



Neutral Citation Number: [2021] EWHC 2217 (Ch)

Case No: CR-2021-000675

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

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

Date: 04/08/2021

Before :

SIR ANTHONY MANN
Sitting as a High Court Judge

IN THE MATTER OF PROVIDENT SPV LIMITED
AND IN THE MATTER OF THE COMPANIES ACT 2006

Barry Isaacs QC, Adam Goodison and Ryan Perkins (instructed by **Clifford Chance**) for the
Applicant Company
Philip Hinks (instructed by **McCarthy Denning**) for the **Customer Advocate**

Hearing date: 30th July 2021

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.

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SIR ANTHONY MANN

Sir Anthony Mann:

Introduction

1. This is an application for the court sanction of a scheme of arrangement under Part 26 of the Companies Act 2006 (“the Scheme”). The court’s sanction is sought pursuant to a Part 8 claim form dated 12 April 2021. The application is made by Provident SPV Ltd (“the Company”), a special purpose vehicle company set up to assume liability for certain debts of two companies, namely, Provident Personal Credit Ltd and Greenwood Personal Credit Ltd (“the Lenders”), which are companies in the Provident Finance group of companies (“the Group”). Mr Barry Isaacs QC appeared for the applicant company.
2. An outline of the background to the Scheme is as follows. The Lenders are companies whose business was the provision of small loans to individuals on low or moderate incomes. The interest rates charged were very high. Those companies now perceive that large numbers of their borrowers, or guarantors of the borrowers, have or may have claims against them based on a number of statutory and other provisions, and in particular that they failed to carry out checks as to the creditworthiness of proposed borrowers or to assess the suitability of proposed loans or guarantees. Over a period of years various borrowers/guarantors have brought claims, but recently the number of claims being brought has increased to a level which has caused the group to consider how, and whether, it can deal with them. Until 2018, the number of claims made for redress from “Redress Claimants” was about 2000 per year. Since April 2018, however, the number has risen dramatically to 60,000 in the year ended 15 March 2021. It seems that claims management companies have played an increasingly prominent role in the process. Since April 2007 the Lenders have paid over £80m to settle claims, funded by the overall parent company of the Group (Provident Finance plc).
3. It is not known how many more people might wish to assert claims. In the period to which the Scheme applies (6 April 2007 to 17 December 2020) approximately 4.2 million customers borrowed money. However, it is not considered that all of those customers would wish to make a claim. The best estimate that has been made is that between 10% and 30% of those loans might attract Redress Claims against the Lenders. The assessed worst possible case of liability amounts is said to exceed £3 billion but, again, it is not considered likely that claims will be made in anything like that sum. Nonetheless, the anticipated level of claims could well exceed £1 billion. The Lenders are said to be not in a position to pay liabilities of that order (though some may take effect as a set-off against outstanding loan amounts).

The proposed Scheme

4. The group proposes the Scheme in order to deal with these liabilities, and liabilities for fees to the Financial Ombudsman Service (which fees are relatively small compared to the potential liability to borrowers). The essential features of the Scheme are as follows.
5. The Company has been set up as a special purpose vehicle. It has by deed poll assumed liability for the claims or potential claims of borrowers against the two Lenders, and for outstanding fees to the Financial Ombudsman Service. It is those liabilities which are

to be the subject of the proposed Scheme. The Company is to be funded to the tune of £50 million by Provident Finance plc, the ultimate parent of the Lenders, to provide a pool from which the liabilities can be paid. A mechanism is proposed for Redress Claimants to submit claims, and for the adjudication of claims both as to their validity and value, the details of which do not matter for these purposes. It suffices to say now that I consider the mechanism to be fair in the circumstances. Claims against the Lenders will be released and substituted by claims against the Company. There is a time bar on claims of six months from the commencement of the Scheme. Any claimant who does not make a claim within that period has his or her claim barred. On the best estimates of the Company at present, it is thought that those with claims will not recover more than 6% of their claims under the Scheme. Since the typical claim is likely to be between £500 and £1,000, recoveries by any given individual are likely to be small. The costs of running the Scheme are also to be provided by the parent. The current estimate is that those costs are likely to be around £20m (an increase of £5m over original estimates).

6. Other creditors of the company are not within the Scheme. Those other creditors are those arising in the normal running of the companies, which will now be run down. They will be paid out of the assets of the companies as they are realised. Employees will be a significant part of that. There is a substantial inter-company debt, but that is to be subordinated in the manner referred to below.
7. The basis on which the redress mechanism I have just described is said to be a benefit to Scheme claimants is that if the Scheme does not operate, the Lenders will be forced into an insolvency procedure. It is said (and I accept) that in an insolvency the claimants will receive nothing because the claims of preferential creditors will swamp such assets as might be available for the payment of creditors. Accordingly, the limited fruits of the Scheme are said to be better than the nothing which will otherwise arise from insolvency.
8. The original proposal was that the Lenders (or at least Provident Personal Credit Ltd) would carry on trading in some form. However, as a result of the views of the Financial Conduct Authority ("FCA"), it is now proposed that the Lenders should be wound down. The costs of winding down their activities will be met from their assets (principally the fruits of loan recoveries) and, insofar as they are insufficient, the costs will be met by the ultimate parent company. It is anticipated that there will be no surplus after that exercise has been conducted but, if there is, then that surplus (calculated without the payment of inter-company debt, which is to be subordinated) will be added to the Scheme funds. The best possible outcome is anticipated to add no more than £4 million in this way, though, as I have said, the likelihood is that there will be no surplus.
9. That is, in broad terms, the Scheme which the court is asked to sanction.

Jurisdiction

10. Section 899(1) of the 2006 Act provides:

“If a majority in number representing 75% in value of the creditors or class of creditors or members or class of members (as the case may be), present and voting either in person or by proxy at the meeting summoned under section 896, agree a

compromise or arrangement, the court may, on an application under this section, sanction the compromise or arrangement.”

That is the jurisdiction which is invoked in this case.

Formalities

11. I can get compliance with the formalities out of the way at this stage in this judgment. As is required in these cases, a prior hearing has taken place to order the convening of a meeting of the relevant persons (in this case the Redress Creditors). That hearing took place before Sir Alastair Norris on 22 April 2021 and is reported at [2021] EWHC 1341 (Ch). The convening order made by Sir Alastair provided for meeting advertisements and other notifications to be placed in a number of places, specifically geared in their placement and content to the large number of small claims and unsophisticated claimants that there undoubtedly are in this matter. All those requirements have been complied with. A Scheme meeting was to be held on 19 July 2021 and electronic systems for voting and participation were provided. The meeting duly took place and a total of 420,717 Scheme Creditors cast votes at the meeting, in person or by proxy. There was an overwhelming vote in favour of the Scheme – approximately 98% in value and 98% by number of those voting. I am satisfied that, in terms of the technical matters which must be complied with under the 2006 Act, they were all complied with and there was the requisite statutory majority in support of the Scheme.
12. The only additional observation to be made at this stage is that, whilst it is not known how many claimants, or what value of claims, there might be under the Scheme, the number of creditors voting, though large (and I am told it is the largest number of creditors ever to vote in a scheme of arrangement) might represent as little as 10% of the potential claimants.
13. Other detailed requirements in the convening order, with which I do not have to deal, were all complied with.

The Customer Advocate

14. One distinguishing feature of the Scheme when compared with most schemes of arrangement was the appointment by the Company of an independent “Customer Advocate” in the person of Mr Jonathan Yorke, an experienced solicitor, acting independently of the Company, to report on various matters for the benefit of the Redress Claimants. His brief was essentially one of assessing the material provided by the Company to the Scheme Creditors and expressing a view as to whether or not it will be likely to have been understood by them in terms of their rights and opportunities. He was also to consider representations made by Scheme Creditors, media bodies and consumer protection groups and report, for the benefit of the court, on those representations. In addition, he attended the Scheme meeting in order to answer questions from Scheme Creditors (Redress Claimants). Those questions might involve the fairness of the scheme, and his role included making any observations about fairness as might be apparent from the communications.

15. However, his role did not include his expressing an opinion independently of what the documents showed as to whether the Scheme was fair or in the best interests of Scheme Creditors. He was not required to conduct any investigative role, and the basic material from which he worked, and which he assessed, was the communications, and the method of communications, emanating from the Company. He was not in any way involved in the formulation of the Scheme.
16. In addition, an independent firm of solicitors, McCarthy Denning, was appointed by the group to provide independent advice about the Scheme to any Redress Claimant who might want it. A small number availed themselves of that opportunity.
17. The Customer Advocate was represented before me by Mr Philip Hinks of counsel. He neither supported nor opposed the Scheme, but made himself available essentially to present the report and to deal with such concerns as the court might wish to address to him.
18. I have considered the reports of the Customer Advocate. They are helpful so far as they go, even though a large part of them are devoted to matters on which the court could form its own view, that is to say the adequacy of the communications. No doubt it is helpful to have the eye of an experienced professional cast over such things. I accept that if he had identified any glaring unfairness of the Scheme in the documentation, or perhaps in the Scheme itself, he would have pointed that out. He has not identified any. He has communicated to the court the sort of concerns which Redress Claimants have raised with him, and I have considered them. I intend no criticism of Mr Yorke when I say that he has not cast the same critical eye over the Scheme as such as the FCA obviously has.

The function of the Court on a sanction hearing

19. This function is now well established and is set out in a number of cases. I can conveniently take the requirements from the judgment of Snowden J in *Re KCA Deutag UK Finance plc* [2020] EWHC 2977:

“The relevant questions for the court at the sanction hearing can therefore be summarised as follows:

(i) Has there been compliance with the statutory requirements?

ii) Was the class fairly represented and did the majority act in a bona fide manner and for proper purposes when voting at the class meeting?

iii) Is the scheme one that an intelligent and honest man, acting in respect of his interests, might reasonably approve?

iv) Is there some other “blot” or defect in the scheme? In the case of a scheme with international elements there is also the question of whether the court will be acting in vain if it sanctions the scheme. This requires some consideration of whether the

scheme will be recognised and given effect in other relevant jurisdictions.”

I will take those points sequentially.

20. I have already observed that the first has been complied with.
21. As to the second, there are no class issues in this case. There is one class of creditors, and the point was in any event dealt with by Sir Alastair at the convening hearing. So far as voting is concerned, the voting was clear. It would seem on its face to be rational. The Scheme offers some sort of return for claimants, albeit a very small return. The liquidation alternative would, it seems, yield them nothing. A rational person might therefore accept it. The number of people voting was not a high proportion of potential claimants, but it would not be safe to assume that the non-voters were convinced the Scheme was bad. Bearing in mind the likely makeup of the customer base, it is probably the case that they did not realise they had a claim, perhaps did not fully understand the Scheme or just could not be bothered. Subject to points raised by the FCA (see below), the relatively low voting proportion of the overall potential claimant pool does not cause me to question the rationality of the vote. I consider that the voting was representative of the class. There is no suggestion that the majority were not acting bona fide.
22. As to the third, some of the same reasoning applies. The communications were appropriately phrased for the recipients (see *Heron International NV [1992] 1 BCLC 667* and *Sunbird Business Services Ltd [2020] EWHC 2493*), though some of them were lengthy. I have read them myself and agree with the Customer Advocate about that. A large number of people voted for the Scheme. Subject to points raised by the FCA in a letter addressed to one of the Lenders and to the Company, and provided to me (and the Redress Claimants), the Scheme would seem to be fair in that without it, the Redress Claimants (and the Financial Ombudsman Service) would get nothing. That they would otherwise get nothing is the view of PwC, the group's accountants, who have mapped out the likely consequences of an insolvency. That view has apparently been verified by Ernst & Young, appointed by the Company as independent accountants to consider the likely position on a winding up. Ernst & Young had to operate on some assumptions provided by the Company / PwC, but those assumptions were not challenged and Ernst & Young supported the Company's position that a liquidation would yield nothing to the Redress Claimants. The accountancy view therefore seems to be clear.
23. The Company claims that that view is also supported by an offer apparently made by an un-named but said to be reputable potential buyer who offered terms which are suggested to reflect a nil valuation for the two Lenders. I put little store by that piece of evidence because of the paucity of information about the offer, but that does not affect the weight to be given to the two accountancy views.
24. In support of the claim that the Scheme is fair and rational, the Company urges on me the fact that the Scheme represents a pure benefit for Scheme Creditors at the expense of the ultimate parent which is providing the £50 million compensation fund (and the

costs of running the Scheme). It is said that the parent has proper and understandable motives for paying what it is paying, and cannot sensibly, and will not, pay more.

25. The reason for that is said to be that the financial position of the ultimate parent, and the group, means that it cannot sensibly pay more. There is a banking company in the group and its presence means that certain solvency ratios must be maintained. If the ultimate parent were to pay more than £50 million into the Scheme, the group's solvency measures would get uncomfortably close in the next couple of years to a level which would contravene solvency requirements. It is said that the group's ultimate shareholders are not prepared to inject any more funds to avoid that consequence.
26. The accuracy of those statements has not been challenged by anyone. It is unlikely that a Redress Claimant, bearing in mind their nature, is in a position to challenge the assertions, and the Customer Advocate is not well-placed to challenge them either (if indeed he considers that within his remit save for obvious points which might appear on the Scheme documentation). The body best placed to consider the force of those points, and challenge them if they require challenging, is the FCA, which has been consulted on the Scheme throughout its gestation. Apart from some remarks in a letter to which I refer below, the FCA has apparently not challenged or questioned that position, and it has certainly not done so in a properly articulated form before me.
27. I have borne in mind that the group gets no financial benefit from the Scheme now that (admittedly only since the Scheme has been propounded) it has agreed to disgorge any final benefits it might receive from the winding down of the business of the two Lenders and pay them into the Scheme in addition to its £50m one-off payment. Yet again I return to this below when considering points raised by the FCA in correspondence.
28. Thus far, and subject to what I say below, I consider that this Scheme fulfils the third requirement.
29. Subject to certain points raised by the FCA which might amount to blots, I do not consider that there are any blots on the Scheme. Thus far, therefore, I would be minded to sanction it. However, before doing so, I need to deal with two further matters: (i) a recent case with some parallels, in which a scheme of arrangement was not sanctioned; and (ii) a letter written by the FCA which raises certain objections to the Scheme (although they are not taken as far as formal opposition to the sanction of the Scheme before me).

The decision in ALL Scheme Ltd [2021] EWHC 1401 (Ch)

30. The recent decision in this case (Miles J) has cast its shadow over this application, and the Company is keen to demonstrate how this Scheme is distanced from the scheme in that case, which failed to attract the court's sanction.
31. That case, like the present, was an application promulgated by a group whose business involved loans of a similar nature to the Provident loans. Like the Lenders, the ALL companies were concerned about the level of redress claims similar to those made against, and anticipated to be made against, the Lenders in this case. A new special purpose vehicle company was set up (via a deed poll) to distribute a specially constituted fund (which was to be topped up in certain future circumstances) against which claimants could claim, with a bar date which discharged claims not made in time.

It was said by the directors of the parent company that, if the scheme did not take effect, an administration was likely in which creditors would not be paid in full. Unsecured creditors would recover nothing; neither would shareholders. The scheme was therefore propounded as a way in which the loan claimants would make some recovery (estimated at 10% of the liabilities).

32. Thus far the situation has a strong resemblance to the present matter. However, in that case Miles J refused to sanction the scheme. The FCA attended the sanction hearing (but not the convening hearing) and objected on various bases, which the court accepted. The key factor in that case was that the court was not satisfied that the choice facing creditors was (as the Company said it was) the scheme or a formal insolvency procedure. There was a realistic possibility of a different form of restructuring which the judge considered would be canvassed if the scheme failed – see para 132. That meant that the Explanatory Statement failed to give an accurate picture because it did not make that apparent (para 132 again). Furthermore, the Explanatory Statement failed to draw sufficient attention to the fact that the scheme creditors were being asked to take a 90% haircut while the shareholders were retaining their interest in the scheme companies (para 134) which the stock market viewed as having a significant value (para 135) because the share price went up significantly when the scheme was announced. In the circumstances, the Explanatory Statement failed to inform the scheme creditors about realistic alternatives to it (para 138). The information was not sufficiently full or accurate to enable the constituency of scheme creditors to form a reasonable judgment on whether or not the scheme was in their interests. The court was therefore unlikely to be able to place much reliance on the votes of creditors, who in any event lacked advice, had no steering group, and only 9% of whom voted.
33. I accept the case of the Company before me that the facts of the present case are different.
34. It is true that in the present case there was no steering group who might have played a part in formulating the Scheme and considering its merits (the Consumer Advocate was prepared to give advice on the scheme as it stood, but only insofar as points occurred to him or he was asked questions), and that the percentage voting was not dissimilar.
35. However, there are key differences. In *ALL* it would seem that there was no intention to wind down the relevant business following the scheme, so it would remain something in which shareholders would retain a potentially valuable interest. The shareholders were not taking a haircut while the scheme creditors were, and that shareholder interest was apparently reflected in the fact that the shares in the parent rose 250% in the period following the announcement of the scheme. That was part of the material which led the FCA and the court to suppose that alternative restructurings might well be available, but had not been put forward. In contrast, in the present case, the relevant businesses are to be wound down (Greenwood's was in fact wound down several years ago), and if they yield any unexpected surplus, then that surplus would accrue to the benefit of the Scheme Creditors. The share price in the Provident group fell 27% when the Scheme was announced, though it has since somewhat recovered. The ultimate shareholders would not benefit in the same way as they would have benefited in *ALL*.
36. The FCA, which can be taken to have had its views on, and the decision in, *ALL* in mind in considering this case and deciding whether to appear at the hearing before me, has not sought to answer to those apparent differences. It has not suggested that any

other restructuring is likely, possible or even plausible. In the absence of such suggestions, and argument from the FCA (which is the only likely protagonist on the point in the absence of a fully funded equivalent of a steering committee), this court, on the information provided, could not sensibly reach the view that another scheme (or alternative restructuring scenario) might be available in the present case.

37. There are therefore no equivalent or parallel matters in this Scheme which match the factors which caused the scheme in *ALL* to fail.

The FCA's points

38. The FCA was represented at the convening hearing before Sir Alastair and made various comments on the Scheme as it was then presented, some of which were catered for in amendments to the Scheme. For example, following representations by the FCA, the Company changed its stance from apparently seeking to continue the business of the Lenders, or at least one of them, to a position in which the Lenders would be wound down and any surplus funds passed to the Scheme. The participation of the FCA at that stage of exercise was no doubt entirely proper, helpful and what would be expected of a body part of whose function it is to protect the interests of consumers.

39. On 13 July 2021, the FCA wrote to Provident Personal Credit) and to the Company about the Scheme. It said that it was writing:

“... to confirm to the Company the FCA's position in respect of the Scheme.”

Prima facie, therefore, the letter was not addressed to the court so that the court could understand the FCA's position. However, the FCA expressly asked (in paragraph 5.2) that the letter be included in the Company's evidence placed before the court at this hearing. I therefore assume that the FCA invites me to be interested in the contents of the letter and to take some note of them.

40. The letter is a little curious in that context and probably not as helpful as the FCA is likely to have expected it to have been. Paragraph 1.3 points out that the Scheme is inconsistent with the FCA's rules, principles and objectives:

“Therefore, the FCA does not support the Scheme and has summarised the serious concerns it has regarding the Scheme in this letter.”

41. It goes on to say:

“However, in this case the FCA has decided not to appear in Court to oppose the sanction of the Scheme as a matter of company law. The FCA's assessment of the Scheme against its statutory objectives is a distinct, and necessarily broader, assessment than whether the Court will sanction the Scheme as a matter of company law. In this case, the FCA's decision not to oppose in court is based on two key factors:

(a) **The lenders face an imminent insolvency in which many Redress Creditors would receive less than under the Scheme** ... the FCA considers on the evidence presented to the court by the Group that approval of the Scheme would result in a better outcome for many consumers than the most likely alternative of an imminent insolvency.”

(b) **The Lenders are not continuing their business and there appears to be no unfair benefit to the Group and its stakeholders at the expense of Redress Creditors:** [it then refers to the fact that the group is not retaining a valuable interest in the business at the expense of Redress Creditors].”

The emboldening is in the original. Paragraph 1.6 refers to the concerns that the FCA has about customers not being redressed in full, and indicates an intention to consult on these types of scheme. That is not a matter for me.

42. Section 2 then deals with the question: “How does the FCA approach the assessment of Schemes?”

“2.1 It has been customary for regulated firms to request a “letter of non-objection” from the FCA in respect of any scheme of arrangement they intend to propose... Following initial feedback from the FCA on the Scheme as it was formed [originally], Provident subsequently withdrew its request for a “letter of non-objection” but proceeded with the Scheme in any event.

2.2 This letter is not a “letter of non-objection”.”

While it is right to make it clear to the Company what it is not getting, that is a somewhat unsatisfactory formulation in a letter which it to be placed before the court, particularly since in what follows there are some points which might be thought to be objections to which the court might wish to have regard. It leaves it open to the court to wonder what the status is of the points that the FCA goes on to make and which would seem to be objections, when the FCA has said it does not consider that it should oppose the Scheme in company law terms. The court is always going to be grateful for such help as the FCA is able to give, but I confess I have felt a little unclear as to what I am to make of some of the points that the FCA goes on to make.

43. The letter goes on:

“2.3 Nevertheless, as part of its usual supervisory functions, the FCA has considered and continues to assess the scheme and its terms, as the Scheme has evolved, by reference to the FCA’s statutory objectives under FSMA ... As part of this, pursuant to the consumer protection objective, the FCA is duty-bound to

seek to secure an appropriate degree of protection for consumers and to ensure the UK financial system is sound, stable and resilient.”

44. Section 3 sets out “the FCA’s concerns regarding the Scheme”. It then lists 10 separate objections, none of which, either separately or in aggregate, apparently induce the FCA to indicate opposition to the Scheme to this court. Nonetheless, I should deal with them in case any of them are matters which I should take into account. Some of them plainly are not – they are matters of regulation, and I can take them shortly. However, some of them go to points considered above.
- A. *“Customers with valid redress claims stand to receive significantly less than the value of their claims.”*
45. This reflects the concern of the FCA about schemes of arrangement being used “to circumvent paying customers their full redress entitlement in the way proposed by the Scheme.” I do not consider that this is a particularly significant matter for me to take into account in considering whether to sanction the Scheme. It is of the essence of schemes of arrangement in the context of insolvency that someone ends up receiving less than their full contractual entitlement. The FCA may have regulatory concerns about this, but, unless the FCA is prepared to say that the regulatory regime requires that claims be paid in full, and that no scheme which provides for anything other than that should be sanctioned (which would be a bold position), this remains a matter for regulators to consider as part of their regulatory function and not for the court on a sanction application such as this. I do not understand the FCA to be contending otherwise.
- B. *“The Group could contribute more to paying Redress Creditors but has decided not to do so.”*
46. This complaint points out that the Redress Creditors are left with a “take it or leave it” choice between very low recovery under the Scheme or an even worse recovery (nil) in insolvency. It acknowledges that the Group is not legally required to increase its offer or to provide any funding at all, but the letter goes on:
- “While the contribution from the Group is welcome, we believe that there is scope for the Group to increase the level of funding to the Scheme, in turn increasing the expected return to the Scheme Creditors, including by providing a share of the Group’s profits to pay Redress Creditors. The reason that the group is not contributing more is that it has made a commercial judgement not to increase the funding because it could not justify that to its investors. The commercial assessment has been made at the ultimate expense of the Lenders’ Redress Creditors.”
47. In the evidence the Company has clearly indicated that it accepts that in one sense the amount that the group, through the ultimate parent company, has decided to provide towards the scheme (£50m plus the costs of administering the scheme) is a matter of judgment rather than science, but it seeks to justify that amount as a ceiling as being

the maximum amount that it considers it can safely contribute without breaching solvency rules which are applicable to the group because of the presence in the group of a bank. It provides some limited figures to justify that, but those figures have not been tested and have not been the subject of any real challenge. The Group also justifies its decision to pay any money at all by reference, *inter alia*, to a desire to preserve its reputation and avoid too much reputational damage, and to preserve morale in its workforce both in terms of running off the business and in terms of the Group's activities as a whole going forward.

48. The FCA's letter acknowledges all of those points, but observes that the Company does not attempt to value the Scheme's benefit to the Group. It also points out that the £50m contribution is a "potentially arbitrary figure which... happens to coincide with the amount originally proposed to be contributed by the group to the Scheme at a time when the Scheme had provided a means for one of the two Lenders to continue in business in the future." And the section ends by saying:

"... the FCA would expect that regulated firms proposing Schemes provide clear explanations both to the FCA and to Redress Creditors on the value of the benefits that they are receiving from any scheme of arrangement."

49. As far as this court is concerned on this application, this is not a wholly satisfactory piece of material. It is not quite clear how far the FCA is going. On one view it is an oblique reference to the point in *ALL* about the possibility of another scheme and a lack of testing of the contribution proposed by the group. It is allied to another point raised by the FCA (point (h): see below). I agree that generically speaking those concerns are concerns that will arise in schemes of this nature, and that they arise in this one. The Company has an answer to them, but that answer has not been tested. It was not the Customer Advocate's job to test it, and no earlier body was constituted (in the nature of a steering committee or ad hoc committee) which might have done it either.
50. In the absence of testing by people or bodies of that nature, the body best equipped to consider the point is the FCA, and it obviously did so in *ALL*. It cannot be expected to negotiate the contribution to be made, but it was involved in considering this Scheme with the Group from an early stage and if there were reasons to suppose that a better offer might be available if the Group were squeezed, then the FCA could be in a position to say that now, and possibly to have said it then. No doubt if it formed the view that the Group might have been able to do better it would have said so, and objected to the sanction of the Scheme, as it did in *ALL*, or at least have provided some clearer evidential material. However, on the evidence I have seen, it has not done so and it does not now oppose the Scheme or even develop the evidence. If it were the case that it was apparent that a contributor in a scheme such as this was really exploiting the situation and getting away with paying as little as possible when it plausibly could, and on the facts possibly should, pay more, then that would seem to me to be something which the court would want to take into account, but that would require evidence and analysis which has not taken place in this Scheme. I note that in various parts of his judgment Sir Alastair Norris refers to submissions by the FCA which suggest that it might be raising these sort of points at the sanction hearing, but it has not done so. That may be because at the time of the convening hearing the Scheme was being considered

on the basis that the solvency and business of the two Lenders was to be maintained for future, and that has now changed. But whether that is the case or not, the FCA has not pursued this point at this hearing.

51. In those circumstances, while the FCA has raised a relevant point, it has not taken it further and produced material which would assist the court to go further. In the absence of it taking it further and presenting a case analogous to that presented in *ALL*, I cannot determine that a better contribution might have been forthcoming or that the Company's reasons for not paying more are not good ones.
52. Accordingly, I do not consider that this point weighs against my sanctioning the Scheme.

C. *"The Group's withdrawal of its commitment to financially support PPC"*

53. The FCA considers it to be unsatisfactory that certain support commitments, which had hitherto permitted the Lenders to continue business, have been withdrawn. On the facts of this case, I do not consider that this is a significant matter for me. This is much more of a regulatory concern. Support arrangements do not have to be continued forever once undertaken. While one could, I suppose, imagine a case in which this factor might come into play, I do not consider it does in this case.

D. *"The Group is subject to ongoing FCA enforcement action"*

54. This point refers to an investigation started in March 2021 with a possible range of outcomes. The FCA expresses the view that currently it would not expect the investigation to prevent the Scheme being sanctioned "nor imperil the solvency of the Group at such a time that greater contribution to the Scheme could not be made" (a half sentence which I am afraid I do not understand). It goes on:

"However, the FCA does have concerns with the use of schemes of arrangement to avoid paying customers redress in full when there are investigations ongoing into how these redress liabilities arose in the first place."

55. I can understand the FCA's concerns as a regulator about these matters, and in another case it may be that they will go to a decision as to whether to sanction the scheme because (for example) they may go to possible recoveries in an insolvency. However, in this case the FCA does not provide any material for supposing that in this case it goes to the merits of the Scheme. I assume it would have said so if it did, and provided more material relating to it.

E. *"Lack of consistency of treatment with other unsecured creditors and intercompany loans"*

56. Under this point the FCA observes that interest on inter-company debt would seem to be intended to be paid in full outside the Scheme notwithstanding the fact that the Ernst & Young report would suggest that the loans were subordinated. Since the FCA's letter

(but not before), the evidence of the Company has made it clear that all inter-company debt owed by the Lenders is to be subordinated to ordinary creditors in the event of a liquidation and in the informal winding up of the business of the Lenders, so any surplus to be paid to the Scheme would not be subject to the prior payment of inter-company debt. Accordingly, this point no longer has force. In fairness to the FCA, the position was only clarified in the evidence after the FCA had made its point in this letter. The FCA does not seem to take a point based on the payment of wind-down related costs being paid in full.

F. *“The FCA believes some Redress Creditors may be worse off under the Scheme than in an insolvency.”*

57. The main point taken here by the FCA is that a creditor who does not participate in the Scheme will lose his or her claim and be worse off than he or she would be in an insolvency because in an insolvency a set-off would be available.
58. This is in essence a complaint about the existence of a cut-off date. However, every scheme of this nature has to have a cut-off date; otherwise there can be no final determination of the universe of creditors for the purposes of declaring a dividend.
59. It is also a point about creditors whose loans have been transferred. Parts of the portfolio have been transferred to third parties. The Lenders have entered into agreements with all but two of those transferees to make sure that rights of set-off are not prejudiced and are given effect. Letters of comfort have been provided by the two potential transferees who have not yet signed up, and the Company believes that they will sign up soon. I was originally concerned about what would happen if those two assignee companies do not enter into the proposed agreements with the Group. However, Mr Isaacs pointed out that the Scheme preserves all rights of set-off, so in the event (said to be unlikely) that agreements are not reached with the transferees, then set-off rights are preserved as against them under normal principles under which assignees take subject to equities. This concern therefore does not seem to arise.

G. *“Low turnout”*

60. The FCA points out that only around 10% of Scheme Creditors have voted in the Scheme or are likely to vote (the letter was written before the Scheme meeting). It expresses a concern that regulated firms should do all that they can to ensure that their customers are engaged in the scheme process, and sets out its expectation that the Company will do all it can to encourage the submission of claims by the Redress Creditors. A low turnout is something which is of concern to the court on a sanction application (see e.g., *ALL*), but in the present case I do not think it demonstrates anything which would cause me to refuse sanction.

H. *“Lack of negotiation with Scheme Creditors”*

61. The FCA expresses a concern that there was no prior consultation with Redress Creditors. This is said to fall short of what the FCA would expect in terms of early engagement, consultation and negotiation.
62. This is potentially a big point. It is allied with the concerns dealt with above about the amount being contributed by the parent to the Scheme. There is theoretical scope for

potential unfairness here. However, the FCA does not propose any practical mechanism as to how this might have been done in this case, and if it were a significant concern then one might have expected the FCA, which was involved in the process from an early stage (as I understand it) to have raised it at that early stage, and to raise it now with the court if it is said to make the Scheme unfair. The letter does not say that the concern was raised and ignored at any earlier stage.

63. This point is of concern in this case, along with the allied point about the amount of the £50m contribution. It is true that the Group appointed the Customer Advocate, but that was effectively an after-the-event appointment, the event being the formulation of the Scheme. As already indicated, the main function of the advocate was to consider whether the Scheme was properly explained in the documentation, though he was allowed to consider the fairness of the scheme if points occurred to him from the documents or if he was asked to do so by Scheme Creditors. This is not the same as the negotiating role fulfilled by, for example, an ad hoc committee of creditors at the time when the scheme is being formulated or when it is being developed. While I suspect that it might have been possible for the group to set up some sort of equivalent of the Customer Advocate at an earlier stage, to consider the Scheme as it was first being formulated, that would probably be not quite so straightforward. The practicalities of that have not been investigated, not least because the FCA has not pursued the point other than mentioning it in its letter. While it is, as I have said, a point which concerns me, and might have to be addressed more fully in future schemes of this nature (perhaps assisted by further contributions from the FCA), I do not consider that it adversely affects this Scheme under any of the criteria which I have to take into account.

I. "Voting on the Scheme"

64. This would seem to be a criticism of the mechanism adopted for assessing the value of voting rights. It is a potentially complicated point hidden behind a simple description of a potential difficulty. It seems to suggest that a creditor might be given voting rights under the methodology proposed for assessing the value of voting rights when that creditor might not have any claims at all.
65. The answer to this point is that all schemes like this will have to have some methodology for attributing a value to voting rights, and paragraph 15 of the order of Sir Alastair Norris at the convening hearing directs the manner of calculation of the claim for voting purposes. (I believe that the order may contain a mistake in cross-referencing – it should probably refer to Part E paragraph 8 of the Explanatory Statement, not paragraph 5, but nothing turns on that.) The court has therefore determined the appropriate methodology at a hearing attended by the FCA. It is not now suggested that the methodology was fundamentally flawed to an extent which somehow requires me to revisit it.

J. "The Company as a special purpose vehicle."

66. While acknowledging that such a structure has been used in other schemes sanctioned by the court, the FCA apparently remains concerned by the use of such a structure in schemes involving ordinary consumers. Putting it shortly, the FCA expresses concerns that consumers may be confused by the introduction of another entity with whom they never contracted, and that the use of a special purpose vehicle creates an additional layer of complexity, including when considering how the rights of Redress Creditors

compare with an insolvency. It suggests it may not be appropriate for ordinary consumers and may obscure the way their rights are being treated in the Scheme and may have an effect which is equivalent to liabilities from regulated activities being transferred to a thinly capitalised company which is not authorised by the FCA.

67. In considering this point I have not been assisted by any development of it by representatives of the FCA. In the absence of such assistance, I am afraid I cannot see that this point has any real force at all. It has to be accepted that schemes such as the present will appear complicated to a layman, but that is of their nature. Appropriately simple explanations have been advanced. In the context of a scheme which presents those complexities, the introduction of a special purpose vehicle is, in my view, unlikely to introduce any additional difficulty of comprehension for an average consumer above that with which he or she has to grapple anyway. It is likely that an average consumer will not appreciate a lot of the detail of the Scheme, and this particular factor is likely to get lost in the rest of the detail, and does not matter very much.
68. Those are the adverse comments that the FCA has in relation to the Scheme. In section 4 of its letter the FCA sets out its concerns about “Phoenixing”, by which I take it to mean the termination of business in one entity and allowing the same or a similar business to arise in another. As the letter itself observes, the position of the Group is now that it is moving out of the market to which the Lenders catered and is going to develop a different style of lending. In those circumstances the FCA does not consider that phoenixing arises in this case, and I need say no more about it.
69. The end result of this consideration is that I do not consider that any of the matters raised by the FCA raise any other fairness factors, or any blots, which weigh against my sanctioning the scheme.

Conclusion

70. In the circumstances, and considering all the matters which I am required to take into account in considering whether to sanction this scheme of arrangement, I do indeed sanction it and will make an appropriate order.