Approved Judgment

Neutral Citation Number: [2017] EWHC 111 (Ch)

Case No. 3482 of 2015 / BR-2015-02338

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

IN THE MATTER OF MOISES GERTNER

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

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

Date: 27 January 2017

Before:

HIS HONOUR JUDGE KEYSER Q.C.
sitting as a Judge of the High Court

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Between:

CFL FINANCE LIMITED	**Applicant**
- and -	
(1) DAVID RUBIN	
(2) DAVID BUCHLER	
(AS JOINT SUPERVISORS OF MOISES GERTNER'S VOLUNTARY ARRANGEMENT)	
(3) MOISES GERTNER	**Respondents**

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- -

Stephen Atherton QC and Blair Leahy (instructed by **Mishcon de Reya LLP**) for the **Applicant**
Tiran Nersessian (instructed by **Edwin Coe LLP**) for the **First Respondent**
Orlando Fraser QC and James Knott (instructed by **Teacher Stern LLP**) for the **Third Respondent**

Hearing dates: 29 and 30 November, 1 and 2 December 2016

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Judgment Approved

H.H. Judge Keyser Q.C. :

Introduction

1. The Third Respondent, Mr Moises Gertner, is a property consultant and businessman. In 2015 the Applicant, CFL Finance Limited ("CFL"), petitioned for Mr Gertner's

bankruptcy. Mr Gertner, who disputed that he was indebted to CFL as alleged, took advice from the First Respondent, Mr Rubin, and the Second Respondent, Mr Buchler, who are both licensed insolvency practitioners, and in consequence of that advice made a proposal ("the Proposal") for an Individual Voluntary Arrangement ("IVA") under Part VIII of the Insolvency Act 1986 ("the Act"). Mr Gertner's Estimated Statement of Affairs showed that, in addition to Crown creditors and connected creditors, he owed £582,809,270 to unsecured creditors. The essence of the Proposal was that a third party would make a one-off payment of £487,500 to the Supervisors of the IVA, which would be used to discharge in full the liability to HMRC, to make a distribution to the other creditors, and to meet the costs of the IVA. It was envisaged that this would result in a dividend to unsecured creditors of 0.07p in the pound. The Proposal showed that Mr Gertner had no assets and only a relatively modest income and contended that the Proposal would lead to a better result for creditors than they would achieve via bankruptcy. As a result of the Proposal, CFL's petition was adjourned to await the outcome of the meeting of Mr Gertner's creditors. CFL completed a proof of debt for that meeting.

2. The creditors' meeting was held on 17 December 2015, when the Proposal was approved and Mr Rubin and Mr Buchler were appointed to be the Joint Supervisors of the IVA[1]. The report of Mr Rubin as Chairman of the meeting, pursuant to r. 5.27 of the Insolvency Rules 1986 ("the Rules"), shows that the proposal was approved by 97.85% of the creditors by value and that Kaupthing hf. ("Kaupthing"), an Icelandic public limited company that was at the time of the creditors' meeting undergoing winding-up proceedings in Iceland, constituted 90.43% of the creditors by value (£557,467,416). Two creditors, with a combined value of 2.15%, voted to reject the proposal; one of these was CFL, with a debt of £12,283,904 (1.99% of the creditors by value). If Kaupthing's debt were excluded, the value of the debts of the two creditors who voted against the proposal would exceed 50% of the value of the unconnected creditors' claims.

3. By this application, filed on 15 January 2016, CFL applies for an order under section 262 of the Act revoking the approval to the IVA or an order under rule 5.22 of the Rules reversing or varying Mr Rubin's decision to admit Kaupthing to vote at all, or to do so on the basis that it was a creditor for more than a nominal amount. The orders are sought on the ground that there was a material irregularity at or in relation to the creditors' meeting or alternatively that the IVA is unfairly prejudicial to the interests of CFL as a creditor of Mr Gertner. That case was advanced at the hearing on the basis that on 11 December 2015 Mr Gertner and Kaupthing had executed a Settlement Agreement ("the KSA") in full and final settlement of his liabilities to Kaupthing on terms that I shall explain below; the KSA was not disclosed to the creditors' meeting. In those circumstances, it is said, either Kaupthing was no longer properly to be considered a creditor, or the debt was to be treated as only of nominal value, or Kaupthing ought to have been excluded from voting on the Proposal because for it to vote would have been a breach of the good faith owed among creditors.

[1] One effect of the present proceedings is that the appointment of Mr Rubin and Mr Blucher as Joint Supervisors of the IVA has not yet come into effect; strictly, Mr Rubin is still the Nominee named in the Proposal. Nevertheless, as Mr Rubin and Mr Buchler were made parties to this application as Supervisors, I shall refer to them as such.

4. Behind CFL's application lies its belief that Mr Gertner's true financial position has not hitherto been adequately investigated and was not accurately disclosed to the creditors in connection with the Proposal, but that he shelters considerable personal wealth behind a complex network of trusts and companies, largely overseas. Some of the matters relied on in this regard are listed in an Appendix, headed "IVA versus Reality", to CFL's written submissions, though CFL maintains that the full reality remains unexplored. CFL considers that the best prospects of recovery for Mr Gertner's creditors lie in bankruptcy proceedings.

5. Mr Buchler resigned as a Supervisor of the IVA in April 2016 on account of ill health, and the proceedings have been stayed as against him other than for the purposes of the costs of the proceedings. As for Mr Rubin, at an earlier stage of these proceedings CFL gave particulars of alleged breaches of duty on his part. Those allegations were not pursued at the hearing. For the purposes of this judgment, Mr Rubin's involvement in the matters giving rise to this application is simply part of the factual background.

6. The rest of this judgment will be structured as follows. First, I shall set out the relevant law and explain very shortly how CFL puts its case in that legal framework. Second, I shall set out sufficient facts to place this application and the KSA in context. Third, I shall consider the terms of the KSA. Finally, I shall set out my conclusions and the reasons for them.

7. I am grateful to all Counsel for their helpful written and oral submissions.

The Law

8. The regime for IVAs is set out in Part VIII of the Act (sections 252 to 263G), as amended by the Insolvency Act 2000, and is supplemented by rules 5.1 to 5.34 of the Rules. I shall outline aspects of the regime and set out such parts of the provisions as are relevant for the purposes of this judgment.

9. Sections 252 to 256 deal with interim orders, which have the effect of creating a moratorium for the debtor while he prepares his proposal for an IVA. Before the Insolvency Act 2000 came into force an interim order was a prerequisite for an IVA; that is no longer so, and in the present case no application was made for an interim order. For CFL, Mr Atherton submitted that such an application could appropriately have been made and would have had the effect of giving Mr Rubin more time to conduct enquiries before the creditors' meeting. However, he did not invite a finding critical of Mr Rubin on this matter and I find no basis on which to make such a finding and no reason to say more on the point.

10. In the circumstances of a case such as the present, section 256A requires the debtor to submit to the nominee a document setting out the terms of the arrangement which he is proposing and a statement of his affairs. Rule 5.5 makes provision in respect of the contents of the statement of affairs, which is required to be verified by a statement of truth made by the debtor. After receipt of the proposal and statement of affairs, the nominee has fourteen days, or such longer period as the court allows upon an application in that regard, to submit a report to the creditors; if he thinks the debtor's

proposal should be considered by the creditors, the report must include his proposal as to the date, time and place for the creditors' meeting and the nominee must summon that meeting in accordance with that proposal. Where there is no interim order, the date of the meeting is required to be not more than 28 days from the date on which the nominee received the debtor's proposal and statement of affairs: rule 5.17. The persons to be summoned to the meeting are every creditor of the debtor of whose claim and address the person summoning the meeting is aware: section 257(2).

11. The creditors' meeting decides whether to approve the proposed voluntary arrangement: section 258(1). A resolution to approve the proposal is passed when a majority of three-quarters or more (in value) of those present and voting in person or by proxy have voted in favour of it: rule 5.23(2). Rule 5.21 makes provision for entitlement to vote at the meeting:

> "(1) Subject as follows, every creditor who has notice of the creditors' meeting is entitled to vote at the meeting or any adjournment of it.
>
> (2) A creditor's entitlement to vote is calculated as follows-
>
> ...
>
> (b) where the debtor is not an undischarged bankrupt and an interim order is not in force, by reference to the amount of the debt owed to him at the date of the meeting; ...
>
> (3) A creditor may vote in respect of a debt for an unliquidated amount or any debt whose value is not ascertained, and for the purposes of voting (but not otherwise) his debt shall be valued at £1 unless the chairman agrees to put a higher value on it."

12. Rule 5.22 provides as follows, so far as relevant:

> "(1) Subject as follows, at the creditors' meeting the chairman shall ascertain the entitlement of persons wishing to vote and shall admit or reject their claims accordingly.
>
> (2) The chairman may admit or reject a claim in whole or in part.
>
> (3) The chairman's decision on any matter under this Rule or under paragraph (3) of Rule 5.21 is subject to appeal to the court by any creditor or by the debtor.
>
> (4) If the chairman is in doubt whether a claim should be admitted or rejected, he shall mark it as objected to and allow votes to be cast in respect of it, subject to such votes being subsequently declared invalid if the objection to the claim is sustained.

> (5) If on an appeal the chairman's decision is reversed or varied, or votes are declared invalid, the court may order another meeting to be summoned, or make such order as it thinks just. The court's power to make an order under this paragraph is exercisable only if it considers that the circumstances giving rise to the appeal are such as give rise to unfair prejudice or material irregularity."

13. The function of the court on an appeal under rule 5.22(3) is not simply to review the decision of the chairman which is sought to be impugned, but rather to form its own view on the basis of the evidence and arguments advanced before it. The characterisation and quantification of a debt for the purposes of rules 5.21 and 5.22 are to be effected as at the date of the creditors' meeting and not at some other time: *Golstein v Bishop* [2016] EWHC 2187 (Ch), *per* Warren J at [16-17]. The question whether the claim ought to have been admitted is to be decided on the balance of probabilities, and the burden lies on the party seeking to establish that the debt ought to have been admitted: *Tradition (UK) Ltd v Ahmed* [2008] EWHC 2946 (Ch), *per* Andrew Simmonds QC at [91]. The present case does not turn on the incidence of the burden of proof.

14. Section 260 has effect where the creditors' meeting approves the proposed IVA. Section 260(2) provides:

> "The approved arrangement—
>
> (a) takes effect as if made by the debtor at the meeting, and
>
> (b) binds every person who in accordance with the rules—(i) was entitled to vote at the meeting (whether or not he was present or represented at it), or (ii) would have been so entitled if he had had notice of it,
>
> as if he were a party to the arrangement."

Accordingly, when approved, the IVA operates by analogy with a contract between the debtor and all his creditors: see *Lloyds Bank plc v Ellicott* [2002] EWCA Civ 1333, [2003] BPIR 632, *per* Chadwick LJ at [51]; and *Narandas-Girdhar v Bradstock* [2016] EWCA Civ 88, [2016] 1 WLR 2366, *per* Briggs LJ at [34].

15. Section 262 of the Act provides as follows, so far as relevant:

> "(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 creditors' meeting summoned under section 257 unfairly prejudices the interests of a creditor of the debtor; (b) that there has been some material irregularity at or in relation to such a meeting.

> (2) The persons who may apply under this section are—(a) the debtor; (b) a person who—(i) was entitled, in accordance with the rules, to vote at the creditors' meeting ...
>
> (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 the meeting; (b) give a direction to any person for the summoning of a further meeting of the debtor's creditors to consider any revised proposal he may make or, in a case falling within subsection (1)(b), to reconsider his original proposal.
>
> ...
>
> (7) In any case where the court, on an application made under this section with respect to a creditors' meeting, gives a direction under subsection (4)(b) or revokes or suspends an approval under subsection (4)(a) or (5), the court may give such supplemental directions as it thinks fit and, in particular, directions with respect to—(a) things done since the meeting under any voluntary arrangement approved by the meeting, and (b) such things done since the meeting as could not have been done if an interim order had been in force in relation to the debtor when they were done.
>
> (8) Except in pursuance of the preceding provisions of this section, an approval given at a creditors' meeting summoned under section 257 is not invalidated by any irregularity at or in relation to the meeting."

16. In these proceedings, CFL advances its case as an appeal pursuant to rule 5.22(5) and an application under section 262(1), on the following grounds:

    (a) There was a material irregularity at or in relation to the creditors' meeting in that Kaupthing ought not to have been admitted to vote at the meeting (i) at all, as the KSA had compromised its claim or made it unenforceable by Kaupthing, or alternatively (ii) for anything other than £1, as the KSA made the debt owed to Kaupthing a contingent debt and unascertained for the purposes of rule 5.21(3).

    (b) Alternatively, even if Kaupthing remained a creditor to the extent of its claim and was technically qualified to vote in that amount at the creditors' meeting, the KSA amounted to vote rigging in breach of the obligation of good faith among the creditors, and the exercise of Kaupthing's vote thereby constituted a material irregularity at or in relation to the creditors' meeting.

(c) Further or alternatively, by reason of the KSA, the IVA was unfairly prejudicial to CFL: CFL is prejudiced because it is prevented from pursuing its bankruptcy petition; that prejudice is unfair because Kaupthing did not exercise its vote in good faith by reference to the rights and interests of the body of creditors but acted for extraneous reasons involving obtaining a secret benefit.

The Facts

17. Mr Gertner and his family have long been associated with substantial wealth, though it is not the function of this judgment to identify that wealth or precisely who owns it. Much if not all of that wealth is held in a number of Gertner family trusts, most of which were settled by Mr Gertner's father, Dr Yehudah Gertner, in the 1980s. Mr Gertner's evidence before me was that his only interest under the family trusts is as a discretionary beneficiary of the Gertner No. 1 Settlement and the Gertner No. 12 Settlement and that the trustees of those settlements have decided that he has exhausted any claim that he may properly make against them. The various family trusts own or have owned a number of overseas companies, the value and viability of which were adversely affected by the financial crisis of 2008. Mr Gertner has been involved in the management of those companies in the capacity of a director, and most of the major debts that he has incurred have been by way of personal guarantees for the debts of the companies. I shall say something about three of Mr Gertner's debts: those owed to Kaupthing, to Bank Leumi (UK) Plc, and to CFL.

18. It is relevant to note, by way of background, that since 2010 the Gertner family and various of its trusts and corporate entities have been engaged in very substantial arbitration proceedings in Israel against one Dan Gertler and his family trusts and associated companies ("the Gertler Arbitration"). Mr Gertner and his brother Mr Mendi Gertner ("Mendi") are parties to the Gertler Arbitration. Mr Gertner's evidence is that as claimants in those proceedings[2] they act only in their capacity as representatives of the Gertner family trusts, and he refers to a Trust Deed dated 29 November 2010, in which he confirmed and declared that he was privy to the Gertler Arbitration only as nominee and bare trustee for the Moises Gertner Trust, of which he is the settlor but not a beneficiary. Clause 2 of the Trust Deed states: "It is hereby declared that the Beneficiaries [i.e. the Moises Gertner Trust] shall have the exclusive right to direct how the arbitration settlement proceeds shall be dealt with." In that context, it is interesting to note that both the KSA and at least one other settlement agreement with one of Mr Gertner's creditors have been made on the basis that the creditor will share in any proceeds of the Gertler Arbitration; this is mentioned further below.

The Kaupthing debt

19. Mr Gertner's liability to Kaupthing arose under an unlimited personal guarantee dated 19 September 2008 in respect of borrowings by Crosslet Vale Limited ("Crosslet Vale"), an investment company incorporated in Gibraltar and owned by Gertner

[2] Mr Gertner and Mendi are also defendants to a cross-claim in the Gertler Arbitration. I do not know in what capacity they defend the cross-claim.

family trusts. The loans to Crosslet Vale were made under a facility originally granted in 2006 and the subject of several supplemental agreements over the next couple of years. The initial advance under the facility was used to make investments in the Congo in a venture with which Mr Gertler was associated. A subsequent advance in September 2008 was made for the purpose of financing Crosslet Vale's purchase of 18,500,000 shares in Kaupthing, at a time when Kaupthing was purportedly seeking to expand its capital base.

20. Crosslet Vale defaulted on its obligations under the facilities with Kaupthing. In October 2010 Kaupthing commenced proceedings ("the Kaupthing Proceedings") against Crosslet Vale under the loan agreements and against those from whom it held guarantees of Crosslet Vale's liabilities: Mr Gertner, Mendi, and Orgate Limited, another company owned by the family trusts. The claim against Mr Gertner amounted to something in excess of £300 million. The Kaupthing Proceedings were stayed by agreement between the parties before any Defence was filed, and thereafter prolonged negotiations took place. Mr Gertner's evidence before me was to the effect that he and the other defendants maintained that the advance in September 2008 had been taken by reason of a fraud perpetrated by Kaupthing's directors and so was unenforceable; he accepted that counsel's opinion had never been obtained as to whether there was any defence to Kaupthing's claim. He said that the reason why negotiations were protracted was that Kaupthing had been taken into state control and its personnel dealing with the matter were frequently replaced.

21. Matters between Mr Gertner and Kaupthing remained unresolved as at early 2015. However, in a letter to Mr Gertner in March 2015, Mr Mark Willis, a licensed insolvency practitioner who was then advising Mr Gertner concerning a possible IVA, noted that Kaupthing was "keen to finalise its position" with him. In a telephone conversation on 6 October 2015 between CFL's solicitor, Kaupthing's solicitor and representatives of Kaupthing, Kaupthing 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.

The Bank Leumi debt

22. As Mr Willis's letter remarked, in March 2015 Mr Gertner was also facing a bankruptcy petition, presented by Bank Leumi and listed for hearing in April 2015. Mr Gertner had given to the bank 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 Bank Leumi made demands on the guarantees. When Mr Gertner failed to perform his guarantee, Bank Leumi presented a bankruptcy petition against him in October 2013. A payment of £100,000 was made to the bank on behalf of Mr Gertner by the Gertner No. 1 Settlement, of which he and his issue were the discretionary beneficiaries. However, no further payment had been made before a settlement was reached in July 2014, as a result of which the petition was dismissed. That settlement, which was accompanied by a further payment of £100,000 from the Gertner No. 1 Settlement, required Mr Gertner and Mendi to pay £10 million to the bank on 28 November 2014. They failed to make that payment, and Bank Leumi presented a further bankruptcy petition against Mr Gertner in February 2015. Before that further petition was heard, on 30

March 2015 Mr Gertner and Mendi entered into a second settlement agreement with Bank Leumi, under which they were required to provide to the bank forthwith (1) £3 million, (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 Gertler Arbitration. Those requirements were complied with. Bank Leumi withdrew its petition. According to Mr Gertner, the payment of £3 million was made from a trust controlled by a family friend, Mr Leib Levison. Mr Gertner'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 £417 million. The undertaking regarding the Uplift Payment concerned (as Mr Gertner accepted in cross-examination) the disposition of trust moneys, of which Mr Gertner and Mendi were not trustees.

The CFL debt

23. CFL no longer carries on business, but it was formerly a lender of last resort. In June 2008 it lent £3,500,000 to a company called Lanza Holdings Limited, which was a Gibraltar company owned by Gertner family trusts. The loan was at high rates of interest, with provision for compound interest in the event of default by the borrower. Mr Gertner guaranteed the debt. Lanza Holdings Limited defaulted. In November 2010 CFL commenced proceedings against Mr Gertner on his guarantee. The principal claimed was £1.7 million, but with compound interest from June 2008 the total claim was far higher. By a Tomlin Order made in October 2011, the proceedings were stayed on the terms of a settlement agreement, by which Mr Gertner agreed to pay to CFL £2 million by specified instalments and a further £50,000 as a contribution towards CFL's costs. The settlement agreement provided that, if Mr Gertner failed to make payments as agreed, the entire moneys claimed in the proceedings should be payable. By the spring of 2013 Mr Gertner had defaulted under the terms of the compromise.

24. On 26 March 2015 Teacher Stern, the solicitors acting for Mr Gertner, wrote to CFL's representative with an offer of £10,000 in full and final settlement of a debt that was stated in the letter to be £2,185,973. The offer was put forward as being more advantageous to CFL than an IVA, under which it would receive nothing. Mishcon de Reya responded on behalf of CFL, seeking detailed information to enable them to reach a decision on the offer. The response pointed out that, with interest, the debt then amounted to £10,857,183. (Mr Gertner disputes his liability for interest, which is why his solicitors only acknowledged a debt of a little over £2 million. However, the settlement agreement clearly makes interest payable.) In the event, these communications came to nothing.

25. In September 2015 CFL served a statutory demand in bankruptcy; by then the operation of compound interest had increased the debt to roughly £11 million. Mr Gertner neither complied with the demand nor applied for it to be set aside. CFL presented the bankruptcy petition on 6 October 2015, and it was served on Mr Gertner on 22 October 2015. The date fixed for the hearing of the petition was 23 November 2015.

The Proposal and the IVA

26. Faced with the bankruptcy proceedings, Mr Gertner sought advice from Teacher Stern and from Mr Buchler. Mr Buchler had done work for Mr Gertner over a number of years and in November 2010, when CFL had issued its proceedings against Mr Gertner, had been instructed by him to "take an in-depth look at his affairs" (email sent by Mr Buchler on 17 November 2010). Mr Buchler advised Mr Gertner to consult Mr Rubin, on account of his greater experience of IVAs, and in early November 2015 he did so. Mr Rubin's evidence was that neither Mr Gertner nor Mr Buchler informed him of the previous connection between them; he learned of it only in these proceedings. I accept that evidence and Mr Rubin's further evidence that he himself was independent of Mr Gertner and had no previous dealings with him and that he was solely responsible for such investigations as took place into Mr Gertner's affairs for the purpose of putting the Proposal to the creditors.

27. On 18 November 2015 affidavits by and on behalf of Mr Gertner were served on CFL in opposition to the bankruptcy petition. Although the affidavits 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. Mr Gertner's affidavit did however confirm that "an independent arms-length third party" was prepared to pay CFL £487,500 in settlement of its claim. CFL rejected that offer.

28. Also on 18 November 2015 Mr Gertner signed the Proposal. Page 5 contained the following passages:

> "I have been involved in the property development sector for a number of years and am currently a property consultant and a director of Fordgate Management Limited.
>
> My previous business activities included the property and mining sectors and as a director of several companies I have provided a number of personal guarantees to financial institutions as a condition for them providing finance to the companies concerned. A number of companies that I gave guarantees for have entered into insolvent liquidation or administration in recent years resulting in the crystallisation of these liabilities.
>
> The major liability is in connection with a shortfall on a loan with Kaupthing Bank which was secured on my personal guarantee and some mining assets and I have been in negotiations with them for some time.
>
> ...
>
> My proposals are as follows:
>
> 1. A third party will make a one-off lump sum payment to the Supervisors of £487,500 which will be used to make a distribution to creditors and meet the costs of the Arrangement. ... This should be sufficient to pay a

dividend of approximately 0.07p in the £ to unsecured creditors.

2. The claim of HM Revenue and Customs which is estimated at £32,678 will be paid in full from the one-off lump sum received by the Supervisors."

It is unnecessary to set out the more detailed provisions of the proposals, but some of the other contents of the document may be noted. In explaining why an IVA would be preferable to bankruptcy, Mr Gertner said: "If I were to be made bankrupt I would be unable to continue as a director of Fordgate Management Limited and may jeopardize my future earning capacity." (Mr Rubin explained that the level of income derived from the directorship was, in the context of the statement of affairs and the terms of the Proposal, such as to be wholly immaterial to the IVA; that was why he did not include mention of the salary in the Proposal.) Mr Gertner's declared assets, as set out in the Estimated Statement of Affairs comprising Appendix A to the Proposal, were "Nil". The list of creditors in Appendix A showed Mr Gertner's father as a Connected Creditor for £28,666,666; the Proposal recorded that his father had agreed to subordinate his claim for dividend purposes in favour of the claims of the other unsecured creditors. Those other creditors were shown in a total sum of £582,809,270; far the largest debt was that owed to Kaupthing, shown as £547,261,182, and the next largest was that owed to CFL, shown as £11,128,611. Among the other creditors I may mention Mr Leib Levison, who was shown as holding a debt of £900,000. Mr Levison was the "third party" who according to the proposal would make the one-off lump sum payment of £487,500 to the Supervisors. (He is also, as I understand it, funding Mr Gertner's and Mr Rubin's conduct of these proceedings.) On page 7 of the Proposal Mr Gertner declared: "I am unaware of any transactions or claims against me under either section 339 (transactions at undervalue), section 340 (preferences) or section 343 (extortionate credit transactions) of the Insolvency Act 1986."

29. On 19 November Mr Rubin as a Joint Nominee produced a report under section 256A(3), recommending the Proposal. In respect of the basis of valuation of assets, he stated: "I have made no independent investigation of the debtor's statement of affairs. I have relied upon the debtor's comments that he has no assets and that the matrimonial home is owned by his wife." In respect of liabilities, he stated: "The claims of the creditors have been ascertained from statements available and from explanations given by the debtor. I have no reason to doubt the reliability of the debtor's estimate of the liabilities to be included in the Arrangement." The report confirmed that Mr Gertner had fully co-operated with Mr Rubin in the preparation of the Proposal. It also recorded that Kaupthing's intention, as expressed to him by its solicitors, was to support the Proposal.

30. On 20 November formal Notice of the creditors' meeting, scheduled for 17 December 2015, was sent to the creditors. As was clear from the Proposal and the report of the Joint Nominees, Kaupthing's stance at the creditors' meeting would be critical.

31. On 16 December 2015 CFL's solicitors, Mishcon de Reya, wrote a long letter to Mr Rubin, raising a number of concerns and giving Mr Rubin "an opportunity" to address them before the creditors' meeting on the following day. The letter was sceptical of the claim that someone with debts of £600 million had no assets at all, and it sought

details of the enquiries and investigations that had been made as to various matters, including the use of trusts and other structures as possible means of sheltering assets. The letter raised a number of matters concerning the Kaupthing debt. It asked why Mr Rubin apparently intended to admit Kaupthing to vote in the full amount of its claim notwithstanding that the Kaupthing Proceedings were ongoing. It said that CFL had received information that Kaupthing had accepted an offer from Mr Gertner for 1% of its claim against him—significantly more than would be received under the Proposal. And it noted that Kaupthing had recently rejected a more generous offer from another party to buy the debt for £10 million. That was a reference to an offer made in mid-October 2015 by a company called Arrowsmith Limited to acquire all Kaupthing's debt and guarantee-related claims against Crosslet Vale, Mr Gertner, Mendi and Orgate Limited for "at least £10,000,000" and perhaps "a (significantly) higher price" if it could be demonstrated that the claims had a greater value. That offer was promptly rejected by Kaupthing, who expressed concern as to Arrowsmith Limited's "motivations and methodologies". (The ultimate owner of Arrowsmith Limited was a Gertler family trust.)

32. Mr Rubin wrote a long reply on 16 December 2015, noting that he had not had time to investigate all of the issues raised by Mishcon de Reya's letter. He noted that the Nominees' investigations prior to circulating the Proposal were limited to information provided by the debtor and his advisers, information "and hard evidence" provided by creditors, and any other information they could find during the process. He said that, if he learned of material mis-statements by Mr Gertner, he would be the first to take appropriate action, including bringing bankruptcy proceedings. He dealt with a number of specific points, of which I mention only two. Regarding Mr Gertner's assets:

> "Mr Gertner has stated that he has no assets. I agree with you that it is difficult to reconcile the huge quantum of the liabilities amounting to over £600 million with the fact that the debtor has no assets to show for all of that money. Many of the liabilities are personal guarantees. In any event, I have requested substantive comments on the points you raise regarding trusts and asset dissipation generally ..."

Regarding Kaupthing:

> "We have received a proof of debt; copies of all of the original loan documentation and a detailed schedule of precisely how the Kaupthing debt is made up. The total debt amounts to £557,467,416.37. I have not investigated the claim in substantial detail for a number of reasons. Firstly, the debtor acknowledges that the debt is due; secondly, the Bank has confirmed that the debt is due; thirdly, the Bank's advisors, Messrs Simmons & Simmons, have also confirmed that the debt is due and indeed I believe that a representative from that firm may well be attending the creditors' meeting tomorrow, so they will again be able to provide you with more information than I can. I confirm that I have received sufficient documentation to admit the claim by Kaupthing to vote in the full amount thereof. ...

> I refer to [the suggestion that Kaupthing had come to an arrangement regarding Mr Gerstner's debt] and I have to say here that I am unaware of any deals being done by Kaupthing and others. I shall leave you to ask those questions of the representatives of Kaupthing who will be attending the creditors' meeting tomorrow. I would imagine that it is for Kaupthing to offer this information, or not as the case may be; but it is certainly not for the Joint Nominees to interfere with any arrangements that the creditors have with parties other than the debtor."

The letter concluded:

> "... I have made it clear to the debtor and his advisors that I require substantial answers to all of the questions you raise, together with some of the questions I have raised during the course of this process. I am sorry that I am unable to provide all of this information prior to the creditors' meeting."

33. Also on 16 December, there was an exchange of letters between Mishcon de Reya for CFL and Simmons & Simmons for Kaupthing. In response to a request for confirmation of the arrangement supposedly reached by Kaupthing to receive 1% of Mr Gertner's debt and for an explanation of Kaupthing's support for the Proposal, Simmons & Simmons stated that Kaupthing was "not confident" that CFL was not implicated in the "current campaign involving co-ordinated action to seek to interrupt the proposed Moises Gertner IVA", driven by "distinct commercial objectives and not by straightforward issues of creditor recovery", and therefore did not propose to engage further with CFL or Mishcon de Reya. The letter concluded:

> "[W]hat you say ignores the fact (of which you are well aware) that Kaupthing's lending relationship is with Crosslet Vale. There is no deal with Mr Gertner in the way you wrongly seek to suggest. Kaupthing's arrangements in relation to Crosslet Vale do give rise to additional value to Kaupthing, but that value forms no part of Mr Moises Gertner's assets."

In his oral evidence Mr Rubin confirmed that he had seen that letter before the creditors' meeting.

34. On 16 December 2015 Simmons & Simmons lodged Kaupthing's proof of debt in the sum of £557,467,416.37. The two-page explanatory note attached to the proof of debt did not mention or allude to the KSA; paragraph 3.3 of the note referred to the stayed proceedings between Kaupthing and Mr Gertner and others and said: "The proceedings have been subject to lengthy extensions for filing of Defences and as at the date hereof, it remains unclear whether and to what extent the Defendants intend to defend the claim, if at all." As will appear more fully below, that sentence makes for interesting reading in the light of the KSA, which had already been executed and very largely performed.

35. The creditors' meeting took place at 11 a.m. on 17 December 2015. Among those present were Mr Rubin and Mr Buchler as Joint Nominees, Mr Jack Rabinowicz of

Teacher Stern as Mr Gertner's solicitor, Ms Blom-Cooper to represent CFL, and a contingent from Simmons & Simmons to represent Kaupthing. Mr Gertner was not present; Mr Rubin told the meeting that he had advised Mr Gertner to attend, though in evidence he observed that the attendance of the debtor at such a meeting was neither necessary nor invariable. The only minutes of the meeting that were put in evidence were those of Ms Blom-Cooper, though an associate of Mr Rubin also took a minute. Ms Blom-Cooper's minutes record that Mr Rubin said he was "sorry if our investigations [were] thinner than they should be", though he explained in evidence that his remarks had been made with particular reference to the enquiries made in Mishcon de Reya's letter of the previous day and not as an acknowledgment of shortcoming. One matter raised at the meeting was the purpose of the loans to Mr Gertner from his father; these were said to have been in order to "keep him [Mr Gertner] going", though in a letter dated 7 November 2016 Mr Gertner's solicitors stated that the moneys provided by Mr Gertner senior were "transferred … to various trusts for investment purposes." (In evidence before me, Mr Rubin said that he had not previously been aware of this latter explanation and would have wanted to look into it if he had known of it.) On behalf of CFL Ms Blom-Cooper proposed that the meeting be adjourned to enable further investigations to be made. Mr Rubin recommended that no adjournment take place, as any adjournment would be for a maximum of 14 days, which would be insufficient to make meaningful enquiries over the holiday period, and his duties as a Supervisor meant that he would be "the first to knock on the court's door" (that is, to ask for a bankruptcy order) if he found any falsehoods in or material omissions from the Proposal. The meeting rejected the request for an adjournment and approved the Proposal. Mr Rubin's report on the creditors' meeting pursuant to rule 5.27 of the Rules shows that of the creditors present or represented by proxy at the meeting all but two were for approval of the Proposal. CFL was one of the two creditors for rejection; together those two creditors represented 2.15% of the creditors present or represented. Mr Leib Levison did not vote at the meeting.

36. If Kaupthing's vote had not been admitted, or had been admitted for a nominal value, the Proposal would not have been approved.

37. CFL filed the present application on 15 January 2016. Its bankruptcy petition, the hearing of which on 23 November 2015 had been adjourned until after the creditors' meeting, was on 26 January 2016 stayed by consent pending determination of this application.

38. When the application was made, the grounds relied on were fairly wide-ranging: for example, non-disclosure of assets and income, inadequate investigations by the Supervisors, issues concerning the validity of Kaupthing's debt. One specific matter relied on was the allegation that "Kaupthing has entered into a collateral arrangement with the Debtor and/or his associates in relation to its purported debt." This matter was put, necessarily, in vague terms. In her witness statement in support of this application, Hannah Blom-Cooper stated:

> "Under the IVA Proposal as they stand Kaupthing will receive just £394,000 being 0.07% of Kaupthing's debt. However ... it is now clear that Kaupthing have entered into a collateral arrangement with a third party in relation to this debt."

Ms Blom-Cooper went on to say that, despite her enquiries, she had not succeeded in ascertaining the details of the arrangement with the third party. She continued:

> "I believe that the only reasonable inference is that Kaupthing has been induced to accept the objectively meagre terms of the IVA Proposal in exchange for entering into a collateral arrangement with the Debtor and/or his associates which has not been disclosed in the IVA Proposal."

39. In his first witness statement in these proceedings, dated 13 May 2016, Mr Gertner responded as follows:

> "I can confirm for the avoidance of doubt that I have not (nor has any entity in which I am interested, nor anyone on my behalf) entered into any agreement with Kaupthing by which it is entitled or will be entitled to any of my assets over and above the portion to which they will be entitled under the IVA.
>
> What Kaupthing does have ... is an understanding with the primary debtor/borrower, Crosslet Vale Limited, which was another family-Trust-owned company. ... In relation to the arrangement with Crosslet Vale I am not sure I can improve on what Kaupthing, through its solicitors Messrs Simmons & Simmons, has explained to the supervisors in their letter dated 16 March 2016 ..."

40. The letter of 16 March 2016 from Simmons & Simmons did not mention the KSA. It referred to the Kaupthing Proceedings as being in respect of Crosslet Vale's obligations: "In other words they concern distinct legal obligations wider than the obligations with which Mr Rubin and Mr Buchler are concerned relating only to Mr Gertner." With regard to "the alleged 'collateral agreement'", the letter said:

> "Kaupthing is seeking to resolve and recover value in respect of its claims against Crosslet Vale. That is not a straightforward matter and Kaupthing is constrained by confidentiality in what it is able to say regarding the steps and actions it has taken and is taking in looking to secure such value. Until (and if) a resolution is achieved, the Kaupthing Proceedings remain current. Those proceedings may yet be prosecuted to judgment.
>
> It will come as no surprise that on conclusion of any settlement Kaupthing is looking for delivery of value for the benefit of its creditors in exchange for whole or partial release of its claims. However, it is clear to, and important to, Kaupthing that such value comes from sources outside the parameters of assets properly available to Mr Gertner's creditors in the event of bankruptcy."

The letter went on to say that no arrangement had been made whereby Kaupthing would receive any additional value by way of a payment from Mr Gertner or from his

assets and repeated the position as set out in Simmons & Simmons' letter of 16 December 2015: "Kaupthing's arrangements with Crosslet Vale do give rise to additional value to Kaupthing, but that value forms no part of Mr Moises Gertner's assets."

41. By an order dated 6 October 2016, H.H. Judge Pelling Q.C. ordered Mr Gertner to provide copies of a number of documents, including documents "relevant to any arrangement between (i) Kaupthing and [Mr Gertner] and (ii) Kaupthing and any third party, in relation to (a) the payment of the sums claimed by Kaupthing under the facility agreements and guarantees in the Kaupthing Proceedings and (b) the settlement of the Kaupthing Proceedings." In consequence of that order, on 28 October 2016 Mr Gertner produced the KSA.

The Kaupthing Settlement Agreement (KSA)

Text

42. The KSA was made on 11 December 2016 between (1) Kaupthing, (2) Crosslet Vale, (3) Mr Gertner, (4) Mendi and (5) Laser Trust, a trust established under the laws of Gibraltar by Mr Leib Levison. (Orgate Limited had been dissolved on 24 September 2013.) It referred to the Kaupthing Proceedings as "the Proceedings" and the matter of those proceedings as "the Dispute" concerning the original and supplemental facility agreements (together, the "Facility Agreement") between Kaupthing and Crosslet Vale. Clause 1 gave the broadest definition of "Potential Claims", wide enough to include, among other things, the claims made by Kaupthing in the Kaupthing Proceedings and any cross-claim arising out of any misrepresentation made by Kaupthing's directors in connection with the extension of a borrowing facility to Crosslet Vale or the taking of Mr Gertner's guarantee, though subject to a significant saving:

> "'Potential Claims' means all and/or any actions, claims, rights, demands and set-offs, whether in this jurisdiction or any other, whether or not presently known to the parties or to the law, and whether in law or equity, that it, its Related Parties or any of them ever had, may have or hereafter can, shall or may have against the other party or any of its Related Parties arising out of or connected with the matters set out at (A) to (C) below, save that nothing in this definition or in this agreement shall be construed as either (i) preventing the parties enforcing the rights and obligations arising pursuant to this agreement, or (ii) constituting a release or discharge of the rights or obligations of the parties under the Facility Agreement:
>
> (A) the Dispute (including the Proceedings);
>
> (B) any previous agreement between or act by the parties or their Related Parties or any of them; and

> (C) any other matter arising out of or connected with the relationship between the parties up to and including the date on which this agreement becomes binding on the parties pursuant to clause 2.1."

The definition of "Related Parties" is also relevant:

> "'Related Parties' means a party's subsidiaries, parent (including ultimate parent), any subsidiary of any such parent, assigns, transferees, representatives, principals, agents, employees, officers, directors or family members (including former representatives, principals, agents, employees, officers, directors or family members) or any other associated entity or person; and any entity or person associated with any trust or similar structure established for the benefit of any of the foregoing, including for the avoidance of doubt the Moises Gertner Trust, the Mendl Gertner Trust or the Gertner No 1 Settlement and, prior to its dissolution, Orgate."

43. The fourth recital stated:

> "The parties have settled their differences and have agreed terms for the full and final settlement of the Dispute and wish to record those terms of settlement, on a binding basis, in this agreement."

44. However, clause 2.1 provided:

> "This agreement shall not be binding on the parties as a settlement of the Dispute and/or the Proceedings until:
>
> (A) Kaupthing has received in full and without deduction the payment set out in clause 3.1 by the time specified; and
>
> (B) the relevant parties have executed each of the agreements or declarations envisaged in clauses 3.1 to 3.8 herein."

45. Clause 3 was headed "Consideration". Clause 3.1 provided:

> "Laser Trust shall pay Kaupthing the total sum of US$6 million by close of business on 15 December 2015. The parties agree that it is a fundamental term of this agreement that Kaupthing be in receipt of the payment of US$6 million by close of business on 15 December 2015 and that Kaupthing may in its absolute discretion, treat this agreement and any related agreements as having been repudiated in the event that payment is not received by close of business on 15 December 2015."

Clause 3.5 contained provision regarding the manner in which payment was to be made. Clauses 3.2 and 3.3 provided for interest to accrue in the event of late payment. Clause 3.4 provided:

> "The obligation on Laser Trust to pay Kaupthing the sums set out in clause 3.1 and the interest in clause 3.2 is absolute."

It is common ground that Laser Trust made the payment of US$6 million in accordance with clause 3.1.

46. Clauses 3.6 to 3.11 made provision in respect of non-monetary consideration. 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."

Appendices 2, 10 and 11 were in materially similar terms *mutatis mutandis*. 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 the Gertler 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."

The profit-sharing agreements were duly executed no later than the KSA.

47. Clause 3.7, headed "Czech real estate", provided:

> "The parties shall use their best endeavours or procure that the relevant parties use their best endeavours to facilitate the enforcement of the security (by way of share transfer) granted over the land in Úherce u Nýřan and Nýřany charged to Kaupthing pursuant to the mortgage agreement dated 4 December 2006 between Kaupthing (as security agent) and Mayfield Plzeň sro (as security provider) including by entering into, within 7 days of the execution of this agreement, an agreement in substantially the form of the draft agreement at Appendix 3."

48. The draft agreement at Appendix 3 was between Kaupthing, Irongate B.V. ("Irongate": a company registered in the Netherlands), Crosslet Vale and Mayfield Plzeň sro ("Mayfield": a company registered in the Czech Republic). It recited that Crosslet Vale's debt to Kaupthing was secured by, among other things, "a pledge of

Irongate's 100% participation in Mayfield" and a mortgage of land owned by Mayfield, and that it was the parties' intention that the participation pledge be enforced by Kaupthing acquiring the pledged participation in partial discharge of Crosslet Vale's debt and that the mortgage of Mayfield's land (which I infer was Mayfield's only or main asset) should simultaneously cease to exist. The operative parts of the draft agreement were to give effect to that intention.

49. The evidence is to the effect that the agreement mentioned in clause 3.7 has not been executed. However, the evidence does not explain why it has not been executed and does not indicate that there is any dispute concerning the agreement or genuine impediment to its execution.

50. Clause 3.8 of the KSA, headed "Shares in Katanga Mining Limited", provided:

> "The parties shall use their best endeavours or procure that the relevant parties use their best endeavours to facilitate (i) the enforcement of the security granted over or (ii) transfer to Kaupthing of the shares in Katanga Mining Limited charged to Kaupthing pursuant to the security agreement dated 11 January 2008 between Pitchley Properties Limited (as charger) and Kaupthing (as security agent)."

51. The evidence is that the shares have neither been sold by way of enforcement of the security nor been transferred to Kaupthing. Again, however, no explanation has been given. Absent some kind of obstruction by Pitchley Properties Limited—and none is alleged—the enforcement of its existing security would appear to be a matter for Kaupthing.

52. Clause 3.9 provided that Mr Gertner and Mendi should each provide a statutory declaration of his assets and liabilities on or before execution of the KSA. They complied with that obligation. Similarly, clauses 3.10 and 3.11 required the provision to Kaupthing of specified financial statements; these too were provided.

53. Clause 4, headed "Stay of action", provided: "The parties hereby consent to, and shall take all necessary steps to obtain an Order in substantially the form of the draft Order in Appendix 5." The draft order was an order to be made by consent by the parties in the Kaupthing Proceedings and was in the form of a Tomlin order: paragraph 1 provided that the Kaupthing Proceedings be stayed upon the terms of the KSA except for the purpose of enforcing the terms of the KSA; paragraph 2 provided that each party should have permission to apply for the enforcement of the terms of the KSA without the need to bring a new claim; paragraph 3 provided that each party should bear its own costs.

54. No consent order has been filed pursuant to clause 4, though no reason for this is in evidence.

55. Clause 5 was headed "Transfer of debt and guarantees". Clause 5.1 provided:

> "The parties shall, within 90 days of:

> (A) the receipt by Kaupthing of all payments due under clause 3.1;
>
> (B) the registration of Kaupthing as a shareholder in Mayfield Plzeň sro and confirmation from the land registry in the Czech Republic of of (sic) the release of the mortgages over the relevant land in the Czech Republic as envisaged by clause 3.7; and
>
> (C) the registration of Kaupthing as the legal owner of the relevant shares in Katanga Mining Limited as envisaged by clause 3.8
>
> enter into an agreement in substantially the form of the draft agreement in Appendix 6 which transfers the benefit of the Facility Agreement [i.e. the agreement by which the loan to Crosslet was made] and the Guarantees [i.e. the guarantees given by Mr Gertner, Mendi and Orgate in respect of Crosslet's liabilities] from Kaupthing to Laser Trust ..."

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 [i.e. Kaupthing], with effect from the date of this Deed, irrevocably assigns to the Assignee [i.e. 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. (Clause 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.

57. Clause 5.2 of the KSA made further provision for the release of any claims that the parties to it might have against each other in respect of certain African assets.

58. Clauses 6 and 7 of the KSA provided as follows:

> "6.1 Each Gertner Party, Laser Trust and Crosslet Vale agree, on their own behalf and on behalf of each of their Related Parties, not to sue, commence, voluntarily aid in any way, prosecute or cause to be commenced or prosecuted against Kaupthing or its Related Parties any action, suit or other proceeding concerning the Potential Claims, in this jurisdiction or any other.
>
> 6.2 Kaupthing agrees, on behalf of itself and on behalf of its Related Parties not to sue, commence, voluntarily aid in any way, prosecute or cause to be commenced or prosecuted against the Gertner Parties, or any of them, or Crosslet Vale any action, suit or other proceeding concerning the Potential Claims, in this jurisdiction or any other, save that nothing in this clause shall be construed as either (i) preventing Kaupthing enforcing its rights under this agreement or (ii) constituting a release or discharge of the rights and obligations of the parties under the Facility Agreement.
>
> 7.1 With effect from the date of this agreement, each party hereby releases and forever discharges, all and/or any actions, claims, rights, demands and set-offs, whether in this jurisdiction or in any other, whether or not presently known to the parties or to the law, and whether or not (sic) in law or equity, that it, its Related Parties or any of them ever had, may have or hereafter can, shall or may have against the other parties or any Related Parties arising out of or in connection with the Dispute or Potential Claims, save that nothing in this clause shall be construed as either (i) preventing Kaupthing enforcing its rights under this agreement, or (ii) constituting a release or discharge of the rights and obligations of the parties under the Facility Agreement, any and all related guarantees and, for the avoidance of doubt, the rights and obligations arising out of the arrangements referred to at clauses 5.2(A) to (C) of this agreement."

59. Of the other provisions of the KSA, I need mention only clause 13, which was an entire-agreement provision, and clause 14, which provided for the confidentiality of the agreement. Clause 14.2 provided that the parties should be entitled to confirm the fact of, but not the terms of, settlement of the Dispute.

Construction

60. The issue to which the KSA gives rise between the parties is, in essence, whether or in what sense it had effected a compromise of the Kaupthing Debt by the time of the creditors' meeting. For Mr Gertner it is said that, as the requirements of clauses 3.7 and 3.8 remained unperformed, clause 2.1 prevented a binding compromise of the Dispute or the Kaupthing Proceedings from coming into effect and the Kaupthing Debt remained vested in Kaupthing. For CFL it is said that all matters of substance

had been performed, leaving only specious formalities, and that in those circumstances, and in the light of the agreement as a whole and the terms of clauses 4 and 6 in particular, pending the assignment to Laser Trust Kaupthing retained at most a nominal title to a debt that it could neither enforce or deal with in any way other than by the assignment.

61. The relevant principles governing the construction of the KSA may be shortly stated. The starting point is the language used by the parties in the written agreement: see *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619. The proper approach to construing the language was summarised by Lord Bingham of Cornhill in *Dairy Containers Ltd v Tasman Orient CV* [2005] 1 WLR 215 at [12]:

> "The contract should be given the meaning it would convey to a reasonable person having all the background knowledge which is reasonably available to the person or class of persons to whom the document is addressed."

The ramifications of these basic principles have been discussed in detail in many cases; I refer for example to *Rainy Sky S.A. v Kookmin Bank* [2011] UKSC 50, [2011] 1 WLR 2900, at [14] – [30], and to the judgment of Lord Neuberger PSC in *Arnold v Britton* at [14] – [23].

62. The provisions of the KSA have been sufficiently set out above. The background knowledge reasonably available to the parties to the KSA included the matters concerning the Kaupthing debt set out in paragraphs 18 and 19 above, the Proposal, Mr Rubin's report and the fact that the creditors' meeting was to be held on 17 December 2015. I consider that it must also be taken to include the state of affairs disclosed by the time of execution of the KSA pursuant to clauses 3.9, 3.10 and 3.11 (cf. also the warranties given by the Gertner parties in that regard in clause 9) and the likelihood that, if the Proposal were not approved, Mr Gertner would face bankruptcy upon CFL's petition.

63. In the light of these matters, my analysis and reasoning are as follows.

63.1 The principal difficulty in construing the KSA arises from its effort, on the one hand, to preserve in existence an obligation under the Facility Agreement and the guarantees and, on the other hand, to effect a binding agreement that will take the place of the Kaupthing Proceedings. This dual object of the KSA and the reason for it are, in my judgment, accurately stated in the written submissions of Mr Atherton QC and Ms Leahy: "The true position is that the KSA was designed to (try to) simultaneously preserve and compromise the Kaupthing claim for the sole purpose of voting through the IVA."

63.2 The attempt to preserve the debt in existence is most apparent from clause 2.1 and from the saving provisions at the ends of clause 6.2 and clause 7.1 and the definition of "Potential Claims" in clause 1. Mr Gertner places considerable weight on these provisions as showing that Kaupthing remained a creditor and entitled to vote at the creditors' meeting. Clause 2.1 is the provision most strongly in Kaupthing's favour, because it states in terms that the KSA "shall not be binding on the parties as a settlement of the Dispute and/or the Proceedings" until the specified conditions have been satisfied. However, a

written contract has to be construed as a whole. The precise meaning to be given to clause 2.1 has to be ascertained in the context of all the other provisions of the KSA. The exercise of construction of the whole agreement involves not only ascertaining the meaning of the particular words in clause 2.1 but also answering the question whether the words as so construed are true or, perhaps better, efficacious. (That question cannot entirely be bypassed. As a contractual statement that an arrangement shall not create a tenancy may be of no avail in the light of the other provisions of the contract, so it might be that an agreement effects a binding settlement of a dispute while purporting not to do so.)

63.3 It is obvious that the opening words of clause 2.1 cannot mean that the KSA was not with immediate effect a valid and binding contract. Clearly it was indeed immediately binding on the parties: this appears from the scheme of the KSA taken as a whole and, more particularly, from the fourth recital, the imposition of immediate contractual obligations (for example, in clause 3.6), the terms of clause 3.1 making the time of payment a condition of the agreement, the obligation to file a Tomlin Order, and the provisions of clause 6 (unconditional covenants not to sue) and clause 7 (releases and discharges "[w]ith effect from the date of this agreement"). The question accordingly concerns the effect of this binding contract on the debt owed to Kaupthing by the Gertner parties.

63.4 The saving provision that is repeated in materially similar terms at the end of the definition of "Potential Claims" in clause 1 and at the end of clause 6.2 and clause 7.1 shows both aspects of the dual object sought to be achieved in the KSA: first, it provides that the parties are not prevented from enforcing their rights under the KSA; second, it provides that the parties' rights and obligations under the Facility Agreement are not released or discharged. However, it is striking how carefully the saving provision is drafted. The very broad definition of "Potential Claims" covers any claims asserted by Kaupthing in the Kaupthing Proceedings and any matter capable of being raised by set-off or cross-claim by the Gertner Parties in defence of or response to such claims. It would, without more, also cover any claim to enforce the terms of the KSA. But whereas the first part of the saving provision expressly preserves the right to enforce the terms of the KSA itself, the second part of the saving provision, which deals with the rights and obligations under the Facility Agreement is very differently drafted; it does not, for example, say, "(ii) preventing Kaupthing enforcing its rights under the Facility Agreement" whether by prosecuting the Kaupthing Proceedings or otherwise, but merely provides that the rights and obligations under the Facility Agreement are not released or discharged. This difference is clearly deliberate and reflects the attempt to preserve an underlying contractual right while at the same time restricting rights of enforcement to those arising under the KSA.

63.5 In my judgment, this conclusion cannot properly be avoided by supposing that, though all other Potential Claims are unenforceable, the claims actually made by Kaupthing in the Kaupthing Proceedings continue to be enforceable. My reasons are as follows.

(a) As mentioned, that is not what the saving provision says. Indeed, it carefully avoids saying any such thing.

(b) Clause 6.1, which is not subject to the saving provision, prevents the other parties from raising against Kaupthing or any assignee of Kaupthing any matter that could have been raised by set-off or cross-claim in the Kaupthing Proceedings. This alone makes it unlikely that the KSA means that Kaupthing or, after assignment, Laser Trust, can enforce the Kaupthing Debt. This consideration supports the view that the careful drafting of the saving provision is deliberate.

(c) Clause 6.2, on this construction, would mean that Kaupthing and any assignee could not sue for the Kaupthing Debt, though the debt would ostensibly remain in existence.

(d) The obligation in clause 4 to file a Tomlin Order is not expressed to be conditional and there is no reason to construe it as conditional. The clause expressly says that the parties "hereby consent to … an Order" in substantially the form of the draft annexed. If it had been meant that, *in certain events*, the parties *would* consent to such an order, different language would have been used. This means that the parties had an immediate obligation to stay the Kaupthing Proceedings on terms. Despite the language of clause 2.1, that is consistent with the tenor of the KSA as a whole, by which the terms of the KSA would be enforceable (most obviously, under the Tomlin Order), the parties' claims against each other could not be pursued, but the underlying rights being asserted in the Kaupthing Proceedings would (at least purportedly) be preserved in existence.

(e) Even if (contrary to my view) the obligation to file the Tomlin Order were conditional upon future performance of conditions in clause 3 of the KSA, it would make no sense to suppose that Kaupthing could in the meantime seek to enforce the Kaupthing Debt, because the parties had agreed that they would stay the proceedings and that the rights under the Facility Agreement would be assigned to Laser Trust, and because the effect of clauses 6.1 and 7 was to render the Gertner Parties entirely defenceless if a claim to enforce the Kaupthing Debt were permissible.

(f) I reject Mr Fraser's submission that it would be commercially absurd to construe the "No Sue" provision in clause 6.2 and the general release in clause 7.1 as having immediate effect, because it would remove any incentive for the Gertner parties and Laser Trust to perform their obligations under the KSA. Upon execution of the KSA, the one significant obligation remaining to be performed was the payment by Laser Trust, and the obligation to make payment was unconditional and capable of being enforced. The remaining matters to be performed under clause 3 concerned only the realisation of pre-existing security and the execution of the profit-share agreements; these too, if of value, were capable of enforcement.

63.6 The resulting position may be summarised as follows. There was an immediate binding agreement between the parties to the KSA. Laser Trust had an unconditional obligation to make payment to Kaupthing. The parties had an unconditional obligation to stay the Kaupthing Proceedings by Tomlin Order. Kaupthing had the right against the defendants in the Kaupthing Proceedings to enforce the KSA as being the terms on which those proceedings were stayed; that enforcement might be by way of specific enforcement or by way of the secondary remedy of damages. However, Kaupthing could not pursue the Kaupthing Debt against the Gertner Parties. Correspondingly, 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. The Kaupthing Debt itself, though not capable of being pursued in the Kaupthing Proceedings, purportedly remained in existence until such time if any as it could be assigned to Laser Trust. (In the light of clause 5 of the KSA and the Assignment of Debt and Security to be executed under it, the Kaupthing Debt must for these purposes include Mr Gertner's liability under his personal guarantee.) Clause 2.1, when read in the context of the KSA as a whole, can mean no more than that Kaupthing's rights under the KSA and in respect of ownership of the Kaupthing Debt are not discharged until the Gertner Parties have fully performed their obligations under the KSA. It cannot have the effect that the KSA was anything other than an immediate and binding compromise of the Kaupthing Proceedings.

63.7 This raises the question of the status or real existence of the Kaupthing Debt as at the date of the creditors' meeting. I shall consider that question in the context of the particular grounds on which the application is put.

Ground 1: Material Irregularity—Kaupthing's vote wrongly admitted

64. The first ground on which CFL advances its case is that there was a material irregularity at or in relation to the creditors' meeting because Kaupthing ought not to have been permitted to vote either (a) at all or alternatively (b) on the basis of a debt valued at more than £1. This ground is advanced both by way of appeal under rule 5.22 and by way of application under section 262(1).

65. CFL's primary argument is that Kaupthing was ineligible to vote at all: the effect of the KSA was that its claim was either entirely compromised or, if it can be thought technically to have subsisted, unenforceable. CFL's secondary argument is that, if Kaupthing was a creditor at all and so eligible to vote, its debt was contingent and unascertained and ought to have been admitted at only £1. I shall consider the primary argument and the secondary argument in turn.

The primary argument: Kaupthing not a creditor

66. The primary argument is advanced, in the alternative, in a weaker and a stronger form.

1) The stronger form of the argument is that there was no subsisting debt at all. This relies on the analysis put pithily in the written submissions of Mr Atherton and Ms Leahy: "Th[e] desired aim, to both compromise a claim and keep it alive, is conceptually impossible, with the result that the KSA is really nothing more than a legal sleight of hand." Where a decision at a creditors' meeting to approve a proposal for an IVA is made on the strength of purported debts that did not in fact exist, there is a material irregularity for the purposes of section 262 and rule 5.22; cf., in the context of company voluntary arrangements, *In re Gatnom Capital and Finance Limited* [2010] EWHC 3353 (Ch), *per* Roth J at [41].

2) The weaker form of the argument is that if any debt subsisted it was unenforceable. This rests principally on clause 6.2: Kaupthing's inability to enforce the debt meant that it could not be considered a creditor in respect of it, the position being analogous to that of a person whose debt is statute-barred by limitation of time.

67. In my judgment, for reasons that appear from the foregoing discussion of the construction of the KSA, CFL's primary argument is correct in its stronger form and, if it were not, would anyway be correct in its weaker form.

68. As at the date of the creditors' meeting, Kaupthing was not entitled to sue upon or enforce a debt owed by Crosslet Vale under the Facility Agreement or a debt owed by Mr Gertner under his guarantee. Its former entitlement in that regard had been replaced by an entitlement to enforce the terms of the KSA. For reasons already set out, neither clause 2.1 nor clauses 6.2 and 7 of the KSA assist Mr Gertner. Accordingly, even if the KSA can be supposed to have preserved in existence underlying contractual obligations (as to which, see further below), Kaupthing's claims in respect of those obligations had been compromised. To say that the debt continues in existence in those circumstances is indeed a "legal sleight of hand", as CFL submits.

69. Alternatively, even if (contrary to my view) the claims could be said to have some kind of continuing existence, Kaupthing's inability to enforce those claims meant that it could not be considered a creditor in respect of them. The position would be analogous in that regard to the case of a statute-barred debt (as to which, see *Ridgeway Motors (Isleworth) Ltd v ALTS Ltd* [2005] EWCA Civ 92, [2005] 1 WLR 2871, at [35], and *Mittal v RP Capital Explorer Master Fund* [2014] BPIR 1537 at [58]). For Mr Gertner, Mr Fraser QC submitted that, if indeed Kaupthing were prevented from enforcing the claims, the case was different from that of a statute-barred debt: a time-barred debt can never be recovered, whether by the creditor or by anyone else, unless the debtor pays voluntarily; in the present case, the covenant not to sue is personal to Kaupthing and does not prevent enforcement of the debt after assignment to Laser Trust; and the result of concluding that the debt was unenforceable and so could not be counted at the creditors' meeting would be that no account could be taken of it when deciding on the Proposal. I do not find that submission persuasive. In the first place, the relevant question is whether Kaupthing was a creditor. If it could not enforce the debt on which it relied, it was not a creditor. Laser Trust did not vote in respect of the debt, and it could not have done so, because it had taken no assignment. I readily accept that the conclusion, namely that no one could vote in respect of the debt at the creditors' meeting, is contrary to what the

parties to the KSA sought to achieve; that is not in doubt. But the result arises from an elaborate attempt to eat one's cake and have it. It is, moreover, a result that reflects at least one purpose of the KSA, namely to ensure that Mr Gertner would not be pursued for the debt at all.

70. Further, I reject the submission that, upon taking the assignment under clause 5, Laser Trust would have the right to sue Crosslet Vale and Mr Gertner on the original liabilities. The covenant not to sue in clause 6.2 was made by Kaupthing on behalf of itself and its Related Parties; the definition of Related Parties was wide enough to include Laser Trust as assignee. The general release in clause 7.1 bound Laser Trust as it bound Kaupthing, and as it is not properly to be construed as enabling Kaupthing to sue on the Facility Agreement and guarantees, but merely as purporting to keep unenforceable choses in action in notional existence, so it must have the same effect vis-à-vis Laser Trust. Moreover, the KSA envisages that the assignment of rights to Laser Trust will take place after the proceedings to recover the Kaupthing Debt have already been stayed by a Tomlin Order compromising the claim. Insofar as the resulting position may seem odd, it is again the consequence of an elaborate attempt to both compromise a claim and keep it alive. In practical terms, the inability of Laser Trust to enforce against Mr Gertner his debt under the guarantee is not odd at all, however, because the purpose of the KSA was to assist Mr Gertner by buying off a creditor, not to enable Laser Trust to sue him.

The secondary argument: debt of nominal value

71. CFL's secondary argument is that by the time of the creditors' meeting the debt owed by Mr Gertner to Kaupthing, if it existed at all, was contingent, because its enforcement depended on the failure of the conditions in clause 2.1(B) of the KSA (i.e. on non-performance of the obligation in clause 3.7 and—in my view—the obligation in clause 3.8). By reason of rule 5.21(3) the debt was therefore to be valued at £1, unless the chairman agreed to put a higher value on it. There was no evidence at the creditors' meeting and there is none now to justify placing any higher value on the debt. This argument concerns not admission or rejection of a disputed claim (rule 5.22(1)) but valuation of a claim that is admitted claim (rule 5.21(3)); for the distinction, cf. *Re a Debtor (No. 222 of 1990), ex parte Bank of Ireland* [1992] BCLC 137.

72. For reasons set out above, I do not consider that the facts support the secondary argument, and consider it in the alternative to the foregoing analyses.

73. There was argument before me as to whether any subsisting debt owed to Kaupthing was "contingent". In considering that question, one must bear in mind that the reference in rule 5.21(3) is rather to "a debt for an unliquidated amount or [a] debt whose value is not ascertained". The concept of a contingent debt is distinct from both that of an unliquidated debt and that of an unascertained; however, that does not mean that a debt may not be both contingent and unliquidated or unascertained. The Bankruptcy Act 1869, section 16(3), provided: "A creditor shall not vote at the said meeting in respect of any unliquidated or contingent debt, or any debt, the value of which is not ascertained." In *Ex parte Ruffle, In re Dummelow* (1873) LR 8 Ch App 997 at 1001 Mellish LJ, commenting on that provision, said:

> "The fair construction of the clause seems to me this: 'a contingent debt' refers to a case where there is a doubt if there will be any debt at all; 'a debt, the value of which is not ascertained,' means a debt the amount of which cannot be estimated until the happening of some future event; and 'an unliquidated debt' includes not only all cases of damages to be ascertained by a jury, but beyond that, extends to any debt where the creditor fairly admits that he cannot state the amount. In that case there must be some further enquiry before he can vote."

74. In *In re Sutherland, decd* [1963] AC 235 the House of Lords considered the meaning of "contingent liabilities" in the context of estate duty. The reasoning of the majority of their Lordships may be taken from Lord Guest at 262: "I should define a contingency as an event which may or may not occur and a contingent liability as a liability which depends for its existence upon an event which may or may not happen." (To similar effect, see *per* Lord Reid at 249.) In *In re Nortel GmbH* [2013] UKSC 52, [2014] AC 209, the Supreme Court accepted that the approach of the House of Lords in *In re Sutherland, decd* was helpful when considering obligations in the context of insolvency: see *per* Lord Neuberger of Abbotsbury PSC at [78-86]. In *HMRC v Maxwell* [2010] EWCA Civ 1379, [2012] BCC 30, Lord Neuberger MR said at [57]:

> "Just how clearly quantified a debt has to be before it is liquidated and ascertained is not a question which it is easy to answer. [And after citing Mellish LJ's definition of an unliquidated debt in the dictum in *In re Dummelow*, set out above, he continued:] However, there is little subsequent authority which takes matters much further. A claim for damages and a contingent claim have (unsurprisingly) been held to be unliquidated or unascertained claims—see *Re Cranley Mansions Ltd; Saigol v Goldstein* [1994] 1 WLR 1610; *Doorbar v Alltime Securities (Nos 1 and 2)* [[1996] 1 WLR 456; and *Re Newlands (Seaford) Educational Trust; Chittenden v Pepper* [2006] EWHC 1511 (Ch)."

The debt in *Saigol v Goldstein* (an unliquidated damages claim in a construction case) was not contingent in the sense explained in *In re Sutherland decd.* However, the debt in *Doorbar v Alltime Securities (Nos 1 and 2)* (liability for future rent during the remainder of the lease) was strictly contingent. Similarly, in *Chittenden v Pepper* a claim for dilapidations was both unliquidated and unascertained but not contingent, while a claim for future rent was contingent, as it "depend[ed] on whether the lease [was] forfeit in the future and remain[ed] unlet for a period of 2 years" (*per* Sir Andrew Morritt C at [29]), and was therefore "by definition both unliquidated and unascertained" (at [24]).

75. Mr Fraser QC objects that the debt owed by Mr Gertner was not contingent: being already due and owing, it did not depend on any contingent circumstances to arise; this is not a case where there is a doubt whether there will be any debt at all. Even if, on the contrary, the question concerning the performance of the obligations under clauses 3.7 and 3.8 constituted a contingency, any such contingency did not relate to the existence of the debt: in the event of performance, the debt would be assigned to Laser Trust.

76. Mr Fraser is right to say that, if there was a subsisting debt, it was not contingent in the sense that the underlying liability would only come into existence upon the occurrence of some future event. However, I do not think that this meets the substance of CFL's point. It is helpful to consider the position as it stood at the time when Kaupthing lodged its proof of debt and the creditors' meeting was held. The KSA had been executed, Laser Trust had paid the $6 million, and all that remained to be performed under the KSA by the Gertner Parties were the obligations under clauses 3.7 and 3.8, each of which related to a convenient method of realising a pre-existing security. There was then and is now no evidence that any Gertner Party was in breach of its obligations under clauses 3.7 and 3.8. If, as I think is clear, Kaupthing could not enforce against Mr Gertner his liability under the guarantee while performance was pending, the very best that can be said of Kaupthing's position is that it would only have an enforceable debt if the Gertner Parties defaulted under clause 3.7 or clause 3.8. Its status as a creditor was therefore at best contingent on future non-performance by the Gertner Parties. This conclusion is unsurprising. If a creditor and a debtor have agreed that the debt shall not be enforceable provided the debtor do something, and it is practically certain that the debtor will do that thing, it cannot be right that the creditor's debt will in the meantime be received at its full value. That example illustrates the principle applicable in the present case. In the circumstances mentioned above, and in agreement with the submissions of Mr Atherton QC, I am of the view that, assuming that the Kaupthing Debt survived, there was and is no evidence to justify placing upon it a higher than nominal value. Indeed, the position is if anything even clearer than it was at the creditors' meeting, because one year later Kaupthing has not purported to hold itself discharged from performance of the KSA by reason of the breach of contract of any other party.

Ground 2: Material Irregularity—breach of the principle of good faith

77. The second ground on which CFL puts its application is that, even on the assumption that at the date of the creditors' meeting Kaupthing was a creditor in the amount of its claim, there was nevertheless a material irregularity at or in relation to the creditors' meeting because the KSA was an agreement, made secretly from the other creditors, that was designed to subvert the legislative policy behind the statutory scheme and the principle of good faith among creditors. Unlike the narrower allegation of material irregularity discussed under Ground 1, above, this wider allegation is pursued by way of application under section 262(1) rather than by way of appeal under rule 5.22. It is an alternative case to Ground 1, as it assumes that the Kaupthing Debt was valid and enforceable. Although it does not strictly fall for decision, in view of my conclusions on Ground 1, I shall discuss it.

78. In *Cadbury Schweppes Plc v Somji* [2000] BPIR 950, "a friend of the debtor, with the latter's concurrence, made a secret deal with two creditor banks in order to induce them to vote in favour of an individual voluntary arrangement at a meeting held pursuant to section 257 of the Insolvency Act 1986" [1]. Another creditor challenged the IVA, on the basis not of section 262(1)(b) ("material irregularity") but of section 262(1)(a) ("unfair prejudice"), and also petitioned for the debtor's bankruptcy pursuant to sections 264(1)(c) and 276(1)(b) of the Insolvency Act 1986. Mr Anthony Boswood QC sitting as a deputy High Court judge at first instance rejected the application under section 262, because the matters complained of fell outside the

terms of the IVA, but he held that the arrangement with the creditor banks was unenforceable as being contrary to the policy of equal treatment among creditors and that, as the arrangement had not been disclosed to the creditors' meeting, the IVA itself was void and the grounds for a bankruptcy order were made out. The Court of Appeal, [2001] 1 WLR 615, upheld the deputy judge's decision to make a bankruptcy order under sections 264 and 276, though it rejected his conclusion that the IVA had been void. In the circumstances, the Court did not find it necessary to consider the position under section 262(1)(a), which forms the basis of the third ground of CFL's application, and was not seised of a question under section 262(1)(b).

79. Mr Boswood QC based his conclusion that the IVA in *Somji* was void on a detailed consideration of older cases relating to compositions and arrangements with creditors. The underlying principle was set out in a dictum of Malins V-C in *McKewan v Sanderson* (1875) LR 20 Eq 65:

> "Now I take it to be thoroughly settled, both in Courts of Law and Equity, that where there is a bankruptcy, or an arrangement with creditors by composition or insolvency, when insolvency exists as contradistinguished from bankruptcy, it is the duty of all creditors who have once taken part in the proceedings of bankruptcy or composition to stand to share and share alike. Equality is the only principle that can be applied, and if one creditor, unknown to the other creditors—not unknown to one or two, but to the general body—enters into an arrangement by which he gets for himself from the debtor, or from any one on behalf of the debtor, any collateral advantage whatever, that is a fraud upon the other creditors …"

Mr Boswood QC summarised the ramifications of that principle, as they emerged from the cases, in six propositions at [23] in his judgment. I need not set them out. It suffices here to refer to Robert Walker LJ's remarks at [21] –[22] in the Court of Appeal:

> "21. … [The deputy judge] extracted from the old cases six principles, set out in para 23 of the judgment, of which the fifth was that in addition to the need for equality between creditors in the distribution of the debtor's assets, there was a further basic requirement for complete good faith between a debtor and his creditors, and between the creditors as between themselves; and that it was therefore irrelevant that an inducement to a creditor might come from a third party, and not out of a debtor's estate.
>
> 22. The deputy judge then asked himself whether the principles continued to apply under the new insolvency regime brought in by the Act, and he decided that it did. It was on that basis that, while dismissing Cadbury's application based on s. 262(1)(a) (and in the absence of any reliance on s. 262(1)(b)) he nevertheless reached the conclusion, embodied in para 4 of his order, that the approval of the IVA given on 20 December 1999

> was void. He also made a bankruptcy order under s. 276(1)(b)."

In concluding that the approval of the IVA was void, the deputy judge had, said the Court of Appeal, relied too greatly on the old law and insufficiently on the terms and policy of the relevant provisions in the 1986 Act, especially sections 262(3) and 262(8); the importance of attaching certainty to the approval of an IVA at a creditors' meeting was reflected in the fact that the only routes of challenge to such approval were directly under section 262(1) or indirectly by petition under section 276(1); the approval could not simply be disregarded as void: see *per* Robert Walker LJ at [34] – [35]. That reasoning led the Court to reject the applicant's submission that "the secret deal found by the deputy judge was more than an 'irregularity at or in relation to the meeting'": ibid.

80. Although the Court of Appeal rejected the conclusion that the older cases showed that the IVA in *Somji* was void, it did not reject the remainder of the deputy judge's analysis of the law to be extracted from those cases and its remaining applicability. At [23] – [24] Robert Walker LJ pointed out that the "intellectual freight" from earlier law least likely to be jettisoned when construing the 1986 Act "includes the basic doctrines (such as proportionate treatment of unsecured creditors, and the principle of set-off) which have been features of English bankruptcy law since its earliest days"; and he continued:

> "The deputy judge's impressive survey of the old law shows that in relation to compositions and arrangements with creditors the court did impose a strict requirement of good faith as between competing unsecured creditors, and prohibited any secret inducement to one creditor even if that inducement did not come from the debtor's own estate. There is no strong presumption that a similar principle must be found in the new regime set out in Part VIII of the Act, but (to put it at its lowest) it would be no great surprise to find it there in one form or another."

The particular way in which the Court in *Somji* found the principle to survive under Part VIII of the 1986 Act was via the power in section 276 to make a bankruptcy order under section 264 where the information given to the creditors was "false or misleading in any material particular or … contained material omissions": see *per* Robert Walker LJ at [30] – [33], *per* Sir Christopher Staughton at [39], and *per* Judge LJ at [40] – [44]. The reasoning at [34] – [35] opened the door to the possible availability of section 262(1)(b) as a route of challenge in such a case, though it did not decide the point.

81. In *Kapoor v National Westminster Bank Plc* [2011] EWCA Civ 1083, [2012] 1 All ER 1201, the question arose on the facts "whether there has been a 'material irregularity' at or in relation to [a creditors' meeting called to approve an IVA] within section 262(1)(b) of the Insolvency Act 1986 if account has been taken of the vote of a creditor who has taken an assignment of part of a debt from an associate of the debtor, the assignment was for no commercial purpose and on uncommercial terms, and was solely for the purpose of enabling the assignee to vote in favour of the IVA, and, had the vote been left out of account, the IVA would not have secured the

majority of votes required under rule 5.23(4) of the Insolvency Rules 1986": see [2]. Agreeing on this point with the first-instance decision of H.H. Judge Hodge Q.C. sitting as a Judge of the High Court, the Court of Appeal answered the question in the affirmative and rejected the contention that the expression "material irregularity" in section 262(1)(b) was to be narrowly construed so as to exclude the "principle of good faith", namely the fifth of Mr Boswood's principles set out in Robert Walker LJ's judgment in *Somji* at [21]. For present purposes, the most important part of the judgment of Etherton LJ, with whom Sir Mark Potter and Pill LJ agreed, is this:

> "64. … I have … reached the conclusion that the good faith principle applies to the facts of the present case and, by virtue of its application, there was a material irregularity within section 262(1)(b) of the Insolvency Act 1986 at or in relation to the creditors' meeting which approved Mr Kapoor's IVA. The irregularity was in treating the resolution approving Mr Kapoor's IVA as passed when, for the purposes of rule 5.23(4) of the Insolvency Rules 1986, more than half in value of Mr Kapoor's creditors voted against it, if Mr Chouhen's vote was excluded as it should have been.
>
> 65. The good faith principle articulated in the authorities considered by the deputy judge in *Somji's* case, and acknowledged by the Court of Appeal in that case, is not restricted to the non-disclosure of secret deals benefiting one or some of the creditors. Although the facts in all those authorities did concern such a situation, the good faith principle, as articulated by the deputy judge and approved by the Court of Appeal, encapsulated 'the fundamental rule that there should be complete good faith between the debtor and his creditors, and between the creditors inter se'. In *Dauglish v Tennent* (1866) LR 2 QB 49, for example, in which the court declared void a deed by which the defendant assigned all his estate to trustees on trust for distribution equally amongst all his creditors, Cockburn CJ said (at 53-54): 'In order that such a deed should be binding on the creditors, it is essential that there should be the most perfect good faith between the debtor and all his creditors.'
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> 66. In *Mare v Sandford* (1859) 1 Giff 288 at 294 Stuart V-C said:
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> 'The principles of this Court, which stamp a transaction of this kind with illegality, are not of a very refined kind. They are consistent with the ordinary principles of morality recognised by all mankind. And, moreover, where the court has interfered to set aside such a transaction, it has done so on the ground of public policy, and of the transaction being such as the law should, in the highest degree, discountenance. The object of the bankrupt laws is to secure an equal distribution of property among the creditors, so that none shall have any advantage over another.'

67. That reference to public policy is significant. An IVA is a means by which an insolvent debtor can escape the full and rigorous consequences of a bankruptcy order, including the right of the creditors to select the trustee in bankruptcy, the supervision of the trustee by the creditors and the court, the ascertainment, collection and distribution of bankruptcy estate by the trustee, and the possibility of holding a public or private examination of the bankrupt on oath. In cases, such as the present, where independent creditors have doubts as to whether the debtor has been full and frank in the information he has provided, and, in particular, as to the full extent of his assets, an IVA has potentially severe disadvantages for those creditors. That is no doubt the reason why, when the new statutory scheme for IVAs was introduced by the Insolvency Act 1986, it was expressly provided in rule 5.23(4) of the Insolvency Rules 1986 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.

68. 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 rule 5.23(4) . The assignment was not a sham, but it does not fall far short of it. 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.

69. The expression 'material irregularity' is not defined. 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 section 262(1)(b) against the background of the good faith principle and the legislative policy reflected in rule 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 rule 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: see the *Shorter Oxford English Dictionary*."

82. The point in *Kapoor* was, accordingly, that the assignee's vote ought not to have been received at the creditors' meeting, as the assignment, though not a sham, was for no legitimate commercial purpose but a mere device to subvert a principle underlying the legislative policy relating to debts owed to associates of the debtor. This goes significantly beyond *Somji*, where the point was that the arrangement ought to have been but was not disclosed to the body of creditors.

83. Mr Fraser QC submitted that the reasoning in *Kapoor* had no application to the present case. First, the KSA was not a collateral agreement directly connected to the IVA and necessary to its approval: it did not purport to bind Kaupthing in the exercise of its voting rights at the creditors' meeting (cf. clause 13, the entire-agreement provision) and, indeed, made no mention of the Proposal. Second, unlike the position in *Kapoor*, the KSA was not a device to place the debt in the hands of a party that could vote: Kaupthing had always owned the debt, and the KSA did not create or extinguish voting rights. The KSA did not satisfy Etherton LJ's test of being "solely, patently and irrefutably designed to subvert the legislative policy". Third, the KSA had a legitimate commercial purpose, namely that Kaupthing should obtain value in respect of the outstanding debt while not taking a disproportionate amount of Mr Gertner's assets and having regard to a realistic assessment of his assets relative to the costs involved in seeking to pursue them. (In this regard, Mr Fraser sought to rely on a letter dated 29 November 2016 from Kaupthing's solicitors, Simmons & Simmons. The letter, explaining Kaupthing's stance, was not properly in evidence. However, the substance of the points made stands or falls on an objective assessment of the KSA rather than on any assertion of subjective purpose.) Fourth, the fact that Kaupthing took a benefit from a third party under the KSA does not in itself subvert the legislative policy: reliance was placed on *Inland Revenue Commissioners v The Wimbledon Football Club Ltd* [2004] EWCA Civ 655, [2004] BCC 638, where HMRC unsuccessfully challenged a Company Voluntary Arrangement on the ground of material irregularity where the proposal for the CVA was based on an arrangement under which a third party would pay in full certain non-preferential creditors, though the preferential creditors would receive only part-payment.

84. I reject Mr Fraser's submissions on this point. In my judgment, if (contrary to my view) the result of the KSA was to leave Kaupthing with a debt that could otherwise be admitted at the creditors' meeting, the good-faith principle nevertheless required that it be excluded; therefore there was a material irregularity at or in relation to the meeting. My reasons are as follows.

84.1 The Court of Appeal in *Kapoor* held that "the well-established good-faith principle", namely the requirement of complete good faith between a debtor and his creditors and between competing unsecured creditors, should colour the meaning of "irregularity" in section 262(1)(b). It was by reason of the application of the principle that there was a material irregularity in that case: *per* Etherton LJ at [64].

84.2 I see no justification for seeking to limit the application of the relevant principle to the cases exemplified by *Somji* (the failure to disclose to the creditors' meeting an arrangement that, if known, might have affected the voting) and *Kapoor* (counting a debt that was only admissible by reason of an arrangement that was a device to subvert a critical principle of legislative policy as to the conditions for approval of an IVA). There is also no justification for taking Etherton LJ's words at [69] in *Kapoor*, namely "an arrangement solely, patently and irrefutably designed to subvert the legislative policy …", as laying down some legal test. Etherton LJ was talking about the facts of that case. The narrow ratio of the decision was that those facts were "a perfectly apposite example of 'irregularity'" for the purposes of section 262(1)(b). The question for me is whether the same can be said of the facts of the present case.

84.3 *Inland Revenue Commissioners v The Wimbledon Football Club Ltd* does not answer that question. I am prepared to accept that the mere fact that a creditor has arranged to take a benefit from a third party does not in itself necessarily constitute a material irregularity. However, as is clear from the analysis of the case-law at first instance in *Somji*, it may do so. The third-party benefit has always to be considered in the context in which it was given and received.

84.4 I accept that the KSA did not give Kaupthing the status of creditor; it was (on the present hypothesis) already a creditor. But the real question, in my judgment, is whether the KSA constituted an arrangement by one creditor in breach of the requirement of complete good faith. And this seems to me to come down to the question whether the KSA constituted either (a) an inducement to Kaupthing to exercise its vote in favour of the IVA or (b) a matter that materially affected Kaupthing's commercial interest in the IVA.

84.5 In this connection there are two main points in Mr Gertner's favour. The KSA does not contain any provision obliging Kaupthing to vote for the IVA. Further, Kaupthing's interest in the outcome of the creditors' meeting was ostensibly unaffected by the KSA, in that it did not purport to affect the distribution of his assets and would therefore apparently not alter the balance of benefits as between an IVA and bankruptcy. However, in my judgment those points are not persuasive.

84.6 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. In his cross-examination (day 2, pp. 89 - 90) 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.

84.7 Second, and intimately related to the first point, the KSA is reasonably to be considered an inducement to Kaupthing to vote in favour of the Proposal; its appearance is that of a price extracted to ensure that the Proposal would be approved. I have regard to the absence of any provision requiring Kaupthing to support the Proposal, but the question whether there was a material irregularity by reason of contravention of the good-faith principle must be answered with regard to the realities of the situation as they emerge from all the facts. Various factors indicate that the KSA was an inducement:

a) the matters mentioned in the last preceding sub-paragraph;

b) the timing of the KSA itself, relative to the progress of the Proposal;

c) the timing of the obligations under the KSA (for example, the payment obligation in clause 3.1) relative to the timing of the creditors' meeting;

d) the clear effort that the KSA makes, by means of leaving the more technical obligations unperformed, to achieve a position whereby Kaupthing can indeed vote at the creditors' meeting (as to which, see above);

e) the apparent needlessness of entering into the KSA, at the cost of the obligations in clause 3, if Kaupthing would anyway vote in favour of the Proposal. This point has to be viewed with caution, because it can be said that the KSA was concerned to settle the position not only of Mr Gertner but also those of Mendi and Crosslet Vale. However, it seems to me to have some force when viewed in the context of the other matters;

f) the risk that, if the Proposal were defeated and Mr Gertner became bankrupt, Laser Trust might argue that Kaupthing had frustrated the commercial purpose of the KSA;

g) Mr Gertner's own evidence in cross-examination, where he frankly accepted that the benefits under the KSA were Kaupthing's price for agreeing to the Proposal: see day 2, pp. 53 – 57 and, in that context, the answer at p. 56: "Sir, at this moment, I do not know what they will require for, as a final agreement at this point, it's a question of … They wanted the percentage of the litigation, which is a major part of their agreement."

Ground 3—IVA Unfairly Prejudicial

85. The third ground of CFL's application is that, in circumstances where the KSA had already been made by the time of the creditors' meeting, the IVA unfairly prejudices the interests of CFL as a creditor, within the terms of section 262(1)(a). "In short, CFL is prejudiced because it cannot pursue its bankruptcy petition, and the admission of Kaupthing to vote in circumstances where (on the current hypothesis) Kaupthing's claim is about to be compromised renders that prejudice unfair" (closing submissions, paragraph 32).

86. In my judgment, the challenge on the ground of unfair prejudice, ingeniously though it was advanced, is both wrong in principle and contrary to the first-instance decision in *Somji*. It may be that this third ground of challenge was pursued because of a concern that, if the court took a narrow view of the scope of *Kapoor* and the principle of good faith, there would be a lacuna in the protection provided to minority creditors. The matters relied on by CFL in support of the unfair prejudice argument are in substance precisely those on which it relied in support of its second ground of challenge. In *Kapoor*, the effect of the breach of the principle of good faith was that the assignee's debt was to be excluded from the creditors' votes. In the present case, Kaupthing did not hold its debt by reason of an assignment or the KSA. If the creditor's bad faith were held to be an exclusionary ground only where it had acquired its debt in bad faith, the wider "material irregularity" argument would not be open to CFL. In the light of my conclusions on the second ground of challenge, the unfair prejudice argument is both unnecessary and, in my view, inappropriate.

87. In *In re a Debtor (No 259 of 1990)* [1992] 1 WLR 226, a challenge on the ground of unfair prejudice was brought to an IVA in circumstances where false or misleading information had been presented to the creditors' meeting, in that persons were shown as creditors who were at best only doubtfully such. Dismissing the creditor's appeal against the rejection of his challenge, Hoffmann J said at 228-9:

> "It seems to me that as a matter of construction section 262 is talking about unfairness brought about by the terms of the voluntary arrangement. This conclusion, as Miss Agnello for the debtor pointed out, is supported by the scheme of the Act, and in particular by the provisions of sections 264(1)(c) and 276. A creditor who is bound by a voluntary arrangement can

> nevertheless present a petition for bankruptcy under section 264(1)(c). However, section 276 provides that in such a case the court shall not make a bankruptcy order unless it is satisfied of one or other of various matters, of which one is:
>
> > '(b) that information which was false or misleading in any material particular or which contained material omissions — (i) was contained in any statement of affairs or other document supplied by the debtor under Part VIII to any person, or (ii) was otherwise made available by the debtor to his creditors at or in connection with a meeting summoned under that Part …'
>
> That shows that if Mr. Kee is right in his claim that the statement of creditors in the debtor's statement of affairs is a fabrication, he is not without remedy. It is a ground upon which he can, notwithstanding the voluntary arrangement, present a petition for bankruptcy.
>
> That conclusion is I think also supported by the provisions of the Insolvency Rules 1986 dealing with the question of the admission of creditors to vote at the meeting. Under rule 5.17(4) the chairman is given the power to admit or reject a creditor's claim for the purpose of his entitlement to vote. But under sub-rule (5) the chairman's decision on entitlement to vote is subject to appeal to the court by any creditor or by the debtor, and under sub-rule (8) such an appeal must be made within the period of 28 days beginning with the day on which the chairman's report to the court is made."

88. In *Somji* the Court of Appeal did not find it necessary to consider the unfair prejudice point, but at [37] Robert Walker LJ said:

> "It is sufficient to say that there is a fairly strong line of first-instance authority, starting with the decision of Hoffmann J in *In re A Debtor (No 259 of 1990)* [1992] 1 WLR 226, which is uniformly in favour of limiting the effect of the provision to unfairness brought about by the terms of the IVA itself. As Hoffmann J pointed out in that case, at p. 229, section 276(1) provides an alternative remedy in many cases of unfairness brought about by other causes. I am by no means convinced by Mr Phillips's arguments that this line of authority is wrong. I am doubtful whether cases on section 459 of the Companies Act 1985 are of much help as a guide to the construction of section 262(1)(a) since, although the statutory language is similar, the notion of the interests of members of a company (as such) is a good deal more complex: see *In re A Company (No 00709 of 1992)* [1999] 1 WLR 1092."

89. In *SISU Capital Fund Ltd v Tucker* [2005] EWHC 2170 (Ch), [2006] B.C.C. 463, in the context of a challenge under section 6 of the Insolvency Act 1986 to a company

voluntary arrangement, Warren J reviewed the authorities on unfair prejudice and said:

> "68. It is for an applicant for relief under s. 6 of IA 1986 to show that the voluntary arrangement which he challenges unfairly prejudices his interests.
>
> 69. To constitute a good ground of challenge, any unfair prejudice must have been caused by the terms of the arrangement itself: *Inland Revenue Commissioners v The Wimbledon Football Club Ltd* [2004] B.C.C. 638. That proposition (and some other useful conclusions) appear in the passage from the judgment of Lightman J at para. 18:
>
> > 'Section 6 provides that a creditor may apply to the court for an order to revoke or suspend a decision approving a voluntary arrangement on the ground that the "voluntary arrangement unfairly prejudices the interest of [the] creditor". The authorities establish that: (1) to constitute a good ground of challenge the unfair prejudice complained of must be caused by the terms of the arrangement itself; (2) the existence of unequal or differential treatment of creditors of the same class will not of itself constitute unfairness, but may give cause to inquire and require an explanation; (3) in determining whether or not there is unfairness, it is necessary to consider all the circumstances including, as alternatives to the arrangement proposed, not only liquidation but the possibility of a different fairer scheme; (4) depending on the circumstances, differential treatment may be necessary to ensure fairness (see *Re Cancol Ltd* [1995] BCC 1133 at 1147G–1148B and *Sea Voyager Maritime Inc v Bielecki* [1999] BCC 924 at 936F–937C and 941C–E); and (I would add) (5) differential treatment may be necessary to secure the continuation of the company's business which underlies the arrangement: (consider *Re Business City Express Ltd* [1997] BCC 826).'
>
> 70. See also to the same effect, *Doorbar v Alltime Securities Ltd (No.2)* [1995] B.C.C. 728 at 730H; and *Re a Debtor (No.259 of 1990)* [1992] 1 W.L.R. 226 at 228–229. It is probably worth mentioning what is probably implicit but which was made explicit by Mr Richard McCombe Q.C. sitting as a deputy judge of this division in *Sea Voyager Maritime Inc v Bielecki* [1999] B.C.C. 924 that the prejudice to the applicant must be prejudice as a creditor of the debtor and not in some other capacity: see at 934–936. The only occasion on which the Court of Appeal appears to have considered this test is in *Cadbury Schweppes plc v Somji* [2001] 1 W.L.R. 615 where Robert Walker LJ identified the 'fairly strong line of first-instance authority' which is 'uniformly in favour of limiting the

> effect of the provisions to unfairness brought about by the terms of the [CVA] itself'. I propose to follow the same line.
>
> 71. In determining whether or not there is unfairness, it is necessary to consider all the circumstances and, in particular, the alternatives available and the practical consequences of a decision to confirm or reject the arrangement: *IRC v Wimbledon* [2004] B.C.C. 638 per Lightman J at para. 23:
>
> > 'The question of fairness of the arrangement requires consideration of all the circumstances and in particular the alternatives available and the practical consequences of a decision to confirm or reject the arrangement. In my judgment the only practicable course available to the administrators was to enter into the agreement and proceed with the scheme. The alternative advocated by the Revenue, in their single-minded pursuit of their principled objection to the payment in full of the priority debts, can only bring down the whole edifice and secure a nil return for all concerned.'"

90. Finally, in *Mourant & Co Trustees Ltd v Sixty UK Ltd (in administration)* [2010] EWHC 1890 (Ch), [2010] B.C.C. 882, again in the context of a CVA, Henderson J summarised at [67] the applicable principles as distilled by Etherton J in *Prudential Assurance Co Ltd v PRG Powerhouse Ltd* [2007] EWHC 1002 (Ch), [2007] B.C.C. 500:

> "(a) Any CVA which leaves a creditor in a less advantageous position than before the CVA will be prejudicial to the creditor. The real issue is generally whether the prejudice is 'unfair'.
>
> (b) There is no single and universal test for judging unfairness in this context, and the question must depend on all the circumstances of the case, including in particular the alternatives available and the practical consequences of a decision to confirm or reject the arrangement.
>
> (c) In assessing the question of unfairness, a number of techniques may be used, including what may be described as 'vertical' and 'horizontal' comparisons. A vertical comparison is a comparison between the position that a creditor would occupy and the benefits it would enjoy in a hypothetical liquidation, as compared with its position under the CVA. The importance of this comparison is that it generally identifies the irreducible minimum below which the return in the CVA cannot go. As David Richards J said in *Re T & N Limited* [2004] EWHC 2361 (Ch), [2005] 2 BCLC 488, at paragraph 82 of his judgment:
>
> > 'I find it very difficult to envisage a case where the court would sanction a scheme of arrangement, or not interfere

> with a CVA, which was an alternative to a winding up but which was likely to result in creditors, or some of them, receiving less than they would in a winding up of the company, assuming that the return in a winding up would in reality be achieved and within an acceptable time-scale: see *Re English, Scottish and Australian Chartered Bank* [1893] 3 Ch 385.'

> (d) A horizontal comparison, on the other hand, is a comparison between the position of the applicant and the position of other creditors, or classes of creditors. The fact that a CVA involves differential treatment of creditors is a relevant factor which calls for careful scrutiny, although it will not automatically render a CVA unfairly prejudicial: see *Re a Debtor (No.101 of 1999)* [2001] 1 BCLC 54 (Ferris J). In considering the question of differential treatment, it is necessary to ask whether the imbalance in treatment is disproportionate, and also whether the differential treatment may be justified, for example by the need to secure the continuation of the company's business by paying essential suppliers or service providers."

91. With respect to the test of unfairness, CFL rely on two particular dicta. In *Re T&N Ltd* [2004] EWHC 2361 (Ch), David Richards J said at [81]:

> "[The underlying test of fairness] is deliberately a broad test to be applied on a case by case basis, and courts have struggled to do better than the approach adopted by the Court of Appeal in *Re Alabama, New Orleans, Texas and Pacific Junction Railway Co* [1891] Ch 213 and summarised in the often-cited passage from a leading textbook, *Buckley on the Companies Acts:*
>
> > 'In exercising its power of sanction the court will see, first, that the provisions of the statute have been complied with, second that the class was fairly represented by those who attended the meeting and that the statutory majority are acting bona fide and are not coercing the minority in order to promise interests adverse to those of the class whom they purport to represent, and thirdly, that the arrangement is such as an intelligent and honest man, a member of the class concerned and acting in respect of his interest, might reasonably approve. …'
>
> … In considering unfair prejudice [in the context of a CVA], the court will have regard to the different position of different groups of creditor."

In the *SISU* case, Warren J said at [78]:

> "[W]here a creditor or group of creditors are looking at their wider interests (i.e. not simply as creditors of the company under consideration) they may judge it to be in their interests to

> vote in favour of a proposal which is favourable to them notwithstanding that, as creditors of that company *only*, they would have voted against it. If such a course results in unfair prejudice to another creditor, s. 6 is there to provide a remedy."

92. For the purpose of this application, Mr Atherton QC accepts that the unfairness complained of under section 262 must have been brought about by the terms of the IVA itself; he reserves his right to argue the contrary on any appeal (opening submission, paragraph 91). But he submits that even on this narrow construction of section 262 the ground is made out in this case, if due regard is had to the circumstances in which the IVA was approved. As regards a "horizontal comparison", the terms of the IVA treat all creditors in the same way, whereas, in the context of the KSA, undisclosed at the creditors' meeting, fairness required that they be treated differently. As regards a "vertical comparison", CFL has been deprived of the chance of obtaining a better outcome either in bankruptcy proceedings, where full investigation of Mr Gertner's position could have been carried out, or by negotiating an advantageous settlement. The Proposal, offering a derisory return, was not such as an intelligent and honest man might reasonably approve in his own interest and would therefore not have been approved by Kaupthing if it had acted *bona fide* rather than trying to coerce the other creditors in furtherance of its own particular interests.

93. The starting-point for me, therefore, is that section 262(1)(a) is limited to unfairness brought about by the terms of the IVA itself. *Prima facie* the terms of Mr Gertner's IVA are not unfair, in that all the creditors were entitled to share equally in his assets and the Proposal preserved that entitlement. The loss of the opportunity to seek a better outcome by means of bankruptcy or private negotiation is inherent in the position of a creditor that unsuccessfully opposes a proposal for an IVA; if that is prejudice, it arises from the fact, not the terms, of an IVA. Therefore CFL has to rely on the contention that Kaupthing's vote in favour of the proposal was not cast bona fide on account of an interest held as a creditor but was effectively bought by the provision of a collateral benefit under the KSA. This seems to me to be an unhelpful approach that involves an unwarranted departure from the clarity of Hoffmann J's analysis in *In re a Debtor (No 259 of 1990)*, the decision at first instance in *Somji* and the obiter dictum of Robert Walker LJ in *Somji* at [37]. If Kaupthing was not a creditor at all or was a creditor only in a nominal value, relief is available on the basis of material irregularity at or in relation to the creditors' meeting. If, though Kaupthing was a creditor, the KSA had the effect that the information given to the creditors' meeting was "false or misleading in any material particular or … contained material omissions", the court would have jurisdiction in a proper case to make a bankruptcy order pursuant to sections 264 and 276 (*Somji*). If the KSA were the means of buying Kaupthing's vote in breach of the principle of good faith, the admission of the vote at the creditors' meeting would be a material irregularity *(Kapoor*). The matters relied on by CFL in support of its unfair prejudice argument are the very matters said to constitute a breach of the principle of good faith and to render Kaupthing's vote inadmissible. If the vote was not properly admitted, questions of unfair prejudice do not arise. But if the vote was not cast in breach of the principle of good faith and was properly admitted, the basis of CFL's argument on unfair prejudice falls away.

Conclusion

94. For the reasons set out above, I am of the view that there was a material irregularity at or in relation to the creditors' meeting that approved the Proposal, in that Kaupthing's vote ought not to have been admitted or, alternatively, ought only to have been admitted in a nominal amount.

95. Therefore it falls to me to consider the exercise of the discretion under rule 5.22(5) and section 262(4).

96. 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.

97. Accordingly I shall make an order revoking the approval of the Proposal given at the creditors' meeting but shall not make an order for a further meeting.

98. This judgment is handed down at a hearing in the absence of the parties. Since it was circulated in draft, the parties have been able to agree on the scope of the consequential matters that fall to be determined and on the terms of an order giving directions for their determination. I shall make an order in substantially the terms of their proposed draft and adjourn the outstanding matters, including Mr Gertner's application for permission to appeal and various questions of costs, for consideration at a further hearing.