



Neutral Citation [2020] EWHC 1241 (Ch)

Claim No: CH-2019-000208

**IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
APPEALS (ChD)**

**On appeal from the order of Chief Insolvency and Companies Court Judge Briggs dated
15 July 2019**

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

Date: 22 May 2020

Before:

THE HONOURABLE MR JUSTICE MARCUS SMITH

BETWEEN:

(1) MOISES GERTNER

First Appellant
(Respondent below)

(2) LASER TRUST

Second Appellant
(Opposing creditor below)

-and-

CFL FINANCE LIMITED

Respondent
(Applicant/Petitioner below)

Mr Mark Phillips, QC, Mr Jonathan Kirk, QC, Mr Frederick Philpott and Mr James Knott (instructed by **Teacher Stern LLP**) for the First Appellant

Ms Felicity Toubé, QC and Mr Robert Amey (instructed by **Stephenson Harwood LLP**) for the Second Appellant

Ms Blair Leahy, QC and Ms Kate Urell (instructed by **Mishcon de Reya LLP**) for the Respondent

Hearing dates: 5, 6 and 9 March 2020

Approved Judgment

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

This judgment was handed down remotely by email to the parties and circulation to Bailii on 22 May 2020. The deemed time of hand-down is 10:00am on 22 May 2020.

CONTENTS		
A.	INTRODUCTION	§1
B.	THE MATERIAL HISTORY	§6
(1)	Previous decisions of the courts	§6
(2)	The background up to the hearing before Judge Briggs	§7
(3)	The Briggs Decision	§8
C.	THE MATERIAL LAW	§14
(1)	Petitioning for bankruptcy	§14
(2)	Individual voluntary arrangements	§19
(a)	<i>Interim order obtained by a debtor <u>not</u> an undischarged bankrupt</i>	§22
(b)	<i>Proposal for an individual voluntary arrangement made by a debtor <u>not</u> an undischarged bankrupt</i>	§27
(c)	<i>Proposal for an individual voluntary arrangement by an undischarged bankrupt</i>	§29
(d)	<i>The nominee's report and the creditors' approval</i>	§30
(3)	Challenging an individual voluntary arrangement	§33
D.	THE GROUNDS OF APPEAL	§39
E.	CHALLENGING CFL'S DEBT ON SUBSTANTIAL GROUNDS	§43
(1)	Introduction	§43
(2)	Points that could have been taken earlier	§44
(3)	Invalid under the Consumer Credit Act	§55
(a)	<i>Introduction</i>	§55
(b)	<i>The first point: provision of credit so as to bring the Settlement Agreement within the Consumer Credit Act</i>	§57
(c)	<i>The second point: policy reasons for disapplying the Consumer Credit Act</i>	§63
(d)	<i>Conclusion</i>	§67
(4)	Penalty	§68
F.	THE DECISION NOT TO STAY THE PROCEEDINGS ON THE PETITION	§77

(1)	What is really in issue?	§77
(2)	The nature of the Judge's discretion in this case	§87
(a)	<i>The nature of the discretion generally</i>	§87
(b)	<i>Factors taken into account by the Judge</i>	§90
(c)	<i>The nature of the discretion in this case: material and immaterial factors</i>	§92
(3)	The good faith rule	§94
G.	DISPOSAL	§97

Mr Justice Marcus Smith:**A. INTRODUCTION**

1. By his order dated 15 July 2019 (the **Order**¹), Chief Insolvency and Companies Court Judge Briggs refused an application by the First Appellant, Mr Moises Gertner, to stay² the hearing of a creditor's petition for the bankruptcy of Mr Gertner brought by the Respondent, CFL Finance Limited (**CFL**). Accordingly, Judge Briggs ordered that Mr Gertner be made bankrupt on 15 July 2018 at 3:40pm.
2. Judge Briggs stayed the bankruptcy pending the determination of Mr Gertner's appeal against the Order. The Second Appellant (**Laser Trust**), a creditor of Mr Gertner's who opposes the petition also appeals the Order. Laser Trust is a trust established in Gibraltar by a Mr/Mrs Leib Levison.³
3. I describe the various grounds of appeal advanced by Mr Gertner and Laser Trust in Section D below. For present purposes, it is sufficient to note that the challenge to the Order proceeds on two broad fronts:
 - (1) First, as an attack on the debt asserted by CFL as the foundation for the petition. Mr Gertner contended that the debt was disputed on substantial grounds. Were this attack to succeed, then CFL's status as petitioning creditor would be undercut and it would be unnecessary to consider the second line of attack.
 - (2) Secondly, and assuming the first attack failed, Mr Gertner and Laser Trust contended that Judge Briggs erred in refusing to stay proceedings on the petition so as to enable a proposal for a voluntary arrangement, made by Mr Gertner and supported by Laser Trust, to be considered by Mr Gertner's creditors. I shall, for reasons that will become obvious, refer to this proposal as the **Second Proposal**. The support of Laser Trust, in this regard, is important. By value, Laser Trust is (by a significant margin) Mr Gertner's largest creditor, holding well in excess of 90% of Mr Gertner's debt. Given the support of Laser Trust, were the Second Proposal to be considered at a creditors' meeting, it would almost certainly be approved by the requisite majority. Given these circumstances, both Mr Gertner and Laser Trust contended that Judge Briggs had erred in law in declining to stay proceedings on CFL's petition.
4. The hearing before Judge Briggs, which culminated in his Order, is part of a long history between, *inter alios*, Mr Gertner, CFL and Laser Trust. It is necessary to set out this history, in some detail, before the issues arising out of this appeal can be grappled with. It is also necessary, for the same reason, to describe – at least by way of overview – the insolvency processes that may culminate in a voluntary arrangement, and the

¹ A glossary of the names and terms used in this judgment is at Annex 1.

² From time to time, the term “adjourn” is used in connection with the hearing of the petition. That lends too much of a case-management flavour to the matter being considered by Judge Briggs. The question before Judge Briggs, as will be described in greater detail, was whether proceedings on CFL's petition should be stayed in favour of a creditors' meeting pursuant to section 266(3) of the Insolvency Act 1986 (**IA1986**).

³ As I will come to describe, not all of the circumstances surrounding the operation of Laser Trust were completely clear. For present purposes, it does not matter exactly who established the trust.

circumstances in which a voluntary arrangement, approved by creditors, may nevertheless be set aside.

5. These matters are addressed in Section B below (which sets out the material history) and in Section C below (which outlines the material law). Thereafter, this judgment is structured in the following way:
 - (1) Section D sets out the various grounds of appeal advanced by Mr Gertner and Laser Trust.
 - (2) Section E considers and determines the points arising out of the contention that CFL's debt was disputed by Mr Gertner on substantial grounds. Essentially, these grounds were that the debt was unenforceable by virtue of the Consumer Credit Act 1974 and/or was void as a penalty. CFL contended that these points were without substance. However, CFL also contended that it was, procedurally speaking, too late for Mr Gertner to make these points in any event. This contention is also considered in Section E.
 - (3) Section F considers and determines the points arising out of Judge Briggs' decision not to stay the proceedings on CFL's petition.
 - (4) Section G states how this appeal is to be disposed of.

B. THE MATERIAL HISTORY

(1) Previous decisions of the courts

6. The matter before me has previously come before the courts on three substantive occasions:
 - (1) First, before His Honour Judge Andrew Keyser, QC, sitting as a Judge of the High Court. Judge Keyser's decision, dated 27 January 2017, has a neutral citation number [2017] EWHC 111 (Ch) and I shall refer to it as the **Keyser Decision**.
 - (2) Secondly, before the Court of Appeal (Patten, Floyd and Coulson LJJ), hearing an appeal from the Keyser Decision. The Court of Appeal's decision, dated 30 July 2018, has a neutral citation number [2018] EWCA Civ 1781 and I shall refer to it as the **Court of Appeal Decision**.
 - (3) Thirdly, before Chief Insolvency and Companies Court Judge Briggs, resulting in the Order. The Order was consequential upon Judge Brigg's decision, dated 15 July 2019. This has a neutral citation number [2019] EWHC 1839 (Ch) and I shall refer to it as the **Briggs Decision**.

(2) The background up to the hearing before Judge Briggs

7. The background facts are as follows:
 - (1) Mr Gertner is a property consultant and businessman. CFL is a private limited company registered in England and Wales under company number 05718498. CFL, amongst other things, provided short term finance to others.

- (2) In 2008, CFL provided a short-term loan facility to a company known as Lanza Holdings Ltd (**Lanza**). Lanza is a company owned and/or controlled by the Gertner family and the loan facility was guaranteed by Mr Gertner. In proceedings under Claim No HC10C03795, CFL commenced proceedings against Mr Gertner under the guarantee he had given. These proceedings, which were defended, were settled by way of a “Tomlin” order made on 26 September 2011 (the **Tomlin Order**). The Tomlin Order conventionally provided as follows:

“All further proceedings in this action between [CFL] and [Mr Gertner] be stayed upon the terms set out at Schedule 1 to this Order, save for the purposes of carrying the said terms into effect for which [CFL] and [Mr Gertner] are at liberty to apply. [CFL] and [Mr Gertner] shall have permission to apply to the Court to enforce the terms of settlement without the need to bring a new claim.”

- (3) Schedule 1 to the Tomlin Order contained a settlement agreement (the **Settlement Agreement**) between CFL and Mr Gertner. So far as material, the Settlement Agreement provided:

“RECITALS

- (1) CFL is the Claimant in proceedings in the High Court of Justice Chancery Division the title and claim number of which is CFL Finance Limited (Claimant) v. Mr Moises Gertner (Defendant) claim number HC10C03795 (“the Proceedings”).
- (2) CFL claims the following sums from Mr Gertner in the Proceedings:
- (a) The capital sum of £1,700,000;
 - (b) Simple interest at the rate of 2.25 per cent per month on £1,700,000 from 13 June 2008 to 23 September 2008;
 - (c) Simple interest at the rate of 2.25 per cent per month on £1,700,000 from 24 September 2008 to 13 October 2008;
 - (d) Compound interest on the outstanding balance at 2.5 per cent per month from 14 October 2008 to the date of payment.
- (3) The Parties wish to settle the Proceedings upon the terms set out in this Agreement.

Payments

2. £2,000,000 shall be paid to CFL on the dates and on the terms set out below:
- (a) £325,000 on or before 26 October 2011; and
 - (b) £1,675,000 by 8 quarterly instalments of £209,375 each and commencing three months after the signing of this Agreement with such payments being made to CFL as follows:
 - (i) £209,375 on or before 26 December 2011
 - (ii) £209,375 on or before 16 March 2012

- (iii) £209,375 on or before 26 June 2012
 - (iv) £209,375 on or before 26 September 2012
 - (v) £209,375 on or before 26 December 2012
 - (vi) £209,375 on or before 26 March 2013
 - (vii) £209,375 on or before 26 June 2013; and
 - (viii) £209,375 on or before 26 September 2013.
3. £50,000 shall be paid to CFL as a contribution towards its costs on the dates and on the terms set out below:
- (a) £25,000 shall be credited to the client account of Mishcon de Reya, solicitors for CFL, on the signing of this Agreement; and
 - (b) £25,000 on or before 26 September 2013, such payment therefore being added to the final quarterly instalment due to CFL by Mr Gertner on or before 16 September 2013 as set out in paragraph 2(b)(viii) above.
4. The sums set out in paragraphs 2(a), 2(b) and 3(b) shall be credited to the account in CFL's name with HSBC, account number 61542354 sort code 40-01-18 ("the Account").

Effect of payment defaults

5. If, in breach of paragraphs 2 and 3 above, the sums payable under paragraphs 2(a), 2(b) and 3(b) shall not be paid in cleared funds to the Account by close of business on the dates identified in paragraphs 2(a), 2(b) and 3(b) or within seven days of the dates identified in paragraphs 2(a), 2(b) and 3(b) or if the sums payable under paragraph 3(a) shall not be paid in cleared funds to the client account of Mishcon de Reya on the date identified in paragraph 3(a):
- 5.1 the following sums claimed by CFL from Mr Gertner in the Proceedings shall become immediately due and owing from Mr Gertner to CFL:
- (a) The capital sum of £1,700,000;
 - (b) Simple interest at the rate of 2.25 per cent per month on £1,700,000 from 13 June 2008 to 23 September 2008;
 - (c) Simple interest at the rate of 2.25 per cent per month on £1,700,000 from 24 September 2008 to 13 October 2008;
 - (d) Compound interest on the outstanding balance at 2.5 per cent per month from 14 October 2008 to the date of payment.
- 5.2 Any payments having already been made pursuant to paragraph 2 above prior to any breach shall be credited to the sums which, as a result of any breach, have now become due and owing by Mr Gertner under paragraph 5.1 above.

Consent order

6. The Parties agree to sign forthwith or cause their respective solicitors to sign a Tomlin Order...to stay the Proceedings against Mr Gertner and to co-operate in arranging to have the Order filed at the Court and sealed.”

By paragraph 12, the Settlement Agreement was governed by the laws of England and Wales.

- (4) Although Mr Gertner made some payments under the Settlement Agreement, some of these payments were sufficiently late to trigger paragraph 5 of the Settlement Agreement. Mr Gertner neither made all of the payments under paragraph 2 of the Settlement Agreement, nor the (larger) payments required by paragraph 5. In all, Mr Gertner paid just over £1.5 million under the Settlement Agreement.
- (5) Although attempts were made to settle Mr Gertner’s breach of the Settlement Agreement, these came to nothing and, on 11 September 2015, CFL served a statutory demand on Mr Gertner in respect of the sums outstanding under the Settlement Agreement, these now amounting to over £11 million. A further offer was made to settle this debt, which came to nothing. No attempt was made by Mr Gertner to set aside the statutory demand.
- (6) On 6 October 2015, CFL presented a petition for Mr Gertner’s bankruptcy, which was served on 22 October 2015. The hearing of the petition was fixed for 23 November 2015. Mr Gertner, whose position at this time was that he disputed that he was indebted to CFL at all, took advice from licensed insolvency practitioners, and in consequence of that advice made a proposal for an individual voluntary arrangement under Part VIII of the Insolvency Act 1986. I shall refer to this proposal as the **First Proposal**.
- (7) Mr Gertner’s estimated statement of affairs showed that, in addition to Crown creditors (in essence, HMRC) and connected creditors, he owed £582,809,270 (i.e. just short of £583 million) to unsecured creditors. The essence of the First Proposal was that a third party would make a one-off payment of £487,500 to the supervisors of the individual voluntary arrangement, 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 individual voluntary arrangement itself. It was envisaged that this would result in a dividend to unsecured creditors of 0.07p in the pound.
- (8) The First Proposal showed that Mr Gertner himself had no assets and only a relatively modest income. It was contended the First Proposal would lead to a better result for creditors than they would achieve via bankruptcy, in that although the dividend anticipated was trifling (a mere 0.07p in the pound), it was better than the nil amount that would be the outcome of Mr Gertner’s bankruptcy.
- (9) As a result of the First Proposal, proceedings on CFL’s petition were stayed to await the outcome of the meeting of Mr Gertner’s creditors. CFL completed a proof of debt for that meeting.
- (10) The creditors’ meeting was held on 17 December 2015, when Mr Gertner’s proposal was approved by creditors. The report of the meeting shows that the

proposal was approved by 97.85% of the creditors by value. One creditor, in particular, Kaupthing hf (**Kaupthing**), an Icelandic public limited company, constituted 90.43% of the creditors by value (£557,467,416). Mr Gertner's liability to Kaupthing was based on a personal guarantee given by him to secure loans made by Kaupthing to Crosslet Vale Ltd (**Crosslet Vale**, like Lanza, a company owned and/or controlled by the Gertner family) pursuant to a loan facility agreement.

- (11) 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). Had Kaupthing's debt been excluded – it was not – the value of the debts of these two creditors would have exceeded 50% of the value of the unconnected creditors' claims.
- (12) Undisclosed at the meeting on 17 December 2015 was the fact that Kaupthing had entered into a settlement agreement (the “Kaupthing Settlement Agreement” or **KSA**) with:
- (a) Crosslet Vale;
 - (b) Mr Gertner;
 - (c) Mr Gertner's brother, Mendi Gertner;
 - (d) Laser Trust. Mr Levison,⁴ it should be noted, was the third party providing the payment into the individual voluntary arrangement proposed by Mr Gertner.⁵
- (13) The KSA recorded that the parties had settled their differences according to the terms of the KSA. As to these terms:
- (a) By clause 2.1, the KSA 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 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.”

The “Dispute” refers to the dispute between Kaupthing, Crosslet Vale and Mr Gertner regarding facilities provided by Kaupthing to Crosslet Vale, and personal guarantees given by Mr Gertner and his brother Mendi in respect of those facilities; and the “Proceedings” are the proceedings commenced by Kaupthing regarding the Dispute.

⁴ See paragraph 2 above.

⁵ See paragraph 7(7) above.

(b) So far as material, clause 3 provided:

“3.1 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.

3.2 Interest shall accrue and be payable on any part of the US\$6 million that is not paid in accordance with clause 3.1 at the rate of 6 per cent per annum above the base rate for the time being of the Bank of England from the date on which the relevant sum became due, until, but excluding, the date of actual payment.

...

3.4 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.

...

3.6 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 Ltd, Maskelyn Ltd and Redinse Ltd respectively.

3.7 The parties shall use their best endeavours to 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 Uherce u Nyrán and Nyrany charged to Kaupthing pursuant to the mortgage agreement dated 4 December 2006 between Kaupthing (as security agent) and Mayfield Plzen sro (as security provider) including by entering into, within 7 days of the execution of this agreement in substantially the form of the draft agreement at Appendix 3.

3.8 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).”

(c) The US\$6 million referenced in clause 3.1 of the KSA was paid to Kaupthing in accordance with the provisions of the KSA.

(d) The profit-sharing agreements referenced in clause 3.6 of the KSA were with three named companies, each of which was (and is) a claimant in an arbitration in Israel, as was (and is) Mr Gertner and his brother Mendi. The arbitration appears to be for high value assets and is brought against a Mr Dan Gertler and various of his family trusts and companies. The

arbitration also includes a cross-claim. In the Court of Appeal Decision, Patten LJ recorded:⁶

“The evidence of Mr Gertner is that the claims have been brought by him and his brother on behalf of the Gertner family trusts but the effect of clause 3.6 of the KSA and the profit sharing agreements was to give Kaupthing an entitlement to share in any recoveries made in the arbitration in return for a release of the named companies from certain liabilities to Crosslet Vale and the Gertner family trusts. The profit-sharing agreements appear to have been executed either on or before 11 December 2015.”

- (e) By clause 5 of the KSA, the parties agreed that within 90 days of Kaupthing receiving the US\$6 million referenced above, and on the satisfaction of certain conditions precedent, there would be an assignment of the benefit of the Kaupthing loan facility agreement and supporting guarantees (referred to in paragraph 7(10) above) to Laser Trust. Although the assignment to Laser Trust did, eventually, take place, it actually only occurred after the Court of Appeal had handed down the Court of Appeal Decision and permission to appeal to the Supreme Court had been refused to Mr Gertner.
- (14) As I have stated, the creditors’ meeting approved the First Proposal. The approval was overwhelming because Kaupthing voted in favour of the proposal. Although there were questions asked at the creditors’ meeting regarding, e.g. the Israeli arbitration and Mr Gertner’s interest in it, nothing was said about, and there were no questions in regard to, the KSA.
- (15) On 15 January 2016, CFL issued an application for orders revoking or suspending the approval of the individual voluntary arrangement and/or challenging the decision to admit Kaupthing either to vote at all or to vote as a creditor for more than a nominal amount. In the Court of Appeal Decision, Patten LJ noted (at [30]):⁷
- “These orders were sought on the grounds that the IVA was unfairly prejudicial to the interests of CFL as a creditor or alternatively on the grounds that there had been some material irregularity at or in relation to the creditors’ meeting. The grounds relied upon were that Mr Gertner had failed to give full and frank disclosure of his assets and income and that approval of the IVA was obtained by the vote of Kaupthing whose proceedings against Mr Gertner had not by then been settled or determined and which was party to an undisclosed collateral arrangement outside the IVA with Mr Gertner which would result in Kaupthing receiving payments over and above the dividend in the IVA in settlement of its purported debt.”
- (16) At the time of this application, the KSA had not been disclosed. It came to be disclosed, as part of disclosure ordered by His Honour Judge Pelling, QC, on 28 October 2016.

⁶ At [21].

⁷ At [30].

- (17) The application to revoke or suspend the approval of the individual voluntary arrangement came before His Honour Judge Keyser, QC (see the Keyser Decision). The Keyser Decision was appealed to the Court of Appeal (see the Court of Appeal Decision). In very brief summary, as regards the Keyser Decision:
- (a) Judge Keyser held that on the true construction of the KSA, the debt based on Mr Gertner's guarantee liability had either been extinguished or was no longer enforceable. Kaupthing was, therefore, no longer a creditor, and so not entitled to vote. Alternatively, Kaupthing's debt was contingent and therefore unliquidated or unascertained. It therefore should not have been admitted at all or – if admitted – at a nominal value.
 - (b) Judge Keyser also held that the individual voluntary arrangement gave rise to a material irregularity within rule 5.22 of the Insolvency Rules 1986 (the rules then applicable) because the KSA breached the principle of good faith between creditors because it enabled Kaupthing to benefit from the US\$6 million and the opportunity to participate in the recoveries in the arbitration (which were not available to other creditors). The KSA thereby acted as an inducement for Kaupthing to support the First Proposal, as a result of which the other creditors would be limited to a dividend based on a share (with Kaupthing) in the £487,500 provided by Laser Trust, whilst Kaupthing would receive not only the dividend, but also the benefits accruing to it under the KSA.
 - (c) Judge Keyser rejected CFL's argument that the First Proposal was also unfairly prejudicial to its interests as a creditor. He held that the unfair prejudice complained of must derive from the terms of the individual voluntary arrangement itself. In this case, the First Proposal treated all creditors equally: it was the KSA and not the First Proposal that created the difference between Kaupthing and the other creditors of Mr Gertner.
- (18) On appeal to the Court of Appeal:
- (a) The Court of Appeal accepted that the failure to assign Kaupthing's rights to Laser Trust "was not readily explicable given the ability of the parties to make the payment of the US\$6 million and to enter into the profit sharing arrangements by the 15 December date".⁸ Nevertheless, the Court of Appeal concluded that Kaupthing was a creditor and that it was not a material irregularity to allow Kaupthing to vote in respect of the entire value of Mr Gertner's liability under the guarantee he had given. To this extent, the Court of Appeal disagreed with, and overruled, Judge Keyser.
 - (b) However, the Court of Appeal accepted that there had been a material irregularity because the KSA benefitted Kaupthing whilst not benefiting the other creditors. On this basis, the Judge's decision to set aside the individual voluntary arrangement was affirmed and Mr Gertner's appeal dismissed.

⁸ To quote from [44] of the judgment of Patten LJ.

- (c) For this reason, the Court of Appeal did not consider further the third point, regarding unfair prejudice deriving from the terms of the First Proposal itself.
- (19) Mr Gertner sought permission to appeal the Court of Appeal Decision to the Supreme Court. Permission was denied. Four days after the Supreme Court refused permission to appeal, Kaupthing completed the assignment of its rights under the Kaupthing facility and guarantees to Laser Trust. The assignment is dated 15 February 2019.
- (20) On 4 March 2019, CFL applied on notice to Mr Gertner to restore the petition and on 7 March 2019 the court listed the petition for hearing on 8 May 2019 (with a time estimate of 15 minutes). Under cover of a letter dated 29 March 2019, Mr Freddy Khalastchi and Mr Jonathan Bass informed CFL that they had been asked by Mr Gertner to propose a second individual voluntary arrangement. This was what I have referred to as the Second Proposal, which was in a number of respects very similar to the First Proposal. The following points are to be noted:
- (a) As in the case of the First Proposal, Mr Gertner claimed to have no significant assets. A contribution of £450,000 was to be made by a third party (again, Mr Levison). The dividend to unsecured creditors was put at 0.43p in the pound,⁹ whereas the dividend in a bankruptcy was put at nil.
- (b) The Second Proposal contained a list of creditors. In this list:
- (i) CFL was listed as being owed £11,128,611. In fact, due to the compound interest payable under the Settlement Agreement, this figure was now in excess of £30 million.
- (ii) Kaupthing was listed as being owed nothing.
- (iii) Laser Trust was listed as being owed £799,360,216.
- The total owed to unsecured creditors was put at £868,617,891.48.
- (21) The date of the creditors' meeting to discuss the Second Proposal was 2 May 2019. This, of course, was before the date scheduled for the hearing of CFL's bankruptcy petition. By an urgent application issued on 26 April 2019, CFL sought the postponement of the creditors' meeting over the hearing of its petition, to enable full argument to take place on whether a bankruptcy order should be made or the creditors' meeting should proceed instead. That application was heard by Insolvency and Companies Court Judge Prentis on 2 May 2019. Judge Prentis ordered that the petition be heard on an expedited basis over 2 days in June 2019, and directed the chair of the creditors' meeting to adjourn the meeting to 1 July 2019.

⁹ The amount of the dividend varied over time, but not materially. I do not propose to set out these changes in this judgment.

(3) The Briggs Decision

8. The matter came before Chief Insolvency and Companies Judge Briggs, who heard it over three days (25, 26 and 28 June 2019). The primary question, as the Judge articulated it in his judgment at [2], was the question of what principles should be applied to an application by an opposing creditor (here: Laser Trust) seeking a stay of the bankruptcy petition of a petitioning creditor (here: CFL) in favour of permitting a meeting to be convened for the purpose of putting an individual voluntary arrangement to creditors.
9. The Judge was sensitive to the history, and noted the circumstances in which the first individual voluntary arrangement came to be revoked. Thus, one of the points the Judge specifically identified as having to be addressed was “whether the debtor should be given a second chance to put proposals to creditors in such circumstances”.¹⁰
10. It is right to say that the Judge saw the question of whether to stay the proceedings on the petition as, essentially, a matter for his discretion, as he made clear in [114]ff and [142] to [143] of his judgment. However, before he could address this question, he was called upon to resolve a number of anterior challenges by Mr Gertner to CFL’s debt. Mr Gertner challenged the debt on a number of grounds:
 - (1) First, it was said that the debt, arising as it did out of the Settlement Agreement annexed to the Tomlin Order, contravened the provisions of the Consumer Credit Act 2006 and was, for that reason, unenforceable.
 - (2) Secondly, it was said that the debt was unenforceable because it amounted to a penalty.

In respect of both of these points, CFL objected that they were made too late: they could (and should) have been made by Mr Gertner when CFL served its statutory demand; or at some point thereafter during the course of the proceedings relating to the First Proposal. Although Mr Gertner chose not to challenge the statutory demand, he had (according to CFL) many other opportunities to raise a dispute in relation to CFL’s debt. For instance, CFL’s right to vote at the creditors’ meeting summoned to consider the First Proposal could have been challenged by Mr Gertner, and was not.

11. Having decided these points against Mr Gertner, the Judge turned to the question of his discretion to adjourn. He considered a number of factors, notably:
 - (1) The nature and quality of Laser Trust’s debt ([54]ff of the Briggs Decision), which he considered “essential when determining the nature and weight to be given to a creditor’s view at the hearing of a petition”.
 - (2) The effect of the “good faith” rule ([65]ff of the Briggs Decision). It was the good faith rule, it will be recalled, that caused both Judge Keyser and the Court of Appeal to revoke the individual voluntary arrangement resulting from the First Proposal. In this case, of course, the context was different: Kaupthing was no longer a creditor of Mr Gertner – its claims had been assigned to Laser Trust. The

¹⁰ Quoting from [2] of the Briggs Decision.

Judge considered the scope of the good faith rule and concluded that it applied in the context of the Kaupthing assignment to Laser Trust:

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

75. The *ad hoc* private arrangement described by Patten LJ meant that the largest and most influential unsecured creditor could vote for an outcome for which it had little or no interest because it had recourse to assets outside of those which were available for all unsecured creditors. The effect was to create different classes of creditor even though the creditors had no pre-contractual bargain to sit in a different class (such as secured creditors). Creating classes through the medium of a private arrangement was manifestly unfair and would have serious consequences on the less influential creditors restricted to share a much smaller and distinct pool of assets. In my judgment this is the true interpretation of the [Court of Appeal Decision]. The Court of Appeal found that notwithstanding the KSA there was no requirement for Kaupthing to vote in support of the proposal for the IVA. There is no suggestion that that is different in respect of the Laser Trust. The incentive to vote in favour of the proposal was to avoid bankruptcy, and investigation into the affairs of [Mr Gertner] and the potential to set aside any antecedent transactions that may include rights provided to support his avoidance of bankruptcy.

...

76. The need for transparency goes hand-in-hand with the good faith principle. Without transparency there can be no good faith. As was observed by Judge LJ in *Cadbury Schweppes v. Somji*, [2001] 1 WLR 615, voluntary arrangements attract the application of the good faith principle as every proposal for an individual voluntary arrangement should be characterised by “complete transparency *and* good faith” (emphasis added). And “section 276 and the Rules encapsulate the principles of transparency and good faith” at [44].”

In this light, the Judge considered the evidence put forward on this point from Laser Trust at [79]ff of the Briggs Decision.

- (3) The fact that Mr Gertner was seeking a “second bite of the cherry” in putting forward the second IVA (at [104]ff of the judgment). In this regard, the Judge specifically considered whether entertaining the Second Proposal amounted in effect to a collateral attack on the Court of Appeal Decision (at [109]ff of the judgment).
 - (4) The extent to which the wishes of the largest creditor – opposing the bankruptcy petition – should be given priority over the wishes of the petitioning creditor seeking the debtor’s bankruptcy: [114]ff of the Briggs Decision.
12. Taking these factors into account, the Judge concluded that, in the exercise of his discretion, he should not stay the proceedings on the petition:

- “131. In taking all the circumstances into account, it is relevant to weigh the proposed outcome of the Arrangement, the voting creditors, the evidence and the pertinent observations made by His Honour Judge Keyser, QC in the [Keyser Decision] and Patten LJ in the [Court of Appeal Decision].
132. The debts of [Mr Gertner] are long in existence. [Mr Gertner] failed to meet his obligations under the personal guarantee provided to CFL and failed to meet his agreed obligations in the [Settlement Agreement]. The presentation of the petition was met with a proposal to creditors for an IVA. The IVA was revoked, an appeal dismissed and soon after the petition was restored a second proposal made on substantially the same basis.
133. It is not unreasonable for the Court to ask, when exercising its discretion, if anything has altered save for the assignment? Has the assignment to a new entity prevented (i) the strict application of the good faith principle and (ii) the major creditor receiving a collateral advantage not available to other creditors? In my judgment, questions (i) and (ii) should be answered negatively. In addition, I infer that the Laser Trust is not wholly independent (or free from the influence) of [Mr Gertner] or a Gertner Family Trust.
134. In these circumstances, I do not undertake a simple accounting exercise and adjourn on the basis that the largest creditor entitled to vote seeks an adjournment. The nature and quality of Laser Trust leads me to discount its influence, and to give greater weight to the wishes of the independent petitioning creditor, CFL. I reach the conclusion, exercising my discretion, after considering the arguments of the creditors in support of and opposing the petition that I should refuse the adjournment application and make an order on the petition.”
13. In the concluding paragraphs of his judgment, Judge Briggs helpfully pulled together the various threads. I set out these paragraphs in their entirety:
- “135. In my judgment the CFL debt is not disputed on genuine and substantial grounds. Neither is the debt impugned. The provisions of the [Consumer Credit Act] do not apply to the Contract. On a true interpretation of the [Settlement Agreement] the debt in the [Settlement Agreement] was not deferred, and credit not extended. In my judgment the law does not provide that a structured settlement clause making provision for the payment of a debt over time extends credit or financial accommodation ([27]-[32]).
136. The “essential character” of the contract cannot be characterised as one “for making loans” ([33]-[35]). In any event the Contract compromised proceedings where [Mr Gertner] defended a claim by CFL for the debt, now under consideration. One of the defences pleaded was that the [Consumer Credit Act] applied. Applying *Binder v. Alchaouzos*, I find that the terms of the [Settlement Agreement] were fair and reasonable, and I am satisfied that the [Settlement Agreement] constituted a *bona fide* compromise and the Court should not, in the absence of vitiating factors, go behind it ([40]-[44]).
137. The purpose of most or a good deal of penalty clauses is to compensate the loss resulting from the breach, if the level of damage is exorbitant or disproportionate to a great extent with “the highest level of damages that could possibly arise from the breach” it is likely to be a penalty. There is little guidance on what may constitute a legitimate interest, save that there can be no legitimate interest in punishing the defaulting party. The high interest rates imposed as a condition for lending to Lanza with very high defaulting rates were in keeping with (i) the nature of the lending that was urgent and very short term and (ii) the nature of the lender which was known as a

lender of last resort. There is no argument that there was any disproportion between the parties and [Mr Gertner] must accept that he had the benefit of skilled legal advice when entering the Contract. There is no obvious oppression where parties freely enter into a contract at arms-length following litigation and where the challenging party had the benefit of legal advice. The claim that the CFL debt amounts to a penalty does not raise a genuine or substantial dispute: *Cavendish Square Holdings v. Makdessi*, [2016] AC 1172 ([46]-[49]).

138. The failure to run the penalty claim or not to pursue it by way of a defence when [Mr Gertner] had a chance to do so in the Part 7 proceedings, the compromise the acceptance of the CFL debt in proposals to creditors, and the failure to argue the penalty when an opportunity arose at the statutory demand stage preclude [Mr Gertner] from raising the issue now. The fact that the petition for bankruptcy was stayed is not relevant. The rights and obligations of [Mr Gertner] are governed by the [Settlement Agreement]. One of the rights that he gave up when entering into the [Settlement Agreement] was to forfeit the right to defend the claim to interest on the ground it contravened the common law on penalties. To permit him to re-open that argument at the hearing of a bankruptcy petition in order to argue that the debt contained in the petition is not liquidated is to argue, in substance, that he may contravene the principle *Johnson v. Gore Wood & Co (No 1)*, [2002] 2 AC 1 in respect of the Part 7 proceedings and *Turner v. Royal Bank of Scotland*, [2000] BPIR 683 in relation to the bankruptcy petition. The CFL debt, KSA and the position of Laser Trust need to be looked at as a whole ([51]-[53]).
139. The [Court of Appeal Decision] found that there would be a breach of good faith where one creditor voted in favour of a proposal in which it had quite different commercial interests from those of other creditors. The fact that approval of a proposal would put investigation of a debtor's interests to an end and out of the reach of other creditors is indicative of a conflict between that party and other creditors entitled to vote. The principle goes hand- in-hand with the need for transparency ([71]-[77]).
140. The evidence provided on behalf of the Laser Trust is not credible and unreliable. The evidence may not be relied upon for: (i) the explanation given in relation to the reasons for purchasing the debt from Kaupthing; (ii) the assertion that Laser Trust has a commercial interest in the proposed Arrangement; or (iii) that Mr Gertner's [Second Proposal] represents "a better deal for...Mr Gertner's other unsecured creditors than bankruptcy". The evidence cannot be relied upon to support the assertion that the Laser Trust is free from the influence of [Mr Gertner] ([79]-[93]).
141. I reject the submission that the doctrine of abuse of process operates to preclude a debtor from putting proposals to creditors following a successful court challenge to an earlier approved voluntary arrangement. The similarities of the proposals, and the collateral advantage to the majority creditor outside of an arrangement are factors to be taken into account when exercising discretion ([104]-[113]).
142. When exercising discretion to adjourn a hearing of a bankruptcy petition, the Court should take into account (i) the class remedy nature of insolvency (ii) if a meeting of creditors is held, whether it is likely that a majority by reference to the value of votes will pass the proposals (iii) the proposal in the context of the claims to identify if a commercial return would be provided to creditors and (iv) all the circumstances of the case ([115]-[119]).
143. In exercising discretion in accordance with the identified principles I refuse the application to adjourn to enable the Laser Trust to vote on the draft proposals for the Arrangement ([121]-[134]).

144. The Nominees had complied with their obligations to investigate. Those investigations are inevitably limited by funding and time and take account of a nominee's inevitable reliance on information provided by a debtor. The Court is not bound by the opinion of the nominee. The results of a nominee's investigations are not sufficient for all purposes ([98]-[100]).
145. I refuse the application to adjourn and make an order on the petition presented to the Court on 6 October 2015.”

C. THE MATERIAL LAW

(1) Petitioning for bankruptcy

14. Section 267 IA1986 sets out the grounds on which a creditor may petition for the bankruptcy of a debtor. Section 267(2) sets out various requirements that must be satisfied at the time the petition is presented, the third of which (section 267(2)(c)) is that “the debt, or each of the debts, is a debt which the debtor appears either to be unable to pay or to have no reasonable prospect of being able to pay”.
15. Section 268 IA1986 defines “inability to pay” by reference, *inter alia*, to the service of a statutory demand. The purpose of section 268 is to provide a formal procedure whereby the debtor is forced to reveal his or her insolvent situation through a failure to satisfy a written demand for payment in the form of a “statutory demand”. If a satisfactory response is not obtained within 3 weeks since the demand was served, the statutory test in section 267(2)(c) will have been met.
16. The debtor has the opportunity to apply to set aside the statutory demand, and such an application has the effect of preventing the presentation of the petition.¹¹ The grounds on which a statutory demand may be set aside are identified in rule 10.5 of the Insolvency (England and Wales) Rules 2016 (**IR2016**). There are various grounds on which an application to set aside a statutory demand may be granted, one of which is that “the debt is disputed on grounds which appear to the court to be substantial”.¹²
17. Section 271 IA1986 sets out the circumstances in which a bankruptcy order may be made on the creditor’s petition. In particular, section 271(1) provides:
- “The court shall not make a bankruptcy order on a creditor’s petition unless it is satisfied that the debt, or one of the debts, in respect of which the petition was presented is either –
- (a) a debt which, having been payable at the date of the petition or having since become payable, has been neither paid nor secured nor compounded for, or
- (b) a debt which the debtor has no reasonable prospect of being able to pay when it falls due.”
18. The court has a broadly articulated discretion as to the hearing of the creditor’s petition. Section 266(3) IA1986 provides:

¹¹ Section 267(2)(d) of the IA1986.

¹² Rule 10.5(5)(b) IR2016.

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

(2) Individual voluntary arrangements

19. An individual voluntary arrangement offers the insolvent debtor a means of avoiding adjudication as a bankrupt by entering into a collectively agreed scheme for the discharge of his or her liabilities with his or her creditors. Prior to bankruptcy, the individual voluntary arrangement process may be commenced:

- (1) Through an application for an interim order under sections 252 to 256 IA1986; alternatively
- (2) Through a debtor’s proposal for an individual voluntary arrangement made without an interim order pursuant to section 256A IA1986.

20. An individual voluntary arrangement may be concluded even after a bankruptcy order has been made, thus providing an additional route out of bankruptcy.

21. It is necessary briefly to consider each of these routes to an individual voluntary arrangement.

(a) *Interim order obtained by a debtor not an undischarged bankrupt*

22. Originally, it was a necessary step on the way to obtaining an individual voluntary arrangement for the debtor to apply for an “interim order” under section 253 IA1986. The application would be made where the debtor intended to make a proposal to his creditors for a voluntary arrangement.¹³ The proposal would have to identify some person – the nominee, a qualified insolvency practitioner – to act in relation to the proposal.¹⁴

23. The effect of making such an application was to trigger (amongst other things) section 254(2) IA1986, which provides:

“Any court in which proceedings are pending against an individual may, on proof that an application under that section has been made in respect of that individual, either stay the proceedings or allow them to continue on such terms as it thinks fit.”

24. If the application for an interim order was successful, then – during the period it was in force – “no bankruptcy petition relating to the debtor may be presented or proceeded with”.¹⁵

25. A court would grant – or, more particularly, not grant – an interim order in circumstances provided for in section 255 IA1986:

¹³ Section 253(1) IA1986.

¹⁴ Section 253(2) IA1986.

¹⁵ Section 252(2)(a) IA 1986.

- “(1) The court shall not make an interim order on an application under section 253 unless it is satisfied –
- (a) that the debtor intends to make a proposal [for an individual voluntary arrangement];
 - (b) that on the day of the making of the application the debtor was an undischarged bankrupt...
 - (c) that no previous application has been made by the debtor for an interim order in the period of 12 months ending with that day; and
 - (d) that the nominee under the debtor’s proposal is willing to act in relation to the proposal.
- (2) The court may make an order if it thinks that it would be appropriate to do so for the purpose of facilitating the consideration and implementation of the debtor’s proposal.”
26. Where an interim order has been made, the nominee must submit a report on the proposal before the order ceases to have effect.¹⁶ The court has general control over the process whereby the nominee reports. In essence, the court decides whether the proposal should be considered by the debtor’s creditors (and, generally, the interim order continued) or whether the proposal should not proceed (and, generally, the interim order not continued).
- (b) *Proposal for an individual voluntary arrangement made by a debtor not an undischarged bankrupt***
27. It has been recognised that the very process of seeking an interim order – whilst obviously of assistance in limiting creditors’ ability to act against the debtor – might render seeking an individual voluntary arrangement impossible on the debtor’s part due to the cost, and would certainly cause a further depletion of the debtor’s resources.¹⁷
28. Section 256A IA1986 provides for a proposal by a debtor for an individual voluntary arrangement where no interim order has been made and no application for such an order is pending. In such a case, the debtor submits his or her proposal to the nominee, and the nominee reports, with minimal intervention by the court and no protection of the debtor by way of interim order.
- (c) *Proposal for an individual voluntary arrangement by an undischarged bankrupt***
29. An undischarged bankrupt may either seek an interim order¹⁸ or pursue the course under section 256A IA1986.¹⁹

¹⁶ Section 256 IA1986.

¹⁷ As to this, see Fletcher, *The Law of Insolvency*, 5th ed (2017) at [4-045] to [4-046].

¹⁸ Section 255(1)(b) IA 1986.

¹⁹ Section 256A(1)(b) IA1986.

(d) *The nominee's report and the creditors' approval*

30. All of the routes to an individual voluntary arrangement described in the preceding paragraphs culminate in a report by the nominee on the debtor's proposal, and in a consideration of that report by the creditors pursuant to section 257 IA1986. The decision is to be made by the "creditors' decision procedure".²⁰ This procedure is laid down in IA1986 and IR2016.²¹ In particular, rule 15.34(6) IR2016 provides:

"In a case relating to a proposed IVA –

- (a) a decision approving a proposal or a modification is made when three-quarters or more (in value) of those responding vote in favour of it;
 - (b) a decision is not made if more than half of the total value of creditors who are not associates of the debtor vote against it."
31. The term "associates of the debtor" is a defined term in IA1986. Section 435 IA1986 provides:
- "(1) For the purposes of this Act any question whether a person is an associate of another person is to be determined in accordance with the following provisions of this section (any provision that a person is an associate of another person being taken to mean that they are associates of each other).
 - (2) A person is an associate of an individual if that person is –
 - (a) the individual's husband or wife or civil partner,
 - (b) a relative of –
 - (i) the individual, or
 - (ii) the individual's husband or wife or civil partner, or
 - (c) the husband or wife or civil partner of a relative of –
 - (i) the individual, or
 - (ii) the individual's husband or wife or civil partner.
 - (3) A person is an associate of any person with whom he is in partnership, and of the husband or wife or civil partner or a relative of any individual with whom he is in partnership; and a Scottish firm is an associate of any person who is a member of the firm.
 - (4) A person is an associate of any person whom he employs or by whom he is employed.
 - (5) A person in his capacity as trustee of a trust other than –

²⁰ Section 257(2A) IA1986.

²¹ Specifically, section 379ZA IA1986, paragraph 11A of Schedule 9 to IA1986 and chapter 15 IR2016.

- (a) a trust arising under any of the second Group of Parts or the Bankruptcy (Scotland) Act 2016, or
- (b) a pension scheme or an employees' share scheme,

is an associate of another person if the beneficiaries of the trust include, or the terms of the trust confer a power that may be exercised for the benefit of, that other person or an associate of that other person.

- (6) A company is an associate of another company –
 - (a) if the same person has control of both, or a person has control of one and persons who are his associates, or he and persons who are his associates, have control of the other, or
 - (b) if a group of two or more persons has control of each company, and the groups either consist of the same persons or could be regarded as consisting of the same persons by treating (in one or more cases) a member of either group as replaced by a person of whom he is an associate.
- (7) A company is an associate of another person if that person has control of it or if that person and persons who are his associates together have control of it.
- (8) For the purposes of this section a person is a relative of an individual if he is that individual's brother, sister, uncle, aunt, nephew, niece, lineal ancestor or lineal descendant, treating –
 - (a) any relationship of the half blood as a relationship of the whole blood and the stepchild or adopted child of any person as his child, and
 - (b) an illegitimate child as the legitimate child of his mother and reputed father;and references in this section to a husband or wife include a former husband or wife and a reputed husband or wife and references to a civil partner include a former civil partner and a reputed civil partner.
- (9) For the purposes of this section any director or other officer of a company is to be treated as employed by that company.
- (10) For the purposes of this section a person is to be taken as having control of a company if –
 - (a) the directors of the company or of another company which has control of it (or any of them) are accustomed to act in accordance with his directions or instructions, or
 - (b) he is entitled to exercise, or control the exercise of, one third or more of the voting power at any general meeting of the company or of another company which has control of it;and where two or more persons together satisfy either of the above conditions, they are to be taken as having control of the company.
- (11) In this section “*company*” includes any body corporate (whether incorporated in Great Britain or elsewhere); and references to directors and other officers of a company and

to voting power at any general meeting of a company have effect with any necessary modifications.”

32. Assuming the proposal is approved by the requisite majority, the bankruptcy petition will not proceed (if the debtor is not an undischarged bankrupt); or (if the debtor is an undischarged bankrupt) he or she will emerge from bankruptcy if the proposal so provides and to the extent it so provides.

(3) Challenging an individual voluntary arrangement

33. There are only limited statutory grounds on which an individual voluntary arrangement, approved in this way by creditors, can be challenged. Essentially:

- (1) The creditors’ decision may be challenged under section 262 IA1986 on one or both of the following grounds:

- (a) That a voluntary arrangement approved by a decision of the debtor’s creditors pursuant to section 257 unfairly prejudices the interests of a creditor of the debtor;²²
- (b) That there has been some material irregularity in relation to a creditors’ decision procedure instigated under that section.²³

- (2) The debtor may nevertheless be made bankrupt were there has been a default in connection with the individual voluntary arrangement as defined in section 276 IA1986. Essentially, a bankruptcy order may be made on a petition where the court is satisfied under section 276(1) IA1986:

- “(a) that the debtor has failed to comply with his obligations under the voluntary arrangement, or
- (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 in connection with a creditors’ decision procedure instigated under that Part, or
- (c) that the debtor has failed to do all such things as may for the purposes of the voluntary arrangement have been reasonably required of him by the supervisor of the arrangement.”

34. With this, we come to the good faith rule. In its modern form, the rule was first considered by Mr Anthony Boswood, QC, sitting as a Deputy Judge of the High Court, in *Cadbury Schweppes plc v. Somji*.²⁴ In *Somji*, Mr Boswood appeared to regard the

²² Section 262(1)(a) IA1986.

²³ Section 262(1)(b) IA1986.

²⁴ [2000] BPIR 950.

rule as a residual discretion at common law that policed the fairness or otherwise of the individual voluntary arrangement as between the debtor and his creditors, and operated outside the scope of the Insolvency Act and the Insolvency Rules. Mr Boswood articulated the principles at common law as he understood them as follows:²⁵

“It is argued by Mr Anthony Mann, QC on behalf of Mr Somji that these authorities, and any principle established by them, have no part to play in the law as it now stands, following the Insolvency Act 1986. I must address that argument presently, but it may be convenient if I summarise the position as it appears to me to have stood at the close of the 19th century:

- (1) any secret deal made in connection with a composition or other similar arrangement for the settlement of debts, whereby a creditor was to receive more than the other creditors in return for supporting (or not opposing) the composition or arrangement, was illegal and void;
- (2) the existence of such a deal rendered the composition or arrangement voidable at the instance of an aggrieved creditor;
- (3) moreover, such a deal was wholly unenforceable as between the parties to it;
- (4) the principle was of entirely general application, and covered all forms of composition and arrangement, whether statutory or otherwise;
- (5) the principle was based on the fundamental rule that there must be equality between creditors in the distribution of the debtor’s assets, and *additionally* on the equally fundamental rule that there should be complete good faith between the debtor and his creditors *inter se*. It was therefore irrelevant that the inducement to the creditor came from a third party, and not out of the debtor’s estate;
- (6) if the secret deal was not made by the debtor himself, all that was required was that it should have been made to his knowledge, and therefore with his concurrence, since concurrence must obviously be inferred where the debtor knows of the deal and does nothing to stop it, or to inform his other creditors of it...”

35. Mr Boswood concluded that these rules survived the Insolvency Act 1986. In the Court of Appeal,²⁶ although the order of Mr Boswood was affirmed and the appeal dismissed, there was rather less enthusiasm for a self-standing ground – existing at common law alone – for the policing of individual voluntary arrangements. Thus, Walker LJ stated:²⁷

“Although the English law of bankruptcy now has the appearance of a complete statutory code, it is built on foundations which owe much to past judicial creativity and development of far more meagre statutory material going back to Elizabethan times, the first “modern” statutes being the Bankruptcy Act 1869...and the Debtors Act 1869...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 1986 Act, but (to put it at its lowest) it would be no great surprise to find it there in one form or another.”

²⁵ At [23].

²⁶ [2001] 1 WLR 615.

²⁷ At [24].

36. However, Robert Walker LJ considered that Mr Boswood erred by over-reliance on the old law,²⁸ and it seems to me that Robert Walker LJ regarded the principles articulated by Mr Boswood as forming a part of the regime under IA1986.²⁹

“If a proposed IVA has apparently been approved by a creditors’ meeting, the only routes to challenge or circumvent it are in my judgment a direct challenge under section 262(1) or an indirect challenge by means of a bankruptcy petition under section 276(1).”

Thus, it appeared to be Robert Walker LJ’s conclusion that the principles articulated by Mr Boswood lived on, in some form, but as part of the IA1986.

37. Staughton LJ agreed without more with Robert Walker LJ.³⁰ Judge LJ also agreed, but said at [40]:

“I agree with Robert Walker LJ, and only add some words of my own by way of emphasis. In my judgment, the effect of section 276 of the Insolvency Act 1986 and the Insolvency Rules 1986 made under it, is to ensure that every proposal for an individual voluntary arrangement should be characterised by complete transparency and good faith by the debtor.”

Referring to section 276(1) – which I have described in paragraph 33(2) above – and the 1996 Rules he continued:

“43 This statutory language plainly provides that a debtor may be in default, and liable to a bankruptcy order, even when he has apparently complied with the rules which govern the contents of the proposal. An accurate proposal dealing with but limited to the matters prescribed by the rules is not sufficient of itself to establish compliance with the requirements of section 276. “Information” must not be provided by the debtor which is false or misleading in any material particular, and the “information” that is provided by him must be complete. This obligation continues up to the date of and during the meeting of creditors itself. Properly fulfilled this obligation enables the creditors to make an informed decision about the proposal for a voluntary arrangement.

44 The principles laid down in the cases decided in the 18th and 19th centuries, accurately summarised by the judge below, have not, as he rightly put it, “become outmoded or unnecessary in modern times”. By contrast with the simple language of the section perhaps some of the eloquent flourish in these judgments may appear a little extravagant to us. Nevertheless, section 276 and the Rules encapsulate the principles of transparency and good faith and make proposed secret deals or confidential arrangements of the kind referred to by Robert Walker LJ as unacceptable today as they were in Victorian England.”

This, as it seems to me, only reinforces what I find Robert Walker LJ to have held.

38. The good faith rule was further considered by the Court of Appeal in *Kapoor v. National Westminster Bank plc*³¹ and in the Court of Appeal Decision. Both decisions involved consideration of what was alleged to have been (and what was found to be) a

²⁸ At [34].

²⁹ At [35].

³⁰ At [39].

³¹ [2011] EWCA Civ 1083.

breach of the good faith principle. I will return to the detail of these decisions in due course. For the present, it is simply necessary to note:

- (1) That both decisions concerned an attack by a creditor of an individual voluntary arrangement that had – on the face of it – been approved by the creditors by the requisite majority. That is in contrast to the present case, where the question is not whether the Second Proposal was properly approved, but whether the Second Proposal should be seen and considered by creditors at all.
- (2) That, in both cases, the Court of Appeal saw the good faith principle as arising out of the IA1986 itself, and not as some separate self-standing principle.

D. THE GROUNDS OF APPEAL

39. As I have noted, both Mr Gertner and Laser Trust sought to appeal the Briggs Decision.

40. Laser Trust, as the opposing creditor, sought to appeal on two grounds:

- (1) First, that the Judge had erred in his interpretation of the good faith rule.
- (2) Secondly, that the Judge had erred in rejecting, without requiring cross-examination, the evidence adduced before him by Laser Trust.

Judge Briggs gave permission to appeal in relation to this first ground; and I gave permission in relation to the second.

41. Mr Gertner, as the debtor, sought to appeal on six grounds:

- (1) First, that the Judge had erred in his interpretation of the good faith rule. This ground is similar to that advanced by Laser Trust and described in paragraph 40(1) above.
- (2) Secondly, that the Judge was wrong to hold that the “independence” of a creditor from a debtor was relevant to the question of whether “that creditor ought to be allowed to vote in an Individual Voluntary Arrangement and/or whether its views as an opposing creditor ought to be discounted”.
- (3) Thirdly, that the Judge erred in holding that allowing Laser Trust to vote its debt in relation to Mr Gertner’s Second Proposal would be unfairly prejudicial to CFL, thereby taking into account incorrect and/or irrelevant considerations.
- (4) Fourthly, the Judge erred in rejecting the evidence of Mr Gertner and Laser Trust as being unreliable and finding that this evidence could not be relied upon in relation to Laser Trust’s motivations in taking an assignment of Kaupthing’s debt. This ground is similar to that advanced by Laser Trust and described in paragraph 40(2) above.
- (5) Fifthly, the Judge erred in holding that the Settlement Agreement did not fall within the Consumer Credit Act.
- (6) Sixthly, the Judge ought to have held that paragraph 5 of the Settlement Agreement amounted to a penalty at common law.

Judge Briggs gave permission to appeal in relation to the first ground; and I gave permission in relation to the remaining grounds.

42. Although these grounds are multiple, they can all be categorised under one or other of the two broad attacks that I have described in paragraph 3 above. Thus, Mr Gertner's fifth and sixth grounds of appeal contend that CFL's debt can be disputed on substantial grounds.³² These two grounds are considered in Section E below. Laser Trust's grounds of appeal and Mr Gertner's first to fourth grounds all relate to the stay of the petition that Judge Briggs did not grant.³³ To a very considerable extent they are inter-related, and I consider them in Section F below.

E. CHALLENGING CFL'S DEBT ON SUBSTANTIAL GROUNDS

(1) Introduction

43. Mr Gertner contended that CFL's debt was disputed on substantial grounds, namely that it was unenforceable under the Consumer Credit Act and/or was a penalty. I consider these grounds in Section E(3) and E(4) below. Before I do so, however, I consider CFL's contention that Mr Gertner was not permitted to raise these contentions at all, because he should have done so earlier.

(2) Points that could have been taken earlier

44. CFL contended that it was well settled that a debtor was not permitted to defend a petition on the basis of arguments that had been advanced or could have been advanced at an earlier stage in the bankruptcy proceedings. That contention was based upon the rule in *Henderson v. Henderson* and/or the rule in *Turner v. Royal Bank of Scotland*.

45. In *Henderson v. Henderson*,³⁴ Wigram V-C stated:

"...where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

46. It is now clear that the rule in *Henderson v. Henderson* is not (or not entirely) based on *res judicata*, but is a form of abuse of process. As Lord Kilbrandon stated in *Yat Tung Investment Co Ltd v. Dao Heng Bank Ltd*,³⁵ "it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings".

³² I.e., they fall under paragraph 3(1) above.

³³ I.e., they fall under paragraph 3(2) above.

³⁴ (1843) 3 Hare 100 at 115, 67 ER 319.

³⁵ [1975] AC 581 at 590.

47. The doctrine in *Turner v. Royal Bank of Scotland*³⁶ actually derives from a *dictum* of Vinelott J in *Brillouett v. Hachette Magazines Ltd, Re A Debtor (No 27 of 1990)*, which was approved by the Court of Appeal in *Turner*:³⁷

“There may be rare cases in which it can be said that a debt claimed in a statutory demand against which there has been an unsuccessful attempt to set it aside and which has not been paid or secured or compounded for is not payable at the date of the petition, for instance, if as a result of legislation it were to become unenforceable between those two dates. But unless there is some change of circumstance of that kind it seems to me that all that the petitioning creditor is required to do is to show that he has made a statutory demand, that either no attempt has been made to set it aside or an unsuccessful attempt has been made, and that the amount of the debt has neither been paid nor secured nor compounded for. The debtor cannot go back and re-argue the very grounds on which he unsuccessfully sought to have the statutory demand set aside.”

48. With great respect to Vinelott J, there seems to be an inconsistency between the underlined words in the passage I have quoted. I can quite understand why a debtor should not – absent special circumstances – be permitted to run the same argument twice-over, once when seeking to set aside a statutory demand and once when resisting a bankruptcy petition. However, given that a debtor is not obliged to challenge a statutory demand – indeed, the debtor must make an application –, it seems to me to go too far to say that a debtor is precluded from raising a point in objection to a bankruptcy petition simply because he or she could have, but did not, apply to set aside the statutory demand that preceded the petition.

49. I note that Court of Appeal, in *Turner*, did not go so far as Vinelott J appeared to go:³⁸

“As Vinelott J pointed out in the *Brillouett* case, the debtor cannot go back and re-argue the very grounds on which he unsuccessfully sought to have the statutory demand set aside. It will require some change of circumstance between the unsuccessful attempt to set aside the statutory demand and the hearing of the petition before the court (on the hearing of the petition) can be asked to go into the question which has already been determined at the hearing of the statutory demand. To hold otherwise would be to encourage a waste of court time, and a waste of the parties’ money; and would defeat the obvious purpose of the statutory scheme.”

50. Subsequent cases have made clear that this is the true extent of the rule. In *Coulter v. Chief Constable of Dorset Police (No 2)*, Chadwick LJ articulated the principle thus:³⁹

“The principle is not based on estoppel, whether of a *Henderson v. Henderson* nature or *res judicata*. It goes no further than this: (i) that it is indeed a waste of the court’s time and the parties’ money to rehearse arguments which have already been run and have failed; and (ii) that, in circumstances where it is desired to run arguments which have not already been run, then, as His Honour Judge Maddocks pointed out in *Barnes v. Whitehead*, the court will inquire why those arguments were not run at the time when they could, and should have been run.”

51. Thus, the principle applies both where an argument was run on an application to set aside a statutory demand and where, on such an application, it could have been run.⁴⁰

³⁶ [2000] BPIR 683.

³⁷ [1996] BPIR 518 at 520 (emphasis added); approved in *Turner* at 694 (*per* Chadwick LJ).

³⁸ At 694.

³⁹ [2005] EWCA Civ 1113 at [22]. See also, to similar effect, *Adams v. Mason Bullock*, [2004] EWHC 2910 (Ch) at [29] and *EDF Energy Customers Ltd v. Re-Energised Ltd*, [2018] EWHC 652 (Ch) at [63].

However, there is nothing to suggest that a debtor who simply declines to make an application, which he or she is under no obligation to make, is by that fact alone precluded from taking a point on the hearing of the petition.

52. In this case, Mr Gertner elected not to apply to have the statutory demand set aside, and I can see no basis for the application of the *Turner* principle for that reason. Equally, there have been no previous proceedings capable of triggering the rule in *Henderson v. Henderson*. There were – as I have noted – no proceedings regarding the statutory demand and I do not consider that the events and proceedings subsequent to the service of the statutory demand were capable of triggering the rule in *Henderson v. Henderson*. As to this:

(1) I accept that Mr Gertner could have contended – at the creditors’ meeting that considered his First Proposal – that CFL was not entitled to vote as a creditor. Although CFL was permitted by the nominees to vote at the creditors’ meeting, without objection by Mr Gertner, the matter must be seen in context. The question of whether CFL was entitled to vote at the meeting was essentially academic given Kaupthing’s position as majority creditor. It would, in my judgment, have been remarkable had – in light of Kaupthing’s position – Mr Gertner sought to contend to the nominees that the votes of CFL should be left out of account altogether. Certainly, his failure to raise the matter at the creditors’ meeting cannot properly form part of an argument that, in raising the matter of CFL’s standing as a creditor now, Mr Gertner is abusing the process of the court.⁴¹

(2) As I have noted, the approval of the First Proposal was a matter that has troubled the courts on two occasions before it came to Judge Briggs.⁴² However, the issue before Judge Keyser and the Court of Appeal related to the validity of the individual voluntary arrangement that had been approved at the creditors’ meeting. Mr Gertner cannot be criticised for failing to raise the question of the validity of CFL’s debt in these proceedings. CFL’s status as creditor was not an issue before either Judge Keyser or the Court of Appeal. What was in issue was the propriety of the KSA which I have described in paragraphs 7(12) and 7(13) above, and whether the proposal put forward by Mr Gertner was consistent with the good faith rule, given the KSA.

53. CFL contended that the Consumer Credit Act point, at least, had been raised by Mr Gertner in previous proceedings. CFL referred to Mr Gertner’s defence in the proceedings brought against Mr Gertner by CFL. As I have described,⁴³ these proceedings were settled by the Settlement Agreement appended to the Tomlin Order. It is quite true that before the proceedings settled, Mr Gertner took a Consumer Credit Act point in relation to the loan agreement between Lanza and CFL and the guarantee of that agreement by himself. That point has nothing to do with the point now raised by

⁴⁰ The similarity with *Henderson v. Henderson* is obvious.

⁴¹ It also must be noted that the question before me and before Judge Briggs was whether CFL’s debt was disputed on substantial grounds. At the creditors’ meeting, the question would have been whether CFL was entitled to vote its debt.

⁴² See paragraph 6 above.

⁴³ See paragraph 7(2) above.

Mr Gertner, which is that the Settlement Agreement itself (and not the loan agreement or the guarantee) is unenforceable or void due to the Consumer Credit Act. The suggestion that Mr Gertner should be precluded by the principle in *Henderson v. Henderson* from raising this point now is unarguable.⁴⁴ The proceedings that CFL relies upon preceded the Settlement Agreement and were compromised by it. It is impossible to see how Mr Gertner could have raised this point (and, indeed, the penalty point) in the course of these earlier proceedings.

54. In the Briggs Decision, Judge Briggs considered the substance of both the Consumer Credit Act point and the penalty point. He was, I consider, correct to do so. However, he also found, at least in relation to the penalty point,⁴⁵ that – notwithstanding his substantive consideration of these points – Mr Gertner was precluded from running them.⁴⁶ For the reasons I have given, he erred in reaching this conclusion; and he was correct to consider the substance of the points advanced by Mr Gertner. It is to these points that I now turn.

(3) Invalid under the Consumer Credit Act

(a) Introduction

55. Judge Briggs rejected Mr Gertner’s contention that the Tomlin Order – incorporating the Settlement Agreement – was a regulated credit agreement under the Consumer Credit Act. If the Judge was wrong in this regard, then the enforceability of the debt in the Settlement Agreement would be highly doubtful because – for instance – CFL had no licence from the OFT to cover the carrying on of consumer credit business and had failed to serve requisite documents on Mr Gertner during the period after the Settlement Agreement had been agreed.
56. These questions of enforceability did not arise on the Judge’s decision, because the Judge held that the Consumer Credit Act did not apply. The Judge reached this conclusion for two reasons:
- (1) First, he held that there was no “provision of credit” so as to bring the Settlement Agreement within the scope of the Consumer Credit Act.⁴⁷
 - (2) Secondly, he held that because the Settlement Agreement was a compromise of differences, as a matter of public policy, it should not be gone behind.⁴⁸ Related to this was a question as to whether – because the Settlement Agreement formed a

⁴⁴ That is so, even if the points taken appeared on the fact of it to be the same. As I have described, the Settlement Agreement replicated in its recitals the terms of the loan agreement with Lanza that Mr Gernter had guaranteed, and these provisions were resurrected, by clause 5, in the case of default. But that is nothing to the point. The Consumer Credit Act defence in relation to the Lanza loan/guarantee was in substance completely different to the defence – even if similarly framed – in the Settlement Agreement.

⁴⁵ CFL suggested that Judge Briggs did not consider whether the Consumer Credit Act point was barred by the *Turner* and *Henderson* rules. I am not sure about this, but nothing turns on it. The fact is that the Judge considered the substance of both points.

⁴⁶ Briggs Decision at [138], quoted at paragraph 13 above. See also, in relation to the Consumer Credit Act point, point (ii) at [43].

⁴⁷ Briggs Decision at [32].

⁴⁸ Briggs Decision at [33]ff.

part of the Tomlin Order – it was not an agreement within the meaning of the Consumer Credit Act. This is an argument that I shall briefly deal with, but I do not consider that it formed a separate part of the Judge’s reasoning.

Mr Gertner contended that the Judge erred on both points. I shall consider both in turn.

(b) *The first point: provision of credit so as to bring the Settlement Agreement within the Consumer Credit Act*

57. Section 8 of the Consumer Credit Act 1974 provides in section 8(1) that:

“A consumer credit agreement is an agreement between an individual (“the debtor”) and any other person (“the creditor”) by which the creditor provides the debtor with credit of any amount.”

58. Section 9(1) of the Consumer Credit Act 1974 states that “credit” includes “a cash loan, and any other form of financial accommodation”. It was common ground that if the Settlement Agreement did provide credit to Mr Gertner, then this was by way of “financial accommodation” and not by way of a “cash loan”. That, plainly, is right.

59. The parties frankly conceded that there was little law in relation to the meaning of “financial accommodation”.⁴⁹

60. I have set out the terms of the Settlement Agreement in paragraph 7(3) above. Considering these terms, the Judge concluded:⁵⁰

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

⁴⁹ See, for example, the submissions of Mr Kirk, QC, on behalf of Mr Gertner at Day 2/p.5.

⁵⁰ Briggs Decision at [32].

61. In substance, I agree with this. But, out of deference to the arguments of Mr Kirk, QC (who put Mr Gertner's case on this point), and because the emphases of argument may have been different before me than they were before Judge Briggs, I shall express my conclusion in my own words:

- (1) The claim advanced by CFL against Mr Gertner in the Particulars of Claim was straightforwardly based on Mr Gertner's alleged liability under the guarantee of Lanza's obligations under the short-term loan agreement between it (Lanza) and CFL.⁵¹ Essentially, CFL contended that the sum outstanding under the loan, and so due under the guarantee, was £1,700,000 in terms of the principal amount.⁵²
- (2) It was not suggested by Mr Kirk that either the loan agreement or the guarantee was a regulated agreement under the Consumer Credit Act 1974. Indeed, he abjured any such contention.⁵³
- (3) By his defence, Mr Gertner took various points – including a point on CFL's authority, a point on formality under Jewish law, a point that the interest claimed amounted to a penalty, and a point that the interest chargeable rendered the transaction an unfair credit transaction.
- (4) A cause of action is simply every fact that it would be necessary for a claimant to prove – if not admitted by the defendant – in order to support his or her right to the judgment of the court.⁵⁴ The fact that a cause of action has been pleaded and proceedings begun says nothing about the likelihood of the claim succeeding. Where, as here, proceedings are settled, the cause of action is disposed of. An unimpeached compromise represents the end of the dispute from which it arose.⁵⁵
- (5) In this case, the effect of the Settlement Agreement was to dispose of CFL's claims against Mr Gertner under the guarantee and to replace them with a new (primary) obligation to pay the various sums set out in paragraph 7(3) above. There is nothing in the Settlement Agreement that involves the provision of any kind of credit or financial accommodation. All that has happened is that the parties have agreed to end the dispute between them on Mr Gertner's promise to pay money to CFL. In no sense has the obligation to pay under the guarantee (to the extent it existed) been deferred. Rather, that obligation has been extinguished, and replaced by another.⁵⁶

⁵¹ See paragraph 7(2) above.

⁵² See Day 1/p.177 (submissions of Mr Kirk, QC): "It is common ground that the company, [Lanza], paid £1.8 million during the four months loan period, but failed and was unable to pay £1.7 million, so that was outstanding."

⁵³ As regards the loan, see Day 1/p.173; as regards the guarantee, see Day 2/p.10.

⁵⁴ *Coburn v. Colledge*, [1897] 1 QB 702 at 706-707.

⁵⁵ *Prudential Insurance Co Ltd v. McBains Cooper*, [2000] 1 WLR 2000 at 2005.

⁵⁶ The position is exactly the same irrespective of the strength or weakness of CFL's claim under the guarantee. The Judge sought to draw certain inferences as to the parties' states of mind from the fact of the compromise (e.g., at [28] "...I infer it was expedient for [Mr Gertner] to seek a compromise..."; at [30]: "...I infer that CFL was confident that it would succeed in its claim...I also infer that CFL had good reason to be confident..."). I do not consider the parties' states of mind to be relevant at all. What matters is the effect of the compromise

62. For this reason, the Judge was quite right to conclude that “no credit was extended beyond the due date for payment”. That is exactly the case: there was simply a promise by Mr Gertner to pay money to CFL.

(c) *The second point: policy reasons for disapplying the Consumer Credit Act*

63. I appreciate that the courts attach particular weight to compromises as an efficient and practical way of settling disputes; and that they are therefore loathe to set them aside. However, this reluctance tends to emerge where one or other of the settling parties seeks to contend that he or she did not intend to settle a particular difference or was duped into settling a claim that he or she never intended to settle. In these circumstances, one can understand the reluctance to allow an old – apparently settled – dispute to be resurrected and for old litigation to stalk the courts once more.

64. I do not consider that this tenderness towards settlements could or should prevent the Consumer Credit Act from applying if according to the terms of the Act, properly construed, it did so apply. The Consumer Credit Act itself provides protections to persons that cannot be waived, as section 173 of the Consumer Credit Act 1974 (which forbids contracting out) demonstrates. It seems to me that if the Consumer Credit Act were to apply to a settlement, then even an express term in that settlement would not be able to exclude the Act, still less a desire on the part of the court to ensure settlements were upheld.⁵⁷

65. The Consumer Credit Act applies to agreements⁵⁸ and it appears to have been accepted by Mr Gertner before me that the Act would not apply to an order of the Court. However, Mr Gertner did not accept that because a compromise was attached to a Tomlin order that fact alone would cause a settlement otherwise subject to the Consumer Credit Act to cease to be so. In this, I consider Mr Gertner to be right.

66. Whilst a Tomlin order causes the proceedings between the parties to remain live for the purposes of enforcement of the settlement, the fact that a contractual settlement is appended to an order staying proceedings save for the purpose of carrying the terms of the settlement into effect does nothing to change the contractual nature of the compromise between the parties. The scheduled terms to a Tomlin order form, notwithstanding the related order of the court, a contractual agreement.⁵⁹ I can see no reason why the fact that a contractual agreement is scheduled to a Tomlin order would cause the Consumer Credit Act to cease to apply if it otherwise did apply.

between them. In this case, this was to dispose of CFL’s claims under the guarantee and replace them with a fresh promise under the Settlement Agreement.

⁵⁷ This was not a case where a dispute to which the Consumer Credit Act applied was being settled. Rather, it was Mr Gertner’s case that the Settlement Agreement was itself a regulated agreement. For this reason, Nugee J’s comments in *Holyoake v. Candy*, [2017] EHC 3397 (Ch) at [500] to [504] are not precisely on point. Nevertheless, Nugee J’s statement at [501] is entirely consistent with the conclusion I have reached.

⁵⁸ See section 8(1) of the Consumer Credit Act 1974.

⁵⁹ *Vanden Recycling Ltd v. Kras Recycling BV*, [2017] EWCA Civ 354 at [45].

(d) **Conclusion**

67. For the reasons I have given, the Settlement Agreement is not regulated by the Consumer Credit Act, and accordingly Mr Gertner's fifth ground of appeal must be dismissed.

(4) **Penalty**

68. The law regarding penalties was authoritatively stated in *Cavendish Square Holding BV v. Makdessi*.⁶⁰ *Chitty* summarises the position as follows:⁶¹

“Where the parties to a contract agree that, in the event of a breach, the contract-breaker shall pay to the other a specified sum of money, the sum fixed may be classified by the courts either as a penalty (which is irrecoverable) or as liquidated damages (which are recoverable). The law on this topic has been fundamentally rewritten by the decision of the Supreme Court in the cases (heard together) of *Cavendish Square Holding BV v. Makdessi* and *Parking Eye Ltd v. Beavis*. A clause is enforceable if it meets the traditional test that it does not extravagantly exceed a genuine attempt to estimate in advance the loss which the claimant would be likely to suffer from a breach of the obligation in question, but the true test is whether the party to whom the sum is payable had a legitimate interest in ensuring performance by the other party and the sum payable in the event of breach is not extravagant or unconscionable in comparison to that interest.”

69. More specifically:

- (1) The question whether a damages clause is a penalty falls to be decided as a matter of construction, and therefore as at the time that it is agreed.⁶²
- (2) The common law considers a penalty clause to be a species of agreement contrary to the policy of the law. Thus, relief from the effects of a penalty is mechanical in effect, involving no exercise of discretion; furthermore, the penalty clause is wholly unenforceable.⁶³
- (3) The test of a penalty is whether the impugned provision is a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation. The innocent party can have no proper interest in simply punishing the defaulter. His interest is in performance or in some appropriate alternative to performance.⁶⁴
- (4) *Chitty* notes⁶⁵ that a court ought to be slow to find that a clause is penal because the doctrine is an interference with freedom of contract. Nevertheless, the basis of the doctrine is the fact that the consequence of breach is, for no good reason, out of proportion with the actual loss, not inequality of bargaining power or

⁶⁰ [2015] UKSC 67.

⁶¹ Beale (ed), *Chitty on Contracts*, 33rd ed (2018) (*Chitty*) at [26-190].

⁶² *Makdessi* at [9].

⁶³ *Makdessi* at [9].

⁶⁴ *Makdessi* at [32].

⁶⁵ At [26-195].

oppression in the negotiation of the contract. As Lords Neuberger and Sumption stated in *Makdessi*:

“33 The penalty rule is an interference with freedom of contract. It undermines the certainty which parties are entitled to expect of the law. Diplock LJ was neither the first nor the last to observe that “The court should not be astute to descry a “penalty clause”: the *Robophone* case, [1966] 1 WLR 1428, 1447. As Lord Woolf said, speaking for the Privy Council in *Philips Hong Kong Ltd v. Attorney General of Hong Kong*, (1993) 61 BLR 41, 59, “the court has to be careful not to set too stringent a standard and bear in mind that what the parties have agreed should normally be upheld”, not least because “any other approach will lead to undesirable uncertainty especially in commercial contracts”.

34 Although the penalty rule originates in the concern of the courts to prevent exploitation in an age when credit was scarce and borrowers were particularly vulnerable, the modern rule is substantive, not procedural. It does not normally depend for its operation on a finding that advantage was taken of one party. As Lord Wright MR observed in *Imperial Tobacco Co (of Great Britain and Ireland) Ltd v. Parslay*, [1936] 2 All ER 515, 523:

“A millionaire may enter into a contract in which he is to pay liquidated damages, or a poor man may enter into a similar contract with a millionaire, but in each case the question is exactly the same, namely, whether the sum stipulated as damages for the breach was exorbitant or extravagant...”

35 But for all that, the circumstances in which the contract was made are not entirely irrelevant. In a negotiated contract between properly advised parties of comparable bargaining power, the strong initial presumption must be that the parties themselves are the best judges of what is legitimate in a provision dealing with the consequences of breach. In that connection, it is worth noting that in the *Philips Hong Kong* case, 61 BLR 41, 57-59, Lord Woolf specifically referred to the possibility of taking into account the fact that “one of the parties to the contract is able to dominate the other as to the choice of the terms of a contract” when deciding whether a damages clause was a penalty. In doing so, he reflected the view expressed by Mason and Wilson JJ in the *AMEV-UDC* case, 162 CLR 170, 194 that the courts were thereby able to “strike a balance between the competing interests of freedom of contract and protection of weak contracting parties” (citing Atiyah, *The Rise and Fall of Freedom of Contract* (1979), chapter 22). However, Lord Woolf was rightly at pains to point out that this did not mean that the courts could thereby adopt “some broader discretionary approach”. The notion that the bargaining position of the parties may be relevant is also supported by Lord Browne-Wilkinson giving the judgment of the Privy Council in the *Workers Trust* case, [1993] AC 573. At p 580, he rejected the notion that “the test of reasonableness [could] depend upon the practice of one class of vendor, which exercises considerable financial muscle” as it would allow such people “to evade the law against penalties by adopting practices of their own.” In his judgment, he decided that, in contracts for sale of land, a clause providing for a forfeitable deposit of 10% of the purchase price was valid, although it was an anomalous exception to the penalty rule. However, he held that the clause providing for a forfeitable 25% deposit in that case was invalid because “in Jamaica, the customary deposit has been 10%” and “[a] vendor who seeks to obtain a larger amount by way of forfeitable deposit must show special circumstances which justify such a deposit”, which the appellant vendor in that case failed to do.”

70. Turning to the Briggs Decision, the Judge identified the point at [45]:

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

71. The Judge then entirely appropriately directed himself to *Makdessi* before concluding:

“48. There is little guidance on what may constitute a legitimate interest, save that there can be no legitimate interest in punishing the defaulting party. The high interest rates that were imposed as a condition for lending to Lanza with very high defaulting rates were in keeping with (i) the nature of the lending that was urgent and very short term and (ii) the nature of the lender which was known as a lender of last resort. Such a lender is only approached in circumstances where the lending is for short term and a borrower is unable to obtain finance elsewhere. I infer that [Mr Gertner] was unable to obtain finance for Lanza from other sources. The failure of [Mr Gertner] to respond positively in repaying the debt due under his guarantee and submitting to the Tomlin Order as a result of a threat to issue an application for summary judgment many years later may go some way to legitimizing CFL’s particular concern or interest in [Mr Gertner’s] performance. Although not expressly stated by [Mr Gertner], the argument must be that CFL had no such legitimate interest and therefore the high interest rates found in the secondary obligation contained in clause 5 of the [Settlement Agreement] were intended to punish [Mr Gertner]. By accelerating payment and requiring compound interest, clause 5 went beyond mere compensation for breach of operative clause 2 of the contract. The full background and legitimacy issue has not been covered by the evidence, but in my judgment I find that the observation made by Lord Hodge JSC in *Makdessi* at [266] pushes the penalty argument below the threshold test of a serious and genuine dispute. This is because “the extent of the disproportion is likely to depend on the bargaining power of the parties and their access to legal advice....the greater the equality of bargaining power, the greater the access to legal advice, the less likely it is that the clause will be held to be a penalty”: Goode on Commercial Law 3.136. As I have mentioned, Mr Kirk did not advance the penalty argument in oral submissions, but has cited *Makdessi* to advance his case. There has been no submission that there was inequality of bargaining power. [Mr Gertner] must accept that he had access to legal advice and was advised by skilled lawyers. In my judgment these factors lead me to conclude that it is not genuinely arguable that there is any disproportion between the parties, or that the [Settlement Agreement] was not entered into with eyes wide open and on careful legal advice.

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

72. The Judge also made the following finding in relation to the argument that the Consumer Credit Act applied at [43] of the Briggs Decision. I consider that it is likely also to have informed his view of the penalty argument:

“Taking account of public policy considerations referred to in *Binder* that (i) there should be finality, (ii) the same party should not be subject to the same claims by the same person more than once, and (iii) encouraging, and when appropriate enforcing any *bona fide* compromise, especially one arrived at under legal advice, I find that the terms of the [Settlement Agreement] were fair and reasonable and I am satisfied that the [Settlement Agreement] a *bona fide* compromise and the Court should not, in the absence of vitiating factors, go behind the agreement.”

73. Although the question of whether a clause constitutes a liquidated damages clause or a penalty is a question of law, it involves the sort of multi-factorial assessment where an appellate court should be slow to interfere with the judgement of the judge at first instance. In this case, the Judge has identified a number of factors that suggest that clause 5 of the Settlement Agreement was not a penalty. In particular:

- (1) Both parties to the Settlement Agreement were legally advised.
- (2) The interest rates in clause 5 are undoubtedly high, but – as the recital in the Settlement Agreement makes clear – they are no more than the interest rates payable by Lanza pursuant to the loan it took out with CFL, which Mr Gertner guaranteed. As the Judge explained at [48] of his judgment, there were good, objective, reasons for CFL to charge high rates of interest and – after all – there was no need for Lanza to have taken the loan, nor for Mr Gertner to have guaranteed it.
- (3) Clause 5 can – subject to one point that I consider in paragraph 74 below – simply be regarded as a (perfectly proper) acceleration provision. By clause 2, Mr Gertner was given time to pay £2,000,000 in settlement of the proceedings: that sum was to be paid by way of instalments in the period between 26 October 2011 and 26 September 2013. One can easily understand a legitimate desire in CFL to ensure that Mr Gertner be incentivised to comply with this timetable for payment by incorporating a provision (clause 5.1) that effectively put CFL in the position it would have been in, had the Settlement Agreement not been concluded.

74. In his oral submissions before me, Mr Kirk emphasised clause 5.2 of the Settlement Agreement as being particularly egregious. This was not an argument that was made before Judge Briggs,⁶⁶ nor indeed was it made in Mr Gertner’s written submissions before me.⁶⁷ In these circumstances, I consider that I should be particularly careful in considering this point, partly because Mr Kirk clearly did not think it worth pressing very hard, but mainly because CFL were not given much notice of the point. Nevertheless, it is a point that arises purely out of the words of the Settlement Agreement and involves no additional facts or evidence. The point is as follows:

⁶⁶ Mr Kirk did not address the Judge on the penalty point orally, but rested on his written submissions. These submissions merely refer to the monthly compounding provision causing the alleged debt to spiral to £33 million: see paragraphs 92-97, and in particular paragraph 97, of Mr Gertner’s written submissions before Judge Briggs.

⁶⁷ See paragraphs 104 to 112 of Mr Gertner’s written submissions before me.

- (1) Assuming no payments at all by Mr Gertner under the Settlement Agreement, I can see no objection to clause 5, for the reasons I have given. A potential problem arises if one assumes some payments by Mr Gertner in accordance with clause 2, which then (in breach of contract) cease or are made late. To take the most extreme example, the clause 5 acceleration would nevertheless occur even if Mr Gertner made every payment under clause 2, and simply failed to pay the £25,000 under clause 3(b) of the Settlement Agreement.
- (2) On this basis, Mr Gertner would have paid £2,000,000 pursuant to the Settlement Agreement, but (through his hypothetical non-compliance with clause 3(b)) would nevertheless have triggered clause 5. The question is how the Settlement Agreement treats this (hypothetical) payment.
- (3) This is the subject-matter of clause 5.2, which provides:

“Any payments having already been made pursuant to paragraph 2 above prior to any breach shall be credited to the sums which, as a result of any breach, have now become due and owing by Mr Gertner under paragraph 5.1 above.”

The meaning of this provision is not very clear. The clause does not actually specify how any monies paid by Mr Gertner prior to any breach should be credited to the sums which “now” become due. For Mr Gertner, the most beneficial would be for the sums to be credited against the principal due, so as to minimise the (very high) charges to interest; and I consider this to be the correct construction of the clause.

- (4) On this basis, due credit for any pre-breach payments is given. Accordingly, I do not consider that this aspect of clause 5 renders the provision a penalty.

75. Although, of course, I appreciate that the actual performance of the agreement is irrelevant to its construction, it is nevertheless instructive to see that the agreement was performed as envisaged and that full and proper credit was given for payments made by Mr Gertner. The parties showed me a schedule showing the capital and interest due from Mr Gertner under the guarantee, calculated on a monthly basis.⁶⁸ I was also provided (separately) with a schedule of payments made by Mr Gertner under the Settlement Agreement. Thus:

- (1) The latter schedule shows two payments in November 2011, one of £325,000 on 3 November 2011 and another of £25,000 on 18 November 2011.
- (2) The former schedule shows the following entries for October, November and December 2011:

Month	Capital element outstanding	Interest charged for the month	Interest charged to date	Total of capital and interest
Oct 2011	£1,700,000	£121,467	£3,212,455	£4,912,455

⁶⁸ A similar schedule showed interest calculated annually: but the monthly calculations appear to reflect the obligations on Mr Gertner (at least after the conclusion of the Settlement Agreement).

Nov 2011	£1,375,000	£113,278	£3,325,733	£4,700,733
Dec 2011	£1,350,000	£118,544	£3,444,277	£4,794,277

As can be seen, the payments made by Mr Gertner are properly credited against the capital outstanding, and Mr Gertner is given full credit for the payments made.

76. For the reasons I have given, the sixth ground of appeal fails. I observe that the point could not have availed Mr Gertner in any event. Had I found clause 5 to be a penalty, then it would obviously have been void and struck out of the agreement by the court's "blue pencil". But the other provisions – notably the obligation in clause 2 to pay £2,000,000 – would have remained and Mr Gertner would have continued to owe a debt well above the bankruptcy threshold.

F. THE DECISION NOT TO STAY THE PROCEEDINGS ON THE PETITION

(1) What is really in issue?

77. Both Mr Gertner and Laser Trust contended that the Judge erred in his interpretation of the good faith rule.⁶⁹ At first sight, it is difficult to see why the good faith rule is relevant at all. The question whether a voluntary arrangement that had, ostensibly, been approved by creditors was vitiated by the fact it had not been concluded in accordance with the good faith rule was not before Judge Briggs. Judge Briggs was considering an anterior question, namely whether to stay the petition so as to enable Mr Gertner's proposal to be considered at a creditors' meeting.
78. The good faith rule became relevant because of the nature of Mr Gertner's and Laser Trust's contentions. It was their contention that the Judge was obliged to stay the proceedings on the petition so that the Second Proposal could be considered by the creditors and voted upon because (as was clear from the support of Laser Trust for the Second Proposal) if the proposal came before the creditors it would be approved and Mr Gertner's bankruptcy avoided.
79. Thus, according to Mr Gertner and Laser Trust, the only basis for not exercising the discretion to stay was if the Second Proposal could not properly be approved. There was, according to Mr Gertner and Laser Trust, no way in which the Second Proposal could not be approved. So far as the formal requirements for approval are concerned, that is clearly right:
- (1) Laser Trust supported the Second Proposal. That much is clear from Laser Trust's position as Second Appellant and opposing creditor.
 - (2) Laser Trust holds over 90% of Mr Gertner's debt by value. Given that fact, three quarters or more of Mr Gertner's creditors would be voting in favour of the Second Proposal in accordance with rule 15.34(6)(a) IR2016.⁷⁰

⁶⁹ See ground 1 of Laser Trust's grounds of appeal (paragraph 40(1) above) and ground 1 of Mr Gertner's grounds of appeal (paragraph 41(1) above).

⁷⁰ See paragraph 30 above.

- (3) Laser Trust is not an associate of the debtor within the meaning of section 435 IA1986.⁷¹ Accordingly, rule 15.34(6)(b) would not be infringed and the Second Proposal would be approved in accordance with the law.⁷² Although before Judge Briggs there was an attempt by CFL to argue that there was a difference between an “associate” within the meaning of section 435 IA1986 and “independence for voting purposes” when considering the approval of an individual voluntary arrangement, that argument was (rightly) not pursued before me. The fact is that section 435 IA1986 sets out in exhaustive detail whose vote counts as an associate and whose vote does not for the purposes of approving an individual voluntary arrangement. I can see no scope for reading into the Insolvency Act a further restriction or limitation on who had the right to vote, even if the point only goes to the “weight” to attribute to the voices on each side of the contest.⁷³
80. Accordingly, the only way in which the Judge could properly refuse the stay was if the good faith rule was engaged, such that Laser Trust’s approval would be vitiated when challenged. Mr Gertner and Laser Trust contended that – on the facts of this case – it was clear that the good faith rule would not be breached, and that the Second Proposal, when approved, would not be capable of being set aside.
81. Hence the first ground of Mr Gertner’s and Laser Trust’s appeals: their contention was that the only basis upon which Judge Briggs had refused the stay was because he had misunderstood the scope of the good faith rule, and had erroneously concluded that the proposal – if approved – would thereafter be set aside by reason of that principle.
82. This is, I consider, something of a mischaracterisation of the Judge’s reasoning. The Judge did not accept that his discretion to stay the proceedings on the petition was in this case so rigidly structured that the only basis for not exercising the discretion was if the proposal could not properly be approved. Rather, the Judge considered that he had a general discretion which entitled him to consider various matters, including whether the approval of Mr Gertner’s proposal would infringe the good faith rule. More specifically:
- (1) It is clear from the terms of the Briggs Decision that he regarded his discretion to stay as a broad one, and that in exercising that discretion he was entitled to take into account a broad range of factors.⁷⁴
- (2) One of those factors was whether, if a meeting of creditors was held, it was likely that a majority by reference to value of votes would pass the proposals.⁷⁵ However, that was not the only, or even the decisive, factor that the court could

⁷¹ See paragraph 31, where the provision in IA1986 is set out.

⁷² See paragraph 30 above.

⁷³ That was the nature of the contention before Judge Briggs, namely that whilst the provisions in IA1986 formally determined voting rights, other factors going beyond IA1986 were relevant to “weight”. I am afraid I find it very difficult to draw the distinction between formal entitlement to vote and factors of weight that diminish or eliminate that very entitlement.

⁷⁴ The Judge articulated his discretion at [114] to [119].

⁷⁵ See [119] and [142].

take into account, and it is clear that the Judge in this case took a number of other factors into account:⁷⁶

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

- (3) In this case, whilst the Judge regarded Laser Trust’s ability to determine the outcome of the creditor’s meeting as a relevant factor to take into account, it was not in this case determinative, and the Judge refused the stay:⁷⁷

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

83. The essence of Mr Gertner’s and Laser Trust’s appeal was, as it seemed to me, that Judge Briggs had:

- (1) Misapplied his discretion so as to take into account irrelevant factors, that is to say, factors other than the only factor that they contended to be relevant, namely whether the creditors’ meeting would (properly in accordance with the good faith rule) approve the Second Proposal.
- (2) Stated the good faith rule too widely, such that he at least appeared to conclude that just as the good faith rule rendered Kaupthing’s vote in favour of the First Proposal invalid, so would Laser Trust’s vote in favour of the Second Proposal also be invalid. Certainly, the Judge appeared to equate Laser Trust’s position in intending to vote for the Second Proposal to Kaupthing’s actual vote in favour of the First Proposal.⁷⁸ Mr Gertner and Laser Trust submitted that the Judge erred in this regard, for Kaupthing benefited through the KSA, obtaining an advantage over other creditors, whereas Laser Trust did not. Thus, the good faith rule was – as the Court of Appeal found – engaged in the former case, but not in the latter.

84. CFL contended that the Judge correctly considered that his discretion was broader than as articulated by Mr Gertner and Laser Trust, and that he correctly took into account a range of factors. As all parties recognised, appealing a general discretion is a difficult matter: an appellate court will give considerable latitude to the judgment of the first instance court, and will not substitute its judgment for that of the first instance court unless it can be shown that the court at first instance has made an error of law,

⁷⁶ At [142].

⁷⁷ At [134].

⁷⁸ See the Briggs Decision at [128] and [133].

disregarded a material factor or took into account an immaterial factor. In its written submissions before me, CFL put the point as follows:

- “111. The Court has a discretion as to whether to make a bankruptcy order on a petition: sections 264(2) and 266(3) IA1986. This much, at least, is common ground.
112. The Appellants say that it is not an appropriate exercise of discretion for the Judge to make a bankruptcy order in the present case. They say that the Judge ought to have adjourned the Petition to await the outcome of the IVA Meeting.
113. An appellate Court should only interfere with a judge’s exercise of discretion if he “has exceeded the generous ambit within which a reasonable disagreement is possible”: see *G v. G (Minors: Custody Appeal)*, [1985] 1 WLR 647 at 651-652.
114. This is therefore a case in which this court should refrain from interfering, unless satisfied that the Judge has made a significant error of principle, or a significant error in the considerations taken or not taken into account.”
85. In these circumstances, it is easy to see why Mr Gertner and Laser Trust placed such primacy on the point that a proposed individual voluntary arrangement that would be approved by creditors should be allowed to go ahead, absent infringement of the good faith rule. That is because, as I have described, that is not how Judge Briggs approached his discretion. Judge Briggs approached his discretion altogether more generally and – if Mr Gertner and Laser Trust are right – on the wrong basis.
86. It therefore seems to me that I must approach the Judge’s decision not to stay the proceedings on CFL’s bankruptcy petition in the following way:
- (1) First, I must consider whether (on the particular facts of this case) the Judge was correct in seeing his discretion as broad or whether Mr Gertner and Laser Trust are correct in their contention that (in this case) the Judge took into account factors that were immaterial.
- (2) Secondly, assuming that Mr Gertner and Laser Trust are correct in their primary contention as to the nature of the Judge’s discretion in this case, whether the Judge erred in his statement of the good faith rule. It seems to me that this question only arises if Mr Gertner and Laser Trust succeed on the first point articulated in the previous sub-paragraph. If the Judge was entitled to take a range of factors into account then, as it seems to me, the question whether he had an unduly broad understanding of the good faith rule is essentially immaterial, provided that the factors he took into account – viewed in the round – were material and not immaterial to his discretion.

I consider these points in turn below.

(2) The nature of the Judge’s discretion in this case

(a) *The nature of the discretion generally*

87. There was no issue between the parties that, in general, the discretion whether or not to stay proceedings on a bankruptcy petition is a general one – obviously to be exercised judicially, but by reference to a range of factors that it would be dangerous to seek to list exhaustively in advance.

88. Section 264 IA1986 describes the circumstances in which the court “may make a bankruptcy order”⁷⁹ and section 266 IA1986 gives a general power to the court to stay proceedings on a petition, on such terms and conditions as it thinks fit.⁸⁰
89. If I may respectfully say so, the Judge clearly and correctly identified the general nature of the discretion in paragraphs [114] to [119] of his judgment. In particular, he cited the decision of Mr Richard Sykes, QC, sitting as a Deputy Judge of the High Court, in *Re Leigh Estates (UK) Limited*.⁸¹

“Although a petitioning creditor may, as between himself and the company, be entitled to a winding up order, *ex debito justitiae*, his remedy is a “class right”, so that, where creditors oppose the making of an order, the court must come to a conclusion in its discretion after considering the arguments of the creditors in support of and opposing the petition: see *Re Crigglestone Coal Company Ltd*, [1906] 2 Ch 327, in particular the statements of principle of Buckley J at first instance and section 195 of the Insolvency Act 1986...

It is plain from the well-known authorities on the subject that, where there are some creditors supporting and other opposing a winding up petition, it is for the court to decide, as a matter of judicial discretion, what weight to attribute to the voices on each side of the contest...”

(b) Factors taken into account by the Judge

90. CFL was able to frame an impressive list of factors that pointed in favour of granting the petition and making Mr Gertner bankrupt, rather than permitting (through a stay of the proceedings on the petition) the Second Proposal to be considered at a creditors’ meeting. These factors, which the Judge accepted and took account of, included:
- (1) The fact that the dividend proposed by Mr Gertner in the Second Proposal was so low as to be derisory. The dividend proposed is described in the Briggs Decision.⁸²

“Two creditors have agreed to defer their claims. The first (an associate as defined by the Insolvency Act) his father and the second Laser Trust, which has agreed to defer any distribution for the first £150,000. On the basis of the Laser Trust’s debt as at 20 March 2019, when it stood at £799,360,216, the return from the Arrangement will be...approximately £280,000 or £0.035 in the pound. A comparison with bankruptcy based on the disclosed assets is that creditors (save for the deferred creditors) will receive a dividend of £0.0043 (although following the submission of CFL’s proof of debt, this sum has been re-calculated to £0.0028) if the Arrangement is passed and nothing in bankruptcy. It is on this basis that Laser Trust “considers that [the] proposal represents the best prospect of a return to creditors...and intends to vote in favour of the IVA...”. As the Laser Trust holds “around 90% of the unconnected indebtedness” and intends to vote in favour of the Arrangement, the proposals will be passed at a meeting.”

The Judge considered that “the return offered in the proposals for the Arrangement is so small as to be properly regarded as *de minimis*. In the absence of a side agreement, an objective creditor would not be able to, without any or

⁷⁹ Section 264(2) IA1986. Emphasis added.

⁸⁰ Section 266(3) IA1986, quoted in paragraph 18 above.

⁸¹ [1994] BCC 292 at 294.

⁸² At [124].

any proper investigation that extends beyond what is ordinarily required by a nominee, conclude that the Arrangement will provide the best outcome for creditors (as stated by Mr Gertner). There is little proportionate economic benefit to be gained by agreeing to the Arrangement.”⁸³

- (2) The fact that bankruptcy would involve a fuller investigation of Mr Gertner’s asset position, than could be carried out by the nominees under the Second Proposal. The Judge was careful not to criticise the nominees: he expressly found that the investigations undertaken by the nominees “were reasonable in the circumstances”.⁸⁴ However, the Judge’s point was that further – more intrusive – investigations could take place by Mr Gertner’s trustee in bankruptcy, and that this case warranted such investigation.⁸⁵ In particular, although in the Second Proposal Mr Gertner was in effect saying he had no assets, he showed an ability to procure the discharge of third party debts when it suited him:

“The sums to be paid to the creditors through the proposal had been described as *de minimis*. CFL forcefully argue that the acceptance of the proposals by the passing of a resolution voted on by Laser Trust will force it to accept a *de minimis* payment when it has been out of its money for 8 years. It contends that it is unreasonable, having in mind, first there has been no objective investigation into the affairs of [Mr Gertner], and, secondly, the unexplained inability of [Mr Gertner] to settle with some creditors by directing that the proceeds of the arbitration be shared among a few. Ms Blom-Cooper [CFL’s solicitor] explains in her second witness statement that in addition to the KSA there has been:⁸⁶

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

- (3) The fact that the First Proposal – which had been approved by Mr Gertner’s creditors – had been upset because of the KSA, which – as the Court of Appeal found – caused Kaupthing’s approval of the First Proposal to infringe the good faith rule. Laser Trust only became Mr Gertner’s creditor through the operation of the KSA. It might very well be said that if Kaupthing’s approval was tainted, then so should the approval of its assignee, Laser Trust:⁸⁷

“The Laser Trust is in the same or nearly the same position as Kaupthing. It seeks to benefit from an *ad hoc* private arrangement as described by Patten LJ. That benefit will mean that it, as the largest and most influential unsecured creditor, will vote for an outcome for which it had little or no interest...”

⁸³ Briggs Decision at [129]. See also [125].

⁸⁴ Briggs Decision at [99].

⁸⁵ Briggs Decision at [100].

⁸⁶ Briggs Decision at [125].

⁸⁷ Briggs Decision at [128]. See also [133]: “It is not unreasonable for the Court to ask, when exercising its discretion, if anything has altered save for the assignment?”

- (4) Laser Trust, itself, provided an unsatisfactory account of its involvement in Mr Gertner's affairs. In a passage that was criticised by Mr Gertner and Laser Trust, the Judge said this:⁸⁸

“The evidence of Mr Steinberg and Mr Hassan is not reliable, and I have said is of little or no substance. The evidence cannot be relied upon to give a true account of the reasons for paying US\$6 million for the Kaupthing debt, the reason given for the desire to vote in favour of the Arrangement or that the Laser Trust is free from the influence of a Gertner Family Trust or of [Mr Gertner]. In these matters there has been a failure to provide a “complete picture”, a good faith requirement. There has been a failure to provide any records, any account as to the source of the US\$6 million or an analysis of the Trust's accounting position that, on its own evidence, leads it to conclude that its deferred return from the proposed Arrangement is a good return. The reason for this absence of evidence is that the Laser Trust has no accounts for financial statements...”

In their grounds of appeal, Laser Trust and Mr Gertner contended that the Judge had erred in rejecting this evidence without requiring cross-examination.⁸⁹ I do not accept this. It seems to me that the Judge was, perfectly properly, assessing the limits of the evidence adduced by Laser Trust, and finding that the evidence could have been fuller and franker. His assessment of these limits entitled him to conclude that Laser Trust had not provided the court with a complete picture. I dismiss Laser Trust's second ground of appeal and Mr Gertner's fourth ground of appeal for this reason.

91. I will turn to consider the extent to which these factors were material to the Judge's discretion in the next section. But certainly the material before the Judge entitled him to reach the conclusions on the facts that he did. There is one point, however, where I consider the Judge may have gone too far. On two occasions in his judgment, the Judge appears to have found that Laser Trust was itself collaterally benefiting in a manner that differentiated itself from Mr Gertner's other creditors. In short, Laser Trust stood in the same position as Kaupthing. Thus, the Judge noted at [113]:⁹⁰

“...it is also clear...that Kaupthing was disabled from voting due to a breach of the good faith principle. At that time there had been no assignment to Laser Trust. The only party who could vote in respect of the Kaupthing debt was Kaupthing. That is why the Court observed that a further creditors' meeting “would necessarily result in the rejection of the Proposal”, but went on to say “unless Laser Trust were able to vote in favour of it on the basis of the KSA”.⁹¹ The similarity of the proposals and the benefits available to the Laser Trust but not the other creditors are matters that should be considered when exercising discretion.”

Later in the judgment, the Judge said:⁹²

“128. The Laser Trust is in the same or nearly the same position as Kaupthing. It seeks to benefit from an *ad hoc* private arrangement as described by Patten LJ. That benefit will

⁸⁸ At [130].

⁸⁹ Laser Trust's second ground of appeal (paragraph 40(2) above) and Mr Gertner's fourth ground of appeal (paragraph 41(4) above).

⁹⁰ Emphasis added.

⁹¹ See [96] of the Keyser Decision.

⁹² Emphasis added.

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

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

It is important to be very clear as to what the Judge is here saying:

- (1) Although, at first reading, it appears that the Judge is finding that Laser Trust had precisely the same illegitimate inducement in voting in favour of the Second Proposal as Kaupthing has in relation to the First Proposal, I do not consider that this is in fact the Judge's meaning.
- (2) If this was the Judge's meaning, he was plainly wrong. Whilst Laser Trust was a party to the KSA, the benefits and obligations arising out of the KSA as they accrued respectively to Kaupthing and Laser Trust were very different. Kaupthing and Laser Trust stood, in effect, on opposite sides. Kaupthing, amongst other things, received £6 million from Laser Trust;⁹³ Laser Trust, on the other hand, received an assignment of Kaupthing's rights:
 - (a) Against Crosslet Vale under the loan between Kaupthing and Crosslet Vale;

⁹³ See paragraphs 7(13)(a) to (c) above.

- (b) Against Mr Gertner under the guarantee of Crosslet Vale’s debts under that loan.⁹⁴
- (3) Rather, I consider that – when referring to Laser Trust’s different status, when compared to those of other unsecured creditors – the Judge was referring to claims that Laser Trust had against Crosslet Vale pursuant to the rights assigned to it by the KSA. (I am prepared to assume that, if Crosslet Vale were sued by Laser Trust, its obligations might be satisfied by monies coming from the arbitration in Israel,⁹⁵ although I do not think I was taken to any evidence in this regard. I cannot see that it matters how Crosslet Vale would satisfy its obligations to Laser Trust.)

This is how I understand the passages that I have quoted above.

(c) *The nature of the discretion in this case: material and immaterial factors*

92. I consider the scope of the good faith rule separately in Section F(3) below. The question that I consider now is the extent to which – apart from the good faith principle – the Judge was entitled to take these factors into account when exercising his discretion under section 266(3) IA1986 to stay proceedings on a petition.
93. I conclude that – in this case – none of the factors I have identified in paragraphs 90 to 91 above were factors that the Judge was entitled to take into account when reaching his decision to stay (or not stay) the proceedings on CFL’s petition. I have reached this conclusion for the following reasons:
- (1) It is entirely right that a creditor’s bankruptcy petition and the approval of a proposed individual voluntary arrangement at a creditors’ meeting both involve the creditors acting as a class. It is important that neither the bankruptcy of the debtor nor the approval of a voluntary arrangement proposed by a debtor differentiate improperly as between different unsecured creditors.
- (2) Thus, in *Re Leigh Estates (UK) Limited*, Mr Sykes declined to permit a creditor’s petition to proceed for the following reason:⁹⁶

“If I assume that the Common Council are correct in their claim that, following a winding-up order, they are entitled to recover rates from the receivers or the debenture holders I find that their reason for seeking to wind up the company is not to swell the estate of the company or otherwise to improve the lot of the unsecured creditors but rather to gain for themselves a preference over the secured and unsecured creditors alike. It might reasonably be said that this attitude is not acting in the interests of the class of unsecured creditors. It is clear that in other “class” situation the voice of one who votes against the interests of the class is disregarded: see, e.g. *Re Alabama, New Orleans, Texas & Pacific Junction Railway Co*, [1891] 1 Ch 213, *Re Holders Investment Trust*, [1971] 1 WLR 583. Similarly, it seems to me, I should disregard the voice of the Common Council.”

⁹⁴ See paragraphs 7(10) and 7(13)(e) above.

⁹⁵ Referred to by the Judge as the Gertler Arbitration: see paragraph 7(13)9d) above.

⁹⁶ [1994] BCC 292 at 295.

- (3) I appreciate that *Re Leigh Estates (UK) Limited* concerned the winding up of a company, and not a bankruptcy petition. Nevertheless, it seems to me that Mr Sykes' statement reads across very well to the bankruptcy context and, indeed, provides a very clear articulation for the basis of the good faith rule, which I shall consider in due course.
- (4) It is dangerous to place too much weight or emphasis on different "classes" of unsecured creditor. Unlike (for example) schemes of arrangement, where it is necessary to consider whether different classes of interest need to be represented at different meetings,⁹⁷ we are here concerned with a single class, the question being whether the vote of one particular member of the class should be accorded less or no weight. Mr Sykes articulated the manner in which the court will consider the voice of a creditor seeking the bankruptcy of a debtor for reasons contrary to the interests of the class: that voice will be disregarded.
- (5) Here, we are concerned with the converse situation, where a creditor – having control of the votes necessary to approve an individual voluntary arrangement – seeks the stay of a petition so that the creditors' meeting can take place, and arrangement approved. Where it is clear that this will be the outcome, it is not for the judge to stand in the way of the approval unless (by reason of the good faith principle) that approval would be tainted.
- (6) According to the statutory scheme laid out in the Insolvency Act and the Rules, it is for the majority of unsecured creditors, as defined by that scheme, to determine whether the debtor's proposal should be approved or not. Where it is clear that such approval be given (as was the case here, and as the Judge clearly appreciated⁹⁸), it is not for the Judge to second-guess that approval by making value judgments as to the level of the dividend,⁹⁹ the benefits of a more detailed investigation of the debtor's affairs,¹⁰⁰ the fact that the creditor is an assignee of an earlier creditor who breached the good faith rule,¹⁰¹ the fact that that creditor has given an unsatisfactory account of its circumstances,¹⁰² or has alternative means of satisfying the debt that is owed to it¹⁰³ unless these factors may permissibly be taken into account under the statutory scheme laid out in IA1986 and IR2016. In this case, at least, that means that unless the good faith rule would be engaged if Laser Trust voted in favour of the Second Proposal, the Judge was obliged in the exercise of his discretion to stay the proceedings on CFL's petition.
- (7) In this case, the Second Proposal was made by a person not an undischarged bankrupt who eschewed the interim order process laid down in sections 252 to 256 IA1986. I have considered whether the other routes to obtaining an individual

⁹⁷ See section 896 of the Companies Act 2006.

⁹⁸ See, e.g. [124] of the Briggs Decision: "As the Laser Trust holds "around 90% of the unconnected indebtedness" and intends to vote in favour of the Arrangement, the proposals will be passed at a meeting."

⁹⁹ The factor considered at paragraph 90(1) above.

¹⁰⁰ The factor considered at paragraph 90(2) above.

¹⁰¹ The factor considered at paragraph 90(3) above.

¹⁰² The factor considered at paragraph 90(4) above.

¹⁰³ The factor considered at paragraph 91 above.

voluntary arrangement (summarised in paragraphs 19 to 29 above) shed any light on the nature of the Judge's discretion in this case:

- (a) I do not consider that I derive any assistance from the interim order regime. That regime provides protection from creditors to a debtor who can persuade the court that he or she is deserving of that protection. There are certain clear limits on the court's discretion in such a case – notably that no previous application for an interim order has been made within the period year¹⁰⁴ – but there is nothing to suggest that the court may permissibly take into account the factors that I have set out in paragraphs 90 and 91 above in a case such as this, where the approval of the proposal is a foregone conclusion.
 - (b) On the other hand, it does seem to me that the fact that an undischarged bankrupt can obtain the benefit of an individual voluntary arrangement is significant. The effect of the Judge's order refusing a stay and making Mr Gertner bankrupt simply means that there will, in short order, be a post-bankruptcy individual voluntary arrangement on lines similar to those contained in the Second Proposal. In short, refusing the stay simply postpones the inevitable.
- (8) Subject, then, to the scope of the good faith rule, which I turn to now, I conclude that the factors that the Judge took into account when deciding not to order a stay of the proceedings on CFL's bankruptcy petition were immaterial ones and that the Judge therefore erred in the exercise of his discretion. Subject, again, to the scope of the good faith rule, I consider that Mr Gertner's second and third grounds of appeal should succeed.¹⁰⁵

(3) The good faith rule

94. The good faith rule was described in paragraphs 34 to 38 above. In my judgment, it is clear law that:
- (1) The rule is not a self-standing rule of the common law but an aspect of the court's statutory powers to police the approval of voluntary arrangements under sections 262 IA1986 and 276 IA1986.¹⁰⁶
 - (2) So far as creditors are concerned, the *rationale* for the good faith rule was – as I have noted – well-articulated in another context by Mr Sykes.¹⁰⁷ Approving creditors must act in the interests of the class of unsecured creditors and so – if there are factors operating on an approving creditor's judgment that cause that creditor to be differentiated from the class – that creditor's approval of the arrangement must be disregarded and the arrangement so approved set aside.

¹⁰⁴ See section 255(1)(c) IA1986.

¹⁰⁵ See paragraphs 41(2) and 41(3).

¹⁰⁶ These provisions are described in paragraph 33 above. The statutory basis for the good faith rule is clear from the law described in paragraphs 36 to 38 above.

¹⁰⁷ See paragraphs 93(2) and (3) above.

- (3) However, the scheme of the Insolvency Act allocates to the creditors considerable latitude. It is for them, not for the court, to determine whether a proposed arrangement should be acceded to or not. The good faith rule focuses not so much on the merits of the proposal (which is a matter for the creditors) but on the question of whether the creditor is acting in accordance with the interests of the class.
- (4) It is significant that the Insolvency Act has articulated – with great specificity – those who are and those who are not “associates of the debtor”.¹⁰⁸ The courts cannot, without doing violence to the scheme laid down by Parliament, incorporate into the good faith rule factors concerning a creditor’s motivation in voting for an arrangement. The factors that can render an approving creditor’s approval void are, therefore, limited.
- (5) It is also significant that the starting point is that “every proposal for an individual voluntary arrangement be characterised by complete transparency and good faith by the debtor”.¹⁰⁹ The focus of the rule – at least in the first instance - is on the good faith of the debtor, which of course implies transparency. That transparency extends to arrangements the debtor has made with particular creditors that serve (i) to improve the position of that creditor as against the class and (ii) as a result vitiate the creditor’s approval of the arrangement. But it is important to appreciate that the initial and indeed primary focus is on the conduct of the debtor. But the debtor’s conduct may impugn the conduct of a creditor, and it is important .
- (6) This was emphasised in *Kapoor v. National Westminster Bank plc*:¹¹⁰ the Court of Appeal Decision:¹¹¹
- “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 assessment, 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 1986 Act, it was expressly provided in rule 5.23(4) of the 1986 Rules¹¹² 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.”
- (7) The courts are sensitive to the rules regarding “associates” being circumvented. Thus, for instance, it is an infringement of the good faith rule for an associate of the debtor to circumvent the rules regarding the votes of associates to assign his

¹⁰⁸ See paragraph 31 above, where the relevant provisions are set out.

¹⁰⁹ To quote, with emphasis added, from Judge LJ: see paragraph 37 above.

¹¹⁰ [2011] EWCA Civ 1083 at [67], cited with approval in the Court of Appeal Decision at [70].

¹¹¹ At [67].

¹¹² Now rule 15.34(6) IR2016. See paragraph 30 above.

or her debt to a non-associate purely to avoid these rules. This is what happened in *Kapoor*:

“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) [of the 1986 Rules]. 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 £4 million 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 of 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...”

95. Turning, then, to the Judge’s consideration of the good faith rule, I conclude that he erred in his statement of its scope and that, as a result, he took into account as relevant factors that are in fact immaterial to the application of the rule. I have reached this conclusion for the following reasons:

- (1) It is not correct to define the good faith rule as a general rule or principle of good faith or transparency.¹¹³ As Judge LJ stated, and as was noted in paragraph 94(5),

¹¹³ Briggs Decision at [74] to [76]. The Judge relied on a principle of good faith articulated in an altogether different context by Bingham LJ in *Interfoto Picture Library Limited v. Stiletto Visual Programmes Ltd*, [1989] QB 433 at 439-445. One might also, in this regard, refer to the general implied term to perform in good faith articulated by Leggatt J in *Yam Seng Pte Ltd v. International Trade Corp Ltd*, [2013] EWHC 111 (QB). In this case, as has been described, the good faith principle has its roots and basis in the Insolvency Act and the rules made under it. There is no suggestion in the case law that the good faith principle applies, to equal extent and effect, to all persons involved in a voluntary arrangement including, without more, the unsecured creditors.

the obligation of transparency and good faith falls, in the first instance, on the debtor, who is obliged to act transparently and in good faith in order to escape the full and rigorous consequences of a bankruptcy order.¹¹⁴

- (2) Of course, creditors are exposed to the effects of the good faith rule where, by some arrangement with the debtor, they cease to have interests that are not of an identity with the general class of unsecured creditor.¹¹⁵ That, as the Court of Appeal held in the Court of Appeal Decision, was Kaupthing's position:¹¹⁶

"...The objection to the KSA is that it provided Kaupthing with a collateral advantage not available to the other creditors which placed it in a position of conflict with the interests of the other creditors..."

- (3) This was not, however, inevitably the position of Laser Trust. Laser Trust took an assignment of certain choses in action owned by Kaupthing (notably Kaupthing's claims against Crosslet Vale pursuant to the loan facility and Kaupthing's claims against Mr Gertner pursuant to Mr Gertner's guarantee of that facility) and so became an unsecured and (within the meaning of the IA1986) unassociated creditor of Mr Gertner:

- (a) It is difficult to discern the "collateral advantage" derived by Laser Trust from the KSA. Laser Trust as simply assigned – for a payment – certain rights, one of which constituted Laser Trust Mr Gertner's unsecured creditor.
- (b) Nor can it be said, in this case, that the assignment was intended to circumvent the voting rules regarding the approval of the Second Proposal. Both Kaupthing and Laser Trust were, in this sense, unassociated creditors.
- (c) I do not consider that the law, as it presently stands, causes one creditor, who is a party to an agreement with another creditor that confers an illicit collateral benefit on that latter creditor, to infringe the good faith rule without more.¹¹⁷ Obviously, Laser Trust's participation in the KSA needs to be carefully considered, since the KSA vitiated Kaupthing's approval of the First Proposal. However, before Laser Trust's intended approval of the Second Proposal can similarly be held to infringe the good faith rule, I consider that it is necessary to show that the KSA conferred on Laser Trust an illicit collateral benefit.
- (d) The assignment to Laser Trust did render Laser Trust a creditor not merely of Mr Gertner, but also of Crosslet Vale.¹¹⁸ I accept that this will have

¹¹⁴ See *Kapoor* quoted at paragraph 94(6) above.

¹¹⁵ See paragraph 94(2) above.

¹¹⁶ At [80].

¹¹⁷ As to this, see Mr Gertner's written submissions before me at paragraph 48. I do not, however, consider that I am particularly assisted by the US law cited in this paragraph. It seems to me that the true scope of the good faith rule has to be derived from the rationale for it in the Insolvency Act and the rules made under it.

¹¹⁸ See paragraph 91(3) above.

differentiated Laser Trust from Mr Gertner's other creditors, who will not have had a self-standing claim against Crosslet Vale. I also accept (as is obvious) that Laser Trust only acquired these rights through the KSA. Even so, it is very difficult to see how this separate claim, transferred as it was from Kaupthing, can constitute an illicit collateral benefit triggering the good faith rule:

- (i) It is clear law that, in order to be caught by the good faith rule, the benefit to the creditor must arise out of the arrangement between the debtor and the creditor agreed as part of the voluntary arrangement process. It is not enough for the benefit to arise out of rights pre-dating the debtor's insolvency.
- (ii) This is illustrated by what were referred to before me as the **football cases**.¹¹⁹ In the Court of Appeal Decision, Patten LJ described these decisions at [74] to [78]. The facts of the *Portsmouth* case were described at [77]:

"...Mann J heard a section 6 application by HMRC in which the Premier League rules requiring the payment of football creditors in full were challenged as unlawful and contrary to public policy because they contravened the principles of *pari passu* distribution and the anti-deprivation principle. The football creditors had already been paid in part by the Premier League out of monies from television rights and the balance was due to be paid sometime after the approval of the CVA. Under the Premier League rules which apply during the administration or insolvency of a club, the right to receive monies from television rights is suspended and the League is entitled at its discretion to use the monies to pay the football creditors. The monies therefore cease to be payable to the club or to its administrators. Notwithstanding this, the football creditors were allowed to vote in respect of their claims at the meeting even though the CVA assumed that they would be paid in full in due course by the Premier League. As part of a wide challenge to the proposal, HMRC contended that the proposal was unfairly prejudicial to its interests as a creditor because it approved past and future payments in full to the football creditors and also involved a material irregularity insofar as football creditors were permitted to vote notwithstanding that they had or would receive payment of their debts in full."

Mann J held that there was no irregularity in the footballers voting for the CVA – even though they would receive payment in full where the CVA was approved or not – because the footballers did have an interest in the CVA being approved:¹²⁰

"Why should those with no interest in the CVA at all, and who were being paid outside it, be entitled to force unwilling creditors into a CVA which is not approved by a requisite majority of that smaller class? However, as

¹¹⁹ The decisions in *IRC v. Wimbledon Football Club Ltd*, [2004] EWCA Civ 655 and *HMRC v. Portsmouth City Football Club Ltd*, [2010] EWHC 2013 (Ch).

¹²⁰ *HMRC v. Portsmouth City Football Club Ltd*, [2010] EWHC 2013 (Ch) at [74], quoted in the Court of Appeal Decision at [78].

Mr Sheldon pointed out, that is not quite this case. The football creditors do have an interest in the CVA being approved. If it is not approved, and if there is a liquidation, then their contracts of employment come to an end. They may or may not get ones that are as favourable in that event, but if they continue into the new company after the CVA then the balance of their present contracts will be honoured.”

Although Patten LJ saw a number of obvious parallels between the arrangements in the football cases and the benefits Kaupthing derives from the KSA, he considered that there was a material difference between the two:¹²¹

“The material difference between this case and the football cases is that the provision made for the football creditors was carried out in conformity with rules which pre-dated the insolvency of the clubs in question. It was a standard published requirement which protected a defined class of creditors and applied to all clubs in the event of insolvency. It was not an *ad hoc* private arrangement designed to give the largest and most influential creditor an additional financial advantage not made available to any other creditor in the IVA.”

- (iii) It is thus clear that had the KSA never been agreed, and had Kaupthing (as a creditor of both Crosslet Vale and Mr Gertner) voted to approve the First Proposal, Kaupthing’s vote would not have infringed the good faith rule:¹²²

“Before the KSA, Kaupthing held debts owed by Crosslet Vale as principal debtor...and Mr Gertner as Guarantor...Those were ordinary debts which were assignable. The fact that Kaupthing could look to the Crosslet Vale Debt to recover its debts in the event of Mr Gertner’s insolvency would not have prevented Kaupthing voting the Gertner Debt. The existence of a route to payment outside the insolvency is inherent wherever there is both a principal debtor and guarantor, and the rule against double proof is there to ensure that the creditor cannot prove in respect of the same debt twice.”

- (iv) The assignment of these claims to Laser Trust cannot, in the circumstances, affect Laser Trust’s right to vote in relation to the Second Proposal, when (holding exactly the same rights and no more) Kaupthing would not itself have been prevented from voting its approval in relation to the First Proposal.

- (4) In short, for the reasons given, I do not consider that the fact that Laser Trust was an assignee of an earlier creditor who breached the good faith rule¹²³ nor the fact that Laser Trust has – by way of its claim against Crosslet Vale - an alternative means of satisfying the debt that is owed to it¹²⁴ to be sufficient, whether in themselves or in combination to bring Laser Trust within the ambit of the good

¹²¹ At [81].

¹²² Mr Gertner’s written submissions at paragraph 33.

¹²³ The factor considered at paragraph 90(3) above.

¹²⁴ The factor considered at paragraph 91 above.

faith rule. The other factors considered – the level of the dividend,¹²⁵ the benefits of a more detailed investigation of the debtor's affairs,¹²⁶ and the fact that that creditor has given an unsatisfactory account of its circumstances¹²⁷ – clearly cannot do so. I have considered whether the fact that Laser Trust has given an unsatisfactory account of its circumstances justifies an inference that some other, illicit, collateral benefit exists, sufficient to trigger the good faith rule: I can see no sufficient evidence to justify such an inference, and the Judge did not himself draw this inference.

96. In these circumstances, since the Second Proposal would, inevitably, be approved and since there is no basis for any suggestion that the good faith rule would cause Laser Trust's approval (which is determinative) to be tainted, the Judge exercised his discretion on the basis of immaterial factors and his decision not to stay the proceedings on the CFL petition was in error and must be set aside. Laser Trust's first ground of appeal succeeds,¹²⁸ as do Mr Gertner's first, second and third grounds.¹²⁹

G. DISPOSAL

97. For the reasons given in this judgment, the appeals of Laser Trust and Mr Gertner succeed¹³⁰ and the Judge's order must be set aside. The proceedings on the CFL petition for bankruptcy must be stayed in favour of a creditors' meeting at which Mr Gertner's Second Proposal can be considered by his creditors.

¹²⁵ The factor considered at paragraph 90(1) above.

¹²⁶ The factor considered at paragraph 90(2) above.

¹²⁷ The factor considered at paragraph 90(4) above.

¹²⁸ See paragraph 40(1) above.

¹²⁹ See paragraphs 41(1) to (3) above.

¹³⁰ Specifically, Laser Trust's first ground succeeds (paragraph 96 above) but its second ground 2 fails (paragraph 90(4) above). Mr Gertner's first, second and third grounds succeed (paragraph 90(4) above); Mr Gertner's fourth, fifth and six grounds all fail (paragraphs 90, 67 and 76 above).

ANNEX 1

(footnote 1)

GLOSSARY OF NAMES AND TERMS USED IN THE JUDGMENT

TERM	MEANING	FIRST USE IN THE JUDGMENT
Briggs Decision	The judgment of Chief Insolvency and Companies Judge Briggs, dated 15 July 2019, under appeal.	§6(3)
CFL	CFL Finance Limited, the petitioning creditor and Respondent in the Appeal	§1
Chitty	Beale (ed), <i>Chitty on Contracts</i> , 33 rd ed (2018).	§68 fn 61
Court of Appeal Decision	An appeal from the Keyser Decision, heard by the Court of Appeal, [2018] EWCA Civ 1781.	§6(2)
Crosslet Vale	Crosslet Vale Ltd, a company owned and/or controlled by the Gertner family.	§7(10)
First Proposal	The proposal made by Mr Gertner for a voluntary arrangement, which was approved by Mr Gertner's creditors on 17 December 2015, but set aside by order of Judge Keyser (affirmed on appeal).	§7(6)
football cases	The decisions in <i>IRC v. Wimbledon Football Club Ltd</i> , [2004] EWCA Civ 655 and <i>HMRC v. Portsmouth City Football Club Ltd</i> , [2010] EWHC 2013 (Ch).	§95(3)((d)(ii)
IA1986	The Insolvency Act 1986	§1 fn 2
IR2016	The Insolvency (England and Wales) Rules 2016.	§16
Kaupthing	Kaupthing hf, an Icelandic public limited company and a (former) creditor of Mr Gertner.	§7(10)
Keyser Decision	The judgment of His Honour Judge Andrew Keyser, QC, dated 27 January 2017, [2017] EWHC 111 (Ch).	§6(1)
KSA	The Kaupthing Settlement Agreement.	§7(12)
Lanza	Lanza Holdings Ltd, a company owned and/or controlled by the Gertner family.	§7(2)
Laser Trust	The Second Appellant, a creditor of Mr Gertner opposing the petition.	§2
Order	The order of Chief Insolvency and Companies Court Judge Briggs dated 15	§1

	July 2019	
Second Proposal	The proposal made by Mr Gertner and supported by Laser Trust, for a voluntary arrangement to be considered at a creditors' meeting.	§3(2)
Settlement Agreement	The agreement setting the proceedings between CFL and Mr Gertner, which was scheduled to the Tomlin Order.	§7(3)
Tomlin Order	The Tomlin order made in proceedings commenced by CFL against Mr Gertner.	§7(2)