangerous to try and suggest a universally applicable formula, given the many different statutory and other liabilities and obligations which could exist. However, I would suggest that, at least normally, in order for a company to have incurred a relevant "obligation" under rule 13.12(1)(b), it must have taken, or been subjected to, some step or*

combination of steps which (a) had some legal effect (such as putting it under some legal duty or into some legal relationship), and which (b) resulted in it being vulnerable to the specific liability in question, such that there would be a real prospect of that liability being incurred. If these two requirements are satisfied, it is also, I think, relevant to consider (c) whether it would be consistent with the regime under which the liability is imposed to conclude that the step or combination of steps gave rise to an obligation under rule 13.12(1)(b)."

94. Applying that test, Lord Neuberger considered that it was met. He also relied upon the *In re Sutherland* case in turn relied upon by David Richards J, it appearing to Lord Neuberger that: "*the issue of (i) what is a contingent liability and (ii) what is an obligation by reason of which a contingent liability arises, are closely related*."

95. Returning to the test set out in paragraph [77] of his judgment Lord Neuberger said as follows:

"*[84] As to the first requirement, on the date they went into administration, each of the Target companies had become a member of a group of companies, and had been such a member for the whole of the preceding two years—the crucial look-back period under the 2004 Act. Membership of a group of companies is undoubtedly a significant relationship in terms of law: it carries with it many legal rights and obligations in revenue, company and common law.*

[85] As to the second requirement, by the date they went into administration, the group concerned included either a service company with a pension scheme, or an insufficiently resourced company with a pension scheme, and that had been the position for more than two years. Accordingly, the Target companies were precisely the type of entities who were intended to be rendered liable under the FSD regime. Given that the group in each case was in very serious financial difficulties at the time the Target companies went into administration, this point is particularly telling. In other words, the Target companies were not in the sunlight, free of the FSD regime, but were well inside the penumbra of the regime, even though they were not in the full shadow of the receipt of a FSD, let alone in the darkness of the receipt of a CN."

96. As regards the third requirement he referred back to a number of anomalies particular to the legislation if claims were not provable as he had earlier identified. For present purposes I need refer only to paragraph 59 where he said:

"*[59] …. It appears somewhat arbitrary that the characterisation and treatment of the liability under the FSD regime should turn on when the FSD or CN happens to have been issued, if it is based on a state of affairs which existed before the insolvency event.*"

97. Lord Sumption (with whom Lords Mance and Clarke agreed), also referred to the question of where the line was to be drawn for the purposes of r13.12(1)(b) IR 1986. He identified the crucial factor as being a legal relationship of the creditor with the debtor company.

98. Finally, I should note that the Supreme Court overruled a number of Court of Appeal cases broadly to the effect that claims that were contingent on the exercise of the

court's discretion (e.g. as regards costs) were not capable of amounting to contingent claims that were provable debts.

The current provisions of IR 2016 regarding provable debts in liquidation/administration

99. The identity of "provable debts" formerly contained in r12.3 IR 1986 is now contained in r14.2 IR 2016 which provides as follows:-

"*Provable debts*

"*14.2.*

(1) All claims by creditors except as provided in this rule, are provable as debts against the company or bankrupt, whether they are present or future, certain or contingent, ascertained or sounding only in damages.

(2) The following are not provable—

(a) an obligation arising under a confiscation order made under—

(i) section 1 of the Drug Trafficking Offences Act 1986(1),

(ii) section 1 of the Criminal Justice (Scotland) Act 1987(2),

(iii) section 71 of the Criminal Justice Act 1988(3), or

(iv) Parts 2, 3 or 4 of the Proceeds of Crime Act 2002(4);

(b) an obligation arising from a payment out of the social fund under section 138(1)(b) of the Social Security Contributions and Benefits Act 1992(5) by way of crisis loan or budgeting loan.

(c) in bankruptcy—

(i) a fine imposed for an offence,

(ii) an obligation (other than an obligation to pay a lump sum or to pay costs) arising under an order made in family proceedings, or

(iii) an obligation arising under a maintenance assessment made under the Child Support Act 1991.

(3) In paragraph (2)(c), "fine" and "family proceedings" have the meanings given by section 281(8) (which applies the Magistrates Courts Act 1980(7) and the Matrimonial and Family Proceedings Act 1984(8)).

(4) The following claims are not provable until after all other claims of creditors have been paid in full with interest under sections 189(2) (winding up), section 328(4) (bankruptcy) and rule 14.23 (payment of interest)—

(a) a claim arising by virtue of section 382(1)(a) of the Financial Services and Markets Act 2000 (restitution orders)(9), unless it is also a claim arising by virtue of sub-paragraph (b) of that section (a person who has suffered loss etc.); or

(b) in administration and winding up, a claim which by virtue of the Act or any other enactment is a claim the payment of which in a bankruptcy, an administration or a winding up is to be postponed.

(5) Nothing in this rule prejudices any enactment or rule of law under which a particular kind of debt is not provable, whether on grounds of public policy or otherwise."

100. In bankruptcy the definition of "bankruptcy debt" is in part contained, as it was at the time of *Re T&N*, in s382 IA 1986. That largely replicates the provisions for companies in respect of administration and winding up now contained in r14.1 IR 2016, which provides as follows:-

"*14.1.*

(1) This Part applies to administration, winding up and bankruptcy proceedings.

(2) The definitions in this rule apply to administration, winding up and bankruptcy proceedings except as otherwise stated.

(3) "Debt", in relation to winding up and administration, means (subject to the next paragraph) any of the following—

(a) any debt or liability to which the company is subject at the relevant date;

(b) any debt or liability to which the company may become subject after the relevant date by reason of any obligation incurred before that date;

(c) any interest provable as mentioned in rule 14.23;

"small debt" means a debt (being the total amount owed to a creditor) which does not exceed £1,000 (which amount is prescribed for the purposes of paragraph 13A of Schedule 8 to the Act and paragraph 18A of Schedule 9 to the Act(1));

"dividend", in relation to a members' voluntary winding up, includes a distribution;

"provable debt" has the meaning given in rule 14.2; and

"relevant date" means—

(a) in the case of an administration which was not immediately preceded by a winding up, the date on which the company entered administration,

(b) *in the case of an administration which was immediately preceded by a winding up, the date on which the company went into liquidation,*

(c) *in the case of a winding up which was not immediately preceded by an administration, the date on which the company went into liquidation,*

(d) *in the case of a winding up which was immediately preceded by an administration, the date on which the company entered administration, and*

(e) *in the case of a bankruptcy, the date of the bankruptcy order.*

(4) For the purposes of any provision of the Act or these Rules about winding up or administration, any liability in tort is a debt provable in the winding up or administration, if either—

(a) the cause of action has accrued at the relevant date; or

(b) all the elements necessary to establish the cause of action exist at that date except for actionable damage.

(5) For the purposes of references in any provision of the Act or these Rules about winding up or administration to a debt or liability, it is immaterial whether the debt or liability is present or future, whether it is certain or contingent, or whether its amount is fixed or liquidated, or is capable of being ascertained by fixed rules or as a matter of opinion; and references in any such provision to owing a debt are to be read accordingly.

(6) In any provision of the Act or these Rules about winding up or administration, except in so far as the context otherwise requires, "liability" means (subject to paragraph (4)) a liability to pay money or money's worth, including any liability under an enactment, a liability for breach of trust, any liability in contract, tort or bailment, and any liability arising out of an obligation to make restitution."

IA 1986: CVA Provisions

101. Under s1 IA 1986 a proposal for a composition of a company's debts or a scheme of arrangement of its affairs may be made to the company and "its creditors".

102. Once certain conditions have been met and steps taken, a decision is sought from the company's creditors as to whether they approve the proposal (s3 IA 1986). Notice of the qualifying decision procedure must be given to every creditor of the company of whose claim and address the person seeking the decision is aware (s3(4) IA 1986) The creditors may approve the proposal with or without modification but what is agreed must still be a composition or scheme of arrangement and the rights of secured creditors and preferential creditors may not generally be affected, subject to certain exceptions (s4 IA 1986).

103. Under s5(2) IA 1986:

"*(2) The voluntary arrangement—*

(a) takes effect as if made by the company at the time the creditors decided to approve the voluntary arrangement, and

(b) binds every person who in accordance with the rules—

(i) was entitled to vote in the qualifying decision procedure by which the creditors' decision to approve the voluntary arrangement was made, or

(ii) would have been so entitled if he had had notice of it,

as if he were a party to the voluntary arrangement."

104. Under s6 IA 1986, a person who was entitled to vote or would have been entitled to vote had he been given notice of the decision making process, has 28 days to apply to the court to challenge a cva, either on the grounds of unfair prejudice or material irregularity. The 28 days runs from a date soon after the cva is approved but in the case of a person not given notice of the decision making process, from the time such person became aware that the decision making procedure had taken place.

Issue 1: Are the Liquidators bound by the CVA under s5(2) IA 1986?

105. The Supervisor's basic position is deceptively simple. As at the date of the approval of the CVA there was no person able to advance the preference claim against the Company. BHD did not itself have a claim: a preference claim is vested in the officeholder (the Liquidators, in this case) not the company in relation to which the liquidator is appointed. The individuals that have since become Liquidators, did not at that date have a claim as liquidator. Accordingly, there is no-one that would have been entitled to vote in relation to the claim now advanced by the Liquidators had they received notice of the proposal.

106. The Liquidators' position is equally simple. As at the date the proposal was approved, the claim was a contingent claim. Contingent claims can be bound by a cva. As regards identity of the creditor, a preference claim is to be treated as made by an officeholder as agent of the company of which he is the officeholder. At the date of the CVA, BHD existed. There is therefore no issue raised on the basis that there was no-one who was able to assert the claim as at the date of the approval of the CAV. Alternatively, it does not matter that as at that date there was no person available to advance the claim (the identification of such person itself was contingent at that date). Contingent claims are caught. Further, the claim would have been provable at that date and provable contingent claims can be bound by a CVA. S5(2)(b)(ii) is to be read as including a person later identified as being able to advance the contingent claim. In other words, the person identified by s5(2) is the person in his or her capacity as creditor and, in the case of a contingent claim where the operation of the contingency will also identify the person with ability to pursue the contingent claim but which has not occurred at the time of the approval of the cva, on the assumption that the contingency had for those purposes occurred.

107. It is important to separate the question of the terms of a cva (and whom it binds and in what manner and what advantage they can take of it) from the question of whether under s5 IA 1986 a "creditor" is bound. A cva can be drafted containing various terms. Theoretically it could leave particular debts outside the cva, in the sense that the creditor in question is left free to pursue its full claims against the company. Similarly, there are various mechanisms which might be provided to deal with claims that come to light later, for example, because of a contingency occurring.

108. Both counsel, as I understood it, accepted that it was in the interests of the workability of cvas that as many creditors as possible were bound by it, as stated by David Richards J and for the reasons given by him. Apart from anything else, a creditor's claim may be compromised or affected by the scheme directly, as for example in being bound to accept a compromise of its claim by way of a percentage recovery of claim, but also indirectly, so that it is bound by the compromise so far as it might otherwise have grounds for impugning the cva: for example on the basis that it amounts to a preference or that some other breach of duty might be involved in giving effect to it. This indirect effect is almost always going to be important to the integrity of the cva.

109. Both Counsel identified circumstances in which a creditor might wish to take advantage of a cva and be bound by it and other circumstances where it might not. Mr Fennell identified factual scenarios where an officeholder with a preference claim would be benefitted by not being bound by a cva. One such example was a case where the company against whom the claim was to be asserted was going to trade on after the cva and a creditor whose debt was not compromised would then be able to pursue the company outside the cva for its full debt. One variant was the circumstance where the preference claim was asserted late into the cva and the assets in the cva had been wholly or largely distributed such that there was little or nothing left to distribute under the cva regarding the preference claim.

110. Mr Curl identified a case, such as that here, where (at least initially) all the assets of the company were to be placed into the cva for the benefit of creditors bound by it and (other than realising those assets) the company was to cease trading and have no business or assets after the cva was complete. There would, he submitted, on Mr Fennell's construction of s5, be neither an ability to apply to upset the cva as unfair under s6 IA 1986 nor any real ability to recover in respect of the claim outside the cva.

111. Mr Fennell also referred to the fact that, if bound in circumstances such as in this case, a liquidator would only have a short period to object and bring court proceedings regarding any alleged unfairness of the cva, under s6 IA 1986 whereas if the claim was not bound by the cva then the liquidator could continue to pursue its claim outside the cva.

Discussion

112. I accept the submission of Mr Fennell that a preference claim is one by statute vested in the officeholder as such and that it is not vested in the officeholder as agent for the relevant company. It follows that the issue of whether s5(2)(b)(ii) covers an officeholder in respect of a claim vested in the officeholder as such and who was not

in office at the time of the creditors' decision is not avoided by saying that the company in respect of which the officeholder was appointed was then in existence and is "the creditor".

113. I also accept the submissions of Mr Curl that a preference claim is both a contingent debt (whether or not provable) falling within the cva regime and one that is in fact provable in a bankruptcy or administration or liquidation ("a formal insolvency event"). That is borne out by the cases that I have referred to.

114. The cases that I have referred to also confirm that neither (a) the fact that the success of, and remedy to be granted in respect of, a preference claim is one to some extent dependent on the exercise of the court's discretion, which will not have retrospective effect nor (b) the fact that at the date of the formal insolvency event, there is then no-one able to pursue the claim, prevents the debt being provable in a formal insolvency.

115. As regards the *Nortel* case. Mr Fennell submitted that the third consideration adverted to by Lord Neuberger required the answer to the question of whether the Liquidators were "a creditor" to be answered differently to the answer given in *Hellard*. It was not clear to me whether he was saying that this was relevant to the definition of "creditor" in the CVA itself or whether it included the term as used in Part 1 of the IA 1986. Strictly, the issue is only relevant to the definition of provable debt but I accept that there was said to be a close connection between that test and the identification of what is a contingent creditor. Indeed, David Richards J sought to deal with a similar issue regarding matters that could properly be regarded as contingent debts and those which could not as the Supreme Court did in relation to provable contingent claims and non provable contingent claims.

116. In my judgment, the first two factors considered by Lord Neuberger clearly apply. At the time of the CVA being approved, BHD had clearly entered into a legal relationship with the Company, by virtue of having paid sums to it in satisfaction of debts (which is said to give rise to the preference) and it must be assumed that it was then insolvent and that liquidation (and a preference claim) was likely. It was, in Lord Neuberger's words (as adapted) "*not in the sunlight, free of the* [preference] *regime, but …well inside the penumbra of the regime*".

117. Mr Fennell's submission was that the third consideration adverted to by Lord Neuberger leads to a different conclusion to that reached in the context of a bankruptcy in the *Hellard* case. However, in my judgment, the main consideration that, as far as possible, debts should be brought within the cva regime rather than being left outside it support the view that a preference claim should be treated as a debt falling within the cva regime. David Richards J considered that provable debts were within the cva regime and that, in any event, even non provable contingent debts were within it.

118. I also note the consideration that influenced Lord Neuberger on his third issue, though to some extent that may have reflected his conclusion on the first two issues he had identified. It would be somewhat odd if the overall situation of a company with a potential preference claim was identical and yet if an officeholder happened to have been appointed in relation to the preferring party the day before the cva in relation to the preferred party was approved the claim would be bound, but if he was appointed

the day after the claim would not be bound, even though in either situation the officeholder would have been unaware of the proposed cva and the nominee and company may have been unaware of the potential preference claim.

119. In my judgment, there is also force in the submission that, in the example I have given, s6 IA 1986, which is only available to a creditor who is bound, would give, to the officeholder appointed the day earlier, a wide ability to challenge the cva on "unfairness" grounds within 28 days of the officeholder becoming aware of it, whereas the liquidator appointed the day later would have no ability to challenge it under s6 but would be limited (if any) to much narrower grounds of attack.

120. I also accept Mr Curl's point that many cvas are an exit route from a form of insolvency process and that in such cases there is unlikely to be any practical benefit to a liquidator asserting a transaction avoidance claim against the company subject to the cva remaining outside the cva.

121. Finally I note, that the fact that creditors may be bound by a cva when in practice they have no ability to participate in the decision making process is not an oddity. A liquidator appointed the day before a decision to approve a cva is unlikely, at least in most cases, to be aware that he or she might have a preference claim that would entitle them to vote. The same may well be true of potential personal injuries claimants who have a contingent claim but have, at that date, suffered no damage (as in *Re T&N*).

122. At the end of the day, it seems to me obvious that it is desirable that as a class contingent claims are bound. The policy arguments, as Mr Fennell seemed to accept, lead to that conclusion, as stated by David Richards J in *Re T&N*.

123. The question ultimately is therefore the meaning to be given to s5(2) IA 1986. Mr Fennell's submission, as I understood it, was that at the end of the day, however desirable it is that a contingent preference claim against a company entering a cva should be bound by it, the statute simply does not permit that where the officeholder has not yet been appointed. To construe the statute as furthering the policy objective I have identified, by extending it to an officeholder asserting a preference claim which officeholder is appointed after (or, more accurately, where the liquidation or administration dates after) the date the cva is approved, is to do violence to the statutory language. Such an individual, if they had been given notice of the decision making process, would not have been able to vote.

124. In my judgment, it does no violence to the language of that section and promotes the underlying policy of the Part 1 IA 1986, if it is read as focussing on the term "creditor" so that the condition to be fulfilled is read (as it says) as being that the *creditor* would have been entitled to vote if the creditor (as creditor) had had notice of the meeting, not as being whether at the time of the decision making process the individual was then a creditor who would have been entitled to vote. In my view, if the Liquidators had been in office at the time of the CVA being approved, they would have been bound. S5(2) IA 1986 should be read as if the reference to creditor is the creditor in that capacity and, if they had then had that capacity, whether they would have been bound. Put another way, the focus of the section is whether the claim would have been bound (through the person asserting it being bound).

125. Accordingly, I consider that the Liquidators' claim is bound by the CVA in this case.

Issue 2: Are the Liquidators entitled to prove as creditors under the CVA?

126. The answer to the second issue turns on the terms of the CVA.

127. Mr Fennell for the Supervisor asserts that paragraph 13 of the SCs has the effect that it is necessary to value claims as at the date of entry into the CVA. If, he submits, there was then no claimant, then there can be no claim and no value to be attributed to it.

128. The Liquidators' submission is, again, fairly simple. It is that paragraph 13 SC simply deals with the question of the valuation of claims (including contingent claims) against the company and the date by reference to which they are to be valued. In a liquidation or bankruptcy it has long been established that the date for valuation is the date of adjudication (bankruptcy) or of the winding up order (corporate insolvency). Under r14.2(3) IR 2016 the concept is dealt with by tying debts to the "relevant date". The definition of "relevant date" in r14.1(3) IR 2016 does not operate in the context of a CVA. SC 13 in effect lays down what the relevant date is for the purposes of the CVA. I should add that it is also well established that under the "hindsight principle", the valuation as at the relevant date can be effected by evidence and events which occur after the event of formal insolvency: see e.g. *In re Northern Counties of England Fire Insurance Co; Macfarlane's Claim* (1880) 17 ChD 337. In that case, a contingent claim under an insurance policy was valued in the light of subsequent events (the occurrence of a fire causing damage to the insured's property after the date the relevant insurance company went into liquidation). As regards (among others) contingent debts, that principle is now encompassed by r14.14(2) IR 2016. The Liquidators submit that the question of what may be proved is determined by the adoption of the very wide use of "creditor" in the CVA terms which has the wide meaning that I have referred to under Part 1 of the Insolvency Act 1986 and which the CVA does not purport to limit. Alternatively, even if the CVA does restrict the definition of creditor to one with a provable debt (by reason of the incorporation of Part 14 of the Insolvency Rules 2016), then that definition still encompasses contingent debts which would be provable debts in a formal insolvency (winding up or administration) and the Liquidators' claim falls within that category.

129. In my view, the Liquidators are correct in their submissions on this point, and I reject Mr Fennell's submission.

Determination of value

130. The determination of value is one to be carried out by the Supervisor, with a right of appeal against his decision. The Supervisor has rejected the proof solely upon the basis that the claim is not one that is bound by the CVA or not one that carries any entitlement to prove. He has not yet carried out any valuation exercise on the basis that the claim is contingent. Normally it is for the officeholder under Part 14 IR 2016 (imported into the CVA) to carry out the valuation, not the court. The court acts as an appeal body. Normally therefore the conclusion would be that, having ruled on admissibility, the court would remit the question of valuation to the supervisor (see e.g. *Beller v Linton* [2012] EWHC 910 (Ch)).

131. Mr Curl submits that this a case out of the ordinary course. He submits that the Supervisor has shown himself completely unsuitable to deliberate upon the Proof further in that he has taken a hostile stance, a partisan line and failed to remain neutral before me.

132. The Supervisor has acted on legal advice. His case has been put forward to me by specialist counsel. It is not always appropriate or necessary to bring in a creditor in a different position to the proponents of one case in order to argue the contrary position when the points are ones of law, and ones which the officeholder, in this case the Supervisor, is in a position to put forward. Mr Fennell made concessions where appropriate. I do not consider that there is anything taking this case out of the norm such that the matter should not be remitted to the Supervisor for the purposes of carrying out the valuation.

Disposition

133. Accordingly, I will grant a declaration that the applicants are contingent creditors with a right to prove in the CVA and will remit the matter to the Supervisor to put a value on that claim.

134. I invite the parties to agree a form of order to give effect to this judgment. If the matter cannot be agreed then by 12 noon on 2 July 2020 the Liquidators should submit a draft order showing what is agreed and, where not agreed, identifying which party propounds which text. I will then consider the matter on the papers unless any party requires a further oral hearing.