

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)
BEFORE INSOLVENCY AND COMPANIES COURT JUDGE PRENTIS
RE: MIZEN DESIGN/BUILD LTD. (IN COMPANY VOLUNTARY ARRANGEMENT)
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

The Rolls Building
7 Rolls Buildings
Fetter Lane
London, EC4A 1NL

Date: Tuesday, 24th January 2023

Before:
ICC JUDGE PRENTIS

Between:

(1) NEWLON HOUSING TRUST
(2) PEABODY CONSTRUCTION LIMITED **Applicants**
- and -

(1) MIZEN DESIGN/BUILD LTD.
(2) MR BRIAN BURKE **Respondents**
(3) MR SEAN BUCKNALL
(4) MR ANDREW ANDRONIKOU
(SECOND TO FOURTH RESPONDENTS IN
THEIR CAPACITY AS JOINT SUPERVISORS OF
THE CVA OF THE COMPANY)

RORY BROWN (instructed by Devonshires Solicitors LLP) appeared for the First Applicant.

ANDREW MACE (instructed by Devonshires Solicitors LLP) appeared for the Second Applicant.

MATTHEW WEAVER KC (instructed by Shoosmiths LLP) appeared for the Respondents.

JUDGMENT

Trial dates: 17-20 January 2023.

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ICC JUDGE PRENTIS :

1. Mizen Design/Build Ltd. (the “Company”) was incorporated on 1st July 1986 as Logicsilver Limited. It changed its name on 20th July 1988 to Victor Securities Limited, and changed again on 18th March 1992 to its present style. Its last filed accounts at Companies House are those to 31st December 2019; its next were due to be filed by 31st December 2021. On the evidence that we heard from its director, Mr. Tansey, they have not been filed because of the advice he has received from its internal accountants.

2. As described in the CVA proposal, which was approved by creditors on 19th May 2022, it is a “leading privately-owned property developer and construction business based in London. The Company provides construction and property management services to other companies within the Mizen Group to joint venture partners and to housing associations across London and the southeast of England”. The proposal provides a further description of it as a “contracting business providing a range of services to public, private and residential sectors of the construction industry, predominantly in London and the South East”. The structure is set out below that phrase at 3.1, and shows that the immediate parent to the Company is Mizen Properties Limited, which has been referred to usually as the “Shareholder”. It itself is held by an Isle of Man company. The Shareholder's accounts at Companies House are last filed to the date 31st December 2020. The next were due by 31st December last.

3. The IVA was passed at the live meeting of creditors on the 19th May. Relevantly, there are votes for acceptance with approved modifications by creditors totalling £13,990,486. That is some 88.28% of those voting. Creditors who voted for rejection

were £1,577,288, some 9.95%. Amongst those creditors, marked as "claim objected to" but admitted for voting purposes is Peabody Construction Limited. It was admitted to vote in the sum of £1,462,804. There was one other creditor admitted on the same basis. That was Vertex Apts RTM Company Ltd, which voted for acceptance, its debt being £4,228,547. Newlon Housing Trust is recorded as having been admitted for £549,930. It abstained.

4. On 15th June 2022 two applications were issued under section 6 of the Insolvency Act 1986. They were by Newlon Housing Trust and by Peabody Construction Limited. On 8th July the applications came, coincidentally, before me. Counsel then was the same as now and I am grateful to them all. We had Matthew Weaver KC for the respondents, the respondents being the Company, and the three supervisors, Brian Burke, Sean Bucknell and Andrew Andronikou. The lead supervisor has been Mr. Burke. We had, and have had, Rory Brown for Newlon and Andrew Mace for Peabody.
5. It was determined at that hearing that the applications had been made within time, and directions were given for an exchange of evidence. There was some evidence before the court at that stage. It was of a rather disparate nature and therefore the court ordered a list of issues to be agreed and filed. That was done. Aside from the evidence filed under that order, on 6th January the respondents issued an application to rely upon a further statement from Mr. Burke and Mr. Tansey. That was not opposed and I granted it on the first day of trial.
6. Newlon's evidence has come from Jim Varley, a partner at Devonshires. His evidence describes Newlon as being owed about £9.7 million plus VAT. It distinguishes between two groups of claims. One was subject to an extant claim in the High Court.

That was for some £2.1 million and would include a claim for costs which, at the time the claim was stayed, was about £900,000. The claim was, in broad terms, in respect of fire safety defects and also a problem with windows at two sites in Whitechapel and in Hoxton. It was due to come on for an eight-day trial on 7th June but, as may be expected, that did not proceed.

7. The other group of claims made by Newlon were at a pre-action stage; they had instructed Clarke Wilmott for that; and that was for £2.8 million of defects identified on a Grenfell Tower basis at a site in Hackney, and £3.9 million for another site known as Burnham Court. The remedial works of those had yet to be undertaken.
8. In its response the Company described the claims as uncertain and unliquidated. It is the position before me that those are contingent claims within the meaning of the proposal, and Newlon will therefore be compromised, as we shall see, at £1.
9. Before the vote Newlon had written a letter of 17th May which had been answered by the Company, if not by the nominees to whom it was addressed, the next day. Having received that letter Newlon decided to abstain at the meeting. Those were the instructions provided to the proxy holder, who was indeed Mr. Brown of counsel, dated 18th May. The Newlon notice of claim, proof of debt if you like, stated that the total amount of the claim was not less than £9.7 million plus any applicable VAT. That was considerably in excess of the £2.3 million to which the letter had referred, and the letter had been supported by an expert report which was attached to it. For the purposes of his closing submissions, Mr. Brown was content to accept that the smaller sum was the proper debt.
10. Evidence for Peabody came from Chandra Mohan, its head of delivery, and also from Mark London, a partner at Devonshires. Peabody had engaged the Company on two

projects. One of them was known as Rosebank: that was conducted under a JCT contract dated 27th June 2016 and was accompanied by a guarantee from the Shareholder. Following practical completion Peabody decided to upgrade the cladding; there was a condition survey carried out; and Peabody says it was discovered that the Company had not constructed in accordance with the planning conditions. That led to a 28th April 2022 letter of claim. Peabody anticipates costs of £231,528, of which it has incurred £40,208, even if retrospective permission should be available.

11. The second is a 20th December 2017 contract, also on the JCT form, in respect of Valley House. Peabody says there have been inexcusable delays in the demolition and construction of 73 new residential dwellings, and no practical completion. It notes there has been an application by the Company for a time extension which it had rejected. There was an 18th May 2022 solicitor's letter claiming £1,389,133 in liquidated damages. The claim is subject to vigorous dispute by the Company. It too, although this does not appear in the evidence, is agreed to be subject to a guarantee from the Shareholder.
12. As we have heard, at the meeting the Chairman, Mr. Burke, placed full value on Peabody's vote marking it as "objected to".
13. Both applications are brought both on the basis that the arrangement unfairly prejudices the applicant, and that there has been a material irregularity in respect of it.
14. There are no great differences between the parties on the law which has been set out in particular by Mr. Mace and Mr. Weaver in their skeleton arguments and Mr. Weaver in closing.

15. Looking at material irregularity, I have had cited to me the case of *Sisu Capital Fund Ltd v Tucker*, and paragraphs 79 through to 81, Warren J there noting that it is for the applicant to demonstrate material irregularity; and the same is true of unfair prejudice. It requires an irregularity at or in relation to the CVA meeting and that that irregularity was material. Warren J accepted the submissions of Michael Crystal QC that the irregularity relates to the information provided to creditors, and that the “correct approach to materiality is to ask the following question which must be answered objectively whether had the truth been told it would have been likely to have made a material difference to the way in which the creditors would have considered and assessed the terms of the proposed arrangement”. The word “likely” building on Lewison J in *Re Trident Fashions plc*, itself approved by Robert Walker LJ who provided the earlier test in *Cadbury Schweppes*, that while it is used in a variety of different ways, it does not necessarily mean that there is more than a 50% chance. Lewison J said:

"It seems to me therefore that the right test is whether there was a substantial chance that the creditors would not have approved the CVA in the form in which it was presented."

16. These principles have been considered on a number of occasions, but recently by Zacaroli J in *Re New Look Retailers Ltd* in which he provided an exegesis at paragraphs 299 through to 304. At 299 he drew particular attention to the obligations resting on a Company proposing a voluntary arrangement under rule 2.3 of the 2016 Insolvency Rules. He described the over-arching obligation as being that reflected in the last item in that rule, item (x), “any other matter that the proposer considers appropriate to enable members and creditors to reach an informed decision on the proposal”.

17. In the next paragraph, he aligned CVAs and schemes of arrangement. “Unsurprisingly since CVAs and schemes of arrangement show in common the fact that creditors are invited to vote upon a compromise or arrangement affecting their rights, this over-arching obligation” that is the one in 2.3(1)(x), “is materially the same as that which exists in the scheme jurisdiction”. He then cited Snowden J in *Re Indah Kiat International Finance Co BV*:

"It is well established that the scheme company has a duty to place before members of creditors sufficient information for them to make a reasonable judgment as to whether the scheme is in their commercial interest or not."

18. Those words are close to those in the rule.
19. "What amounts to a sufficient information to enable creditors to reach an informed decision on the proposal is highly fact-specific and will differ from case to case."
20. At 304, he noted that the question of whether or not there was a substantial chance that the creditors would not have approved the CVA in the form in which it was presented, had they been aware of the different information, raises an objective question. “The subjective view of particular creditors may in some circumstances be relevant if, for example, it is clear that particular creditors would not have voted differently even if the disclosure had been made”.
21. In relation to the adequacy of disclosure, Mr. Weaver took me to Sir Alistair Norris in *Re Amicus Finance plc* and submissions as it happens made by Mr. Mace criticising on behalf of his then client an explanatory statement within a scheme. Mr. Mace had objected that the explanatory statement was “so sparse in detail about a prospective liquidation as not to present creditors with any real alternative to the scheme, to such an extent that it was not possible for the creditors or the courts to undertake any

comparison of potential outcomes”. The judge noted that the context here was that the “scheme was proposed by the administrators of a small or medium enterprise”, so there is context, “who for two years had been providing detailed financial information to their creditors”; so, ongoing provision of relevant information. Sir Alastair's views on this submission are at the end of this paragraph: “Of course more specific information could have been provided, but the touchstone is not whether the fullest specific information reasonably obtainable was included in the explanatory statement, it is whether what was provided is sufficient to enable the creditors to make an informed decision whether to accept the risks inherent in the scheme in place of the risks inherent in a liquidation”.

22. Again, very similar wording to the rule 2.3(1)(x) provision.
23. Mr. Weaver also drew my attention to Trower J in ED&F Man Holdings Limited, at paragraph 39, expressing his view that “the court should recognise that the directors are normally in the best position to identify what will happen if a scheme or a construction plan fails”, and that “where the evidence appears on its face to reflect a rational and considered view of the company's board, the court will require sufficient reason for doubting that evidence”.
24. The final case in this trilogy is Snowden LJ's, sitting as an additional judge of the High Court in Smile Telecoms Holdings Limited. At paragraph 53:

"If a creditor or member wishes to oppose a scheme or plan based upon a contention that the company's valuation evidence is the outcome for creditors or members and the relevant alternative is wrong, they must stop shouting from the spectators' seats and step up to the plate. The creditor or member should obtain any financial information from the company that may be required, either on a voluntary basis or by making a timely disclosure application, file expert evidence of its own, instruct the expert to engage in the production of a joint report in the normal manner and tender the expert for cross-examination."

25. That is not a dictum which transfers easily to the facts of this case. It was a dictum in the context of a scheme where doubtless in the usual scheme-like way there were reams of financial documents as to historic performance, anticipated performance, often accompanied as well by expert reports: that is the context for that observation. Those same documentary provisions do not inure in a voluntary arrangement necessarily; they certainly did not here.
26. As to unfair prejudice, we can start with *Etherton J in PRG Powerhouse Limited*, with paragraphs 71 through to 75. Again, those can be read into this judgment, but let me just pick up some points from them. The judge noted that it was “common ground that the issue whether CVA would unfairly prejudice the interests of a creditor is to be judged on the information available at the time the CVA was approved”. It is common ground as well, he recorded, that “there is no single and universal test for judging unfairness in this context. The cases show that it is necessary to consider all the circumstances, including in particular the alternatives available”. In paragraph 75 he noted that “the cases show in broad terms that unfairness may be assessed by comparative analysis of a number of different angles” and they include what he describes as vertical and horizontal comparisons. “Vertical comparison is with the position on winding up”, by which he means the relevant available alternative insolvency process on the facts of the case being adjudicated; horizontal comparison is with other creditors or classes of creditors.
27. “Another helpful guide” he continued “in the case of a CVA is comparison with the position if instead of a CVA there had been a formal scheme of arrangement under section 425 of the Companies Act, on which the different classes of creditors would have been required to meet and vote separately”.

28. From the same judgment, paragraph 96, Etherton J agreed with Warren J in *Sisu Capital Fund Ltd v Tucker*, a paragraph I did not cite from there, that “if a reasonable and honest man in the same position as the claimants might reasonably have approved the CVA, that would be a powerful and probably conclusive factor against the defendants on the issue of unfair prejudice, I also agree with Mr. Morgan that the fact that no reasonable and honest man in the same position as the claimants would have approved the CVA is not necessarily conclusive in favour of the claimants”.
29. Paragraphs 98 and 99, we can read in, they deal with guaranteed landlords which was the issue there. The guarantees there would have been have value, would have been enforceable both now and in the future.
30. Paragraph 103 compared the treatment of guaranteed landlords with that of other creditors under that CVA. That treatment supported the conclusion that they had been unfairly prejudiced: closed premises landlords were to receive 28p in the pound, whether or not they had the benefit of guarantees, and the guarantee landlords were to receive nothing extra.
31. 105 is also directed at value. Then 106 the judge said that “the authorities clearly show that there may be circumstances in which a CVA may properly provide for one set of creditors to be paid in full, while others receive only a fraction of the company's liability to them: as in the *Garuda* case, where it was necessary to pay suppliers in full in order to ensure that the Company could continue to trade”.
32. What that does not say is that if there are critical creditors who require paying within an arrangement, they must necessarily be paid at 100p in the pound.

33. We can also read in paragraphs 107 through to 109. 107 is again addressing value, in the sense of the value of the compromise which landlords were there to receive. The judge noted in 108 that as the landlords were the group which would suffer least on an insolvent liquidation but the group that was most prejudiced by the CVA, one arrived at an “illogical and seemingly unfair result which could not have been achieved if there had been a formal scheme of arrangement... It is common ground that under such a scheme the guaranteed landlords would have been in a class of their own separate from other unsecured creditors. Moreover the scheme would not have needed to include and would not have included creditors who were to be paid in full. Accordingly, this was accepted by Mr. Morgan, the guaranteed landlords could and would have vetoed any such scheme. The only reason a different result has been achievable within the CVA is that all creditors form a single class for the purposes of a CVA and that class includes every creditor entitled to a notice of the meeting to approve the CVA, including creditors who would be paid in full. In effect, the votes of those unsecured creditors who stood to lose nothing from the CVA and everything to gain from it inevitably swamped those of the guaranteed landlords who were significantly disadvantaged by it”.
34. Paragraph 109: “It is obvious from the terms of the Cork Report that such a result was wholly outside the contemplation and intention of the committee”.
35. Mr. Mace in his skeleton makes reference to *Mourant & Co v Sixty UK Ltd*, paragraphs 75 and 77. That was looking at the vertical comparison again in respect of a landlord, though that does not matter for the principle. The judge noted that in determining what sum ought to be paid in lieu “at a time of market uncertainty, it would be difficult if not impossible to determine what sum will fairly compensate the

landlord for the loss of such rights, and in the absence of a compelling justification, a landlord should not be forced to accept a sum which is based on numerous assumptions, which may or may not prove to be well-founded". The judge then said this, which does not apply directly here, "To adopt such a procedure", and this is why, "in circumstances where the solvency of the guarantor is not in issue is to undermine the basic commercial function of the guarantee and to force the landlord to accept a commercially inferior substitute for it". It is not the position here because the hypothesis of this CVA is that if the Company became insolvent then so too would the Shareholder by reason of the calls on the guarantees by the guaranteed creditors, those it would be unable to meet if it had to meet them in full, and it would therefore enter an insolvency procedure itself.

36. We can look as well as Mr. Weaver took us again to Re New Look Retailers Ltd at paragraphs 106-111. 107 refers to the development of two helpful tests labelled "The vertical and horizontal comparators". In 60 UK Limited, Henderson J, at paragraph 108, had described the "irreducible minimum below which the return in the CVA cannot go", that being the comparison with what the creditors' position would have been in the relevant alternative insolvency event.
37. Zacaroli J referred to David Richards J in Re T&N Limited where it considered it "difficult to envisage a court not interfering with a CVA" which was "likely to result in creditors or some of them receiving less than they would in a winding up of the company, assuming that the return in the winding up would in reality be achieved within an acceptable timescale".
38. 109. "It is emphatically not enough to preclude a finding of unfair prejudice that the vertical comparator test is satisfied in respect of objecting creditors. It is also

necessary to consider the position, as between creditors, of the horizontal comparator”.

39. He goes on to cite from Knox J in *Doorbar v Alltime Securities Ltd (No 2)*, which is helpful guidance in our case as well because it confirms that "unfair prejudice is a reference to a degree of prejudice to one creditor or class of creditors as compared with other creditors or class of creditors. It involves an assessment of any imbalance between possible prejudices to one or the other.
40. 111. “The mere fact that there is differential treatment does not however establish unfair prejudice.”
41. We can turn on to paragraph 170. Zacaroli J stated:
- "It has been firmly established that although differential treatment to different groups of creditors is a cause for enquiry which needs to be justified, it is not inherently unfairly prejudicial."
42. At 186, there is more guidance, Zacaroli J accepting that “taking into account the basic principles of good faith and equality, the fact that a statutory majority for a CVA is achieved by the votes of unimpaired or differently-treated creditors will be an important consideration in determining whether unfair prejudice exists”. “I do not accept that those principles necessarily lead to a finding that a CVA achieved in those circumstances is unfairly prejudicial”.
43. 190: “where a subgroup of creditors is compromised by a CVA and their vote was swamped at the creditors' meeting by the votes of those who were unimpaired by the CVA, I do not think that it is necessarily enough to avoid a finding of unfair prejudice that the differential treatment of others was objectively justified, for example, because they were critical creditors and the compromised creditors are treated more

favourably than they would be in the relevant vertical comparator. Whether unfair prejudice exists depends on all the circumstances including those that would be taken into account and exercised in the discretion to sanction a scheme." He then made four points, to which I will return, which are of particular relevance. He said, "On the facts of this case", and emphasising he was not attempting to define what all the circumstances in any case might be, "first, an important consideration is whether there is a fair allocation of the assets available within the CVA between compromised creditors and other subgroups of creditors. This will include considering the source of the assets from which the treatment of the different subgroups derives and whether they would or could have been made available to all creditors in the relevant alternative."

44. He noted at 195 the position where:

"assets that would, in the relevant alternative, have been available for all unsecured creditors are allocated in a greater proportion to other creditors (for example, where critical creditors are paid in full), then the fact that the requisite majority was reached by reason of the votes of those creditors may point towards a CVA being unfairly prejudicial even if there was an objective justification for their payment in full."

45. Again, one is looking at the particular circumstances in order to find unfair prejudice.

46. The second consideration he identified was the "nature and extent of the different treatment, the justification for that treatment and its impact on the outcome of the meeting. There would be strong grounds to conclude that it was unfairly prejudicial where a CVA which compromises the claims of a subgroup of creditors is achieved only because of the votes of a large swathe of creditors who are unaffected by the CVA, even if there was some objective justification for those creditors being

unaffected by the CVA. As was pointed out in Powerhouse, that could not have been achieved in the scheme”.

47. The third point was the extent to which others in the same position as the objecting creditors approved.
48. Fourth, "A finding of unfair prejudice ought not to be precluded merely because the same result might have been achieved in a Part 26A plan”.
49. We can then turn back to Warren J in Sisu Capital Fund Ltd v Tucker, and just some paragraphs further from that: 69 "Any unfair prejudice must have been caused by the terms of the arrangement itself", 71, "In determining whether or not there is unfairness, it is necessary to consider all the circumstances and in particular the alternatives available and the practical consequences of a decision to confirm or reject the arrangement." 73, "In my judgment, it is not for the court to speculate whether the terms of a proposed CVA which are put forward by an officeholder were the best that could have been obtained, or whether it would have been better if it had not contained all of the terms which it did contain. Unless the court is satisfied that better terms or some other compromise would have been on offer, the comparison must be between the proposed compromise and no compromise at all, judging matters as of the day of the vote on the CVA”.
50. That passage is not saying that there should never be consideration of the alternatives, as shown by his paragraph 71.
51. At 123, Warren J said the “question for me in relation to the CVAs is ultimately whether they unfairly prejudice the applicants, not whether the process by which the

CVAs were arrived at was fair", which indicates that unfair prejudice is not directed at process.

52. I have identified the witnesses from whom I heard already. Nobody put the credibility of any of them in issue and I am grateful for the evidence which they gave.
53. I turn to the proposal. The nominees report from the trio was sealed on the 29th April 2022, which was also its date. It confirmed that the nominees had not verified the financial information on which a proposal and statement of affairs are based. It stated that if the CVA is not accepted, it is highly likely that the Company would be placed into an alternative insolvency procedure. The estimated outcome statement at Schedule 3, which we will come to, indicates that in such circumstances, unsecured creditors might expect not to receive a dividend. Paragraph 12 was headed "Matters that an administrator or liquidator will pursue which may not be pursued by a supervisor. Administrators and liquidators, who have more wide-ranging powers than supervisors, can investigate matters including the following transactions and undervalue preferences, extortionate credit transactions and avoidable charges. Although no such claims have come to my attention that might be capable of being pursued by an administrator or liquidator, but not by a supervisor, or which an administrator or a liquidator would be in a better position to pursue, we have not carried out any investigations into the reasons for the Company's insolvency and under the terms of the proposal no investigation would be carried out by the supervisors if the arrangement is approved."
54. Those are matters in respect of the company's business for which this report had been provided. The opinion of these three professionals was that "This is a serious and viable proposal and that it is feasible, it is fair to creditors, it is fair to the

Shareholders, it is an acceptable alternative to other insolvency procedures and is fit to be considered by creditors and Shareholders. Sufficient information has been obtained from the Company and its directors in order to offer a CVA as a solution to its financial difficulties. We are satisfied that the measures to be taken by the directors to avoid a recurrence of financial difficulties are sufficient", and this is then signed off.

55. The front page of the proposal in bold stated that "The ability of the Company to continue to trade is conditional on the CVA being approved by the requisite majority of the creditors and the Shareholder and the challenge period expiring without a challenge having been made." In fact, a challenge has been made, but I am not sure that by itself anybody says that that has affected the viability.

"The compromises set out herein will enable the Company to reduce its trading costs and compromise significant creditor claims, which will enable the Company to return to profitability and continue to trade. Compromised creditors will receive a greater return on the amount owed to them by the Company in the CVA than they would do if the Company were to enter administration. If the proposal is not proposed and implemented then it is very likely that the Company will enter administration."

56. Next comes an "important notice" from the directors, so headed. "The proposal has been prepared by the directors of the Company solely to inform the creditors and the Shareholder of a proposal for a CVA of the Company. Nothing in this proposal shall be relied upon for any other purpose. The creditors and the Shareholder should review this proposal in detail."
57. We know from the evidence that actually the proposal was drafted by Mr. Burke, with assistance from Shoosmiths solicitors, and assistance as well from directors and management at the Company. It was of course the proposal of the Company, though, rather than anybody else.

58. Within this important notice as well is a statement that "By their nature, forward-looking statements involve risk and uncertainty because they relate to events and depend on circumstances that will occur in the future. Although the Directors believe the expectations affecting such statements are reasonable, no assurances can be given that such expectations will prove correct. Without limiting the generality of the immediately preceding paragraph" -- the directors probably are not responsible for the drafting of that -- "all statements contained in this Proposal in relation to estimated outcomes to the Creditors, whether as a consequence of the Proposal being approved or otherwise, are illustrative only. As they are based on assumptions that necessarily involve the subjective analysis of the matters referred to in this proposal, they cannot be relied upon as guidance as to the actual outcomes to the Creditors." This is not saying that they are not nevertheless the best account available for the creditors' consideration.
59. There is then a notice from the nominees recording their views again that the proposal has a reasonable prospect of being approved and implemented. Key dates are provided so after the meeting date of 19th May, there was a claims date by which claims had to be submitted, 17th June, anticipated completion date 19th May 2024.
60. We must go, I am afraid, into the key terms of the proposal in a little detail. The Company had no secured creditors. Preferential creditors were unaffected. "Critical Creditors" was the first paragraph under the key terms of the proposal: "Each Critical Creditor shall be paid the full amount of its Allowed CVA claim by the Company direct."
61. There is a definitions section, section 2. Critical Creditors were "those Creditors of the Company where the Directors considered that payment in full of sums due to such

Critical Creditors is essential to the operation of the Company's business after the Effective Date" -- the date of the meeting -- "and which are listed as Critical Creditors in Schedule 12."

62. "Critical Creditor Arrears", say the key terms, shall be paid in full by the Company direct to the relevant Critical Creditor no later than four months following the Effective Date. Critical Creditor Arrears were defined as "all monies which are owing [present tense] by the Company to any Critical Creditor, which may become due for payment by the Company at any time prior to the Effective Date." That is historic debt, if you like, debt up to the Effective Date.
63. Post CVA Critical Creditor amounts shall be paid in full by the Company direct to the relevant Critical Creditor in accordance with the terms of the relevant Critical Creditor Arrangement. Post CVA Critical Creditor Amounts are defined, as may be anticipated, as "all monies which are owing by the Company to any Critical Creditor which become due for payment by the Company at any time after the Effective Date." If a Critical Creditor does not honour its trading terms then it becomes a Non-Critical Creditor with the effects I am about to describe. No interest is payable to them.
64. Next, we have Retained Contract Critical Creditors. The definition of that is Paragon and Peabody, with an exception in relation to costs which need not concern us, "and any sub-contractors associated or connected or in any way related to the Paragon Contract."
65. It is then stated that these creditors are those with current and ongoing correct contracts with the Company, which the Company intends to comply with and provide the full contractual package. It then addresses that the Paragon Contract negotiations

are currently ongoing between the Company and Paragon. If successful, they will result in enhanced contractual sums being agreed.

66. In relation to Valley House, this is currently the subject of the Valley House claim. Notwithstanding that, it is the intention of the Company again to honour the terms of the Valley House contract.
67. Looking at either of those, if there is a breach by Paragon or Peabody of the terms, they are to become a Non-Critical Creditor.
68. Non-critical Creditors are defined next. They are "any creditor listed in Schedule 13", and "the Terminated Contract Creditors" and, after some others, "any other creditor of the Company [this is to wrap up others unknown] that is not... a Guarantee Creditor, Contingent Creditor or Critical Creditor."
69. Where there are ongoing or outstanding contractual obligations with any Non-Critical Creditors, they were to cease immediately on the Effective Date. Provided that they were allowed CVA claims, then the liabilities would be Non-Critical Creditor claims, which would result in this: "The amount payable to each Non-Critical Creditor shall be approximately 1.2 or 1.3% of the allowed CVA claim of the relevant Non-Critical Creditor." They were to be settled by the Compromised Creditors' Payment Fund, to which we will come in a moment. Again, no interest.
70. "'Guarantee Creditors' "means any Creditors of the Company who have the benefit of a performance guarantee from the Shareholder, whether such performance guarantee is contained within a Guaranteed Contract or otherwise". "'Guaranteed contract' means any contracts entered into by the Company with a Creditor which contain a performance guarantee from the Shareholder, including to those parties which appear

at Schedule 14." It follows that all Schedule 14 creditors are being identified as Guarantee Creditors within the proposal. The key terms confirm that they are "those creditors of the Company where the Shareholder has guaranteed the obligations of the Company arising under a Guaranteed Contract between the Company and the relevant Guarantee Creditor. The direct claims of the Guarantee Creditors against the Company... will be compromised under the terms of this Proposal. In addition, the ability of these Guarantee Creditors to make a claim against the Shareholder under the terms of their guarantees", so the relevant guaranteed contract, "will be compromised in return for an additional further payment to compensate these Guaranteed Creditors for the loss of the Shareholder guarantee".

71. "It is necessary to compromise the ability of the Guarantee Creditors to make a claim against the Shareholder in order to prevent Ricochet Claims being brought against the Company by the Shareholder". That rather over-vivid expression is defined as "any claim from the Shareholder against the Company arising as a result of the right of indemnity following a claim being made against the Shareholder by a Guarantee Creditor."
72. It is confirmed that each Guarantee Creditor will be entitled to claim in the CVA both in respect of the Company's direct liability and in respect of the compensation to be paid in respect of the guarantee. "If the Guarantee Creditors were to seek to enforce their guarantees against the Shareholder, the Shareholder would not be able to discharge this liability and would become insolvent". I have already made reference to that.
73. "The estimated outcome statement in relation to the Shareholder, which is set out at part 2 of Schedule 3, demonstrates that in this scenario, the return to the Unsecured

Creditors or the Shareholder would be 5.3%”. We will investigate that.

74. “The amount payable to each Guarantee Creditor [as compensation]... shall be approximately 7.5% of the claim which the Guarantee Creditor would have been entitled to bring against the Shareholder under the terms of the relevant guarantee”. What they are getting is the 7.5%, plus if they are a Non-Critical Creditor then the 1.2 or 1.3% of that claim against the Company.
75. The Contracts (Rights of Third Parties) Act does apply in respect of the Shareholder.
76. "Unless otherwise provided for in the Proposal, all compromised payments to Guarantee Creditors... that are allowed CVA claims will be settled by the Compromised Creditors' Payment Fund."
77. Next addressed is Shareholder Debt. That is the £4.4 million unsecured owed by the Company to the Shareholder as at the effective date. "In return for the ongoing financial support of the Shareholder in the form of (1) the Shareholder Guarantee", that is a “guarantee to be provided by the Shareholder to the Company and the Supervisors in relation to the obligations of the Company to make the payments into the Compromised Creditors Payment Fund”; secondly, the “funding by the Shareholder of the Valley House claim”, so this is the claim the Company against Peabody in relation to Valley House; thirdly, the “introduction of further capital to enable the Company to continue to trade and to meet its obligations under the terms of the CVA”, the “Shareholder Debt will not be compromised within the CVA” and will remain on the company's balance sheet in full.
78. The introduction of the further capital is at the least that by clause 3.20, which says to “support the proposed strategy and the ongoing viability of the Company” there is to

be made available a £200,000 working capital facility. While the Shareholder Debt was not to be compromised, it was not permitted to participate in the Compromised Creditors Payment Fund or the Valley House Claim fund in this respect; so it is not going to receive any return for it from the CVA.

79. Compromised Contingent Creditors next. This means any contingent creditor, a contingent liability being very widely defined. They were to have all their liabilities compromised at £1, payable on demand.
80. The last of these key terms relates to the funds from which creditors were to receive moneys. The Compromised Creditors Payment Fund was to be established by the Company with the Supervisors for the benefit of the Compromised Creditors Payment Fund Creditors. They were the Compromised Creditors, but not the Contingent Creditors who were going to receive their £1 outside. The Compromised Creditors were defined as the Non-Critical Creditors, the Contingent Creditors – the drafting of the Proposal was not, as all counsel agreed, in all respects internally perfect- and the Guarantee Creditors. So, Non-Criticals and Guarantee Creditors at least are to be paid out of this fund. The Company was to make eight quarterly payments of £49,500 each to the fund over the course of the CVA period to enable the settlement of those relevant allowed CVA claims. So the total to be paid in was £396,000.
81. The Shareholder was, as we have heard, to guarantee the obligations of the Company including in this respect, “such that in the event that the Company is unable to or fails to make the required payments into the Compromised Creditors Payment Fund the Shareholder will do so”.
82. There is then provision for payment of an interim dividend as soon as reasonably practicable after the date which falls 12 months after the effective date and a final

dividend as soon as reasonably practicable after the final payment in.

83. The £396,000, though, was not to remain inviolate as far as creditors were concerned. Within section 2 of the proposal, clause 16, there were more provisions dealing with this fund. 16.1 includes that the Supervisors would have sole control and administration of the fund; and all moneys paid into it in accordance with clause 16 “shall be held by the Supervisors on trust for the Compromised Creditors Payment Fund Creditors in accordance with this clause”. The sum of £396,000 was to “enable full settlement of the approximate compromised value of the allowed CVA claims”. In addition to those, and in accordance with clause 23, “the Company shall pay to the Supervisors the estimated Supervisors' costs expenses and disbursements” including those in respect of any CVA challenge. By clause 16.5, if the sums paid in under 16.2 were deemed insufficient by the Supervisors to enable full settlement by the Company of their costs, expenses and disbursements, then the Company was to provide such additional sums as were requested. By 16.6, the Company authorised the Supervisors to “use at their sole discretion” monies within the fund to “pay on behalf of the Company the approximate compromised value of the Allowed CVA Claims” and the supervisors’ costs, expenses and disbursements as before. 16.8, “All liabilities arising to Compromised Creditors Payment Fund Creditors, whether pursuant to this Proposal or otherwise, are the liabilities of the Company and do not in any way constitute a liability of either the Supervisors and/or the Compromised Creditors Payment Fund”. That may possibly be confirmatory of the position if the arrangement fails.
84. Peabody suggests at one point that the fund is not a protected fund for creditors. It is, as we have just heard, a fund which is held on trust, but as we have already heard it is not a protected fund in the sense that it is not dedicated to meeting creditors' claims.

85. It is also suggested on behalf of Peabody that clause 16.8 may mean that there is no claim against the Fund, but I do not see how that can be a proper interpretation of the clause in the previous provisions to which I have made reference.
86. There is then and finally within this the Valley House Claim fund. This derives from the Company's belief that "it has a valid and substantial claim for variations... against Peabody in relation to the Valley House Contract in the total value of about £3.6 million. However, Peabody has indicated it has a counterclaim and, as such, the level of any potential recovery by the Company in relation to the Valley House Claim is currently unknown". The Shareholder agreed to fund the pursuit of this. If it is successful, then it will have returned to it its funding. The balance, if there is one, is to be paid to the Creditors, any person to whom the Company owes a liability including a CVA liability and that is to be shared *pari passu* by reference to the value of the Creditors' allowed CVA claims.
87. If one were a Guarantee Creditor, as Mr. Weaver explained, one would receive in two hats, one being the claim against the Company and whatever that was admitted for and the other being the claim against the Shareholder and whatever that was admitted for. So far as this fund is concerned, those claims would be treated exactly equally: the distribution would not be by reference to the anticipated outcome differing between the 1.3 and the 7.5p.
88. There is then a table which sets out the benefits in the CVA: for Critical Creditors, 100p as opposed to nothing in administration; Non-Criticals, 1.2-1.3 as opposed to nothing; Guarantee Creditors in respect of the guarantee from the Shareholder, 7.5 as opposed to 5.3p.

89. There is a description of the Company's recent trade. Its net assets have declined from £2.653 million in the 2018 accounts down to a negative £5.5 million or so in the 2021 management accounts. There is a collapse as well in profit between those parameters, from £1.2 million down to a loss of nearly £3.8 million. A number of attributes are given to that: difficulties on construction projects, major losses on some of those, including the Paragon contract, COVID-19, action taken including a change in management and a reduction in personnel, reference to funding from the Shareholder, currently at 4.4 million.
90. There is then a description of the forward order book, the Paragon contract, Uxbridge Road, which is anticipated at £80,000 profit- it is a cost plus contract, the plus being a 10% share in development profit- and Valley House.
91. On completion of these contracts the Company will seek new work and there is then a description of the work in progress.
92. In relation to Creditors, clause 6.1, the “Directors have undertaken a comprehensive view of the Company's Creditors to determine what compromises and liabilities will be required to restore the financial viability of the Company, improve the balance sheet of the Company and to assist in a return to profitability”.
93. Then clause 7 is headed "Desirability of the Proposal". The reduction in the Company's costs base is “needed”; the “Directors have concluded that the future viability of the Company is dependent on the successful implementation of the Proposal”; again, if not approved and implemented, administration is likely. The Directors are also of the opinion that the Proposal would be beneficial to the Company and to the Shareholder. “For an analysis of the anticipated outcome of the

Proposal as compared to the outcome of an administration please refer to Schedule 3”, this is the estimated outcome statement for the Company.

94. As foreshadowed by the realisation figures already provided, the administration outcome is a realisation of assets at a little over £500,000; they have a book value of just over 3 million. Substantial costs are then incurred, taking the net realisation down to £46,500, which is insufficient to pay off the second preferential creditors; unsecureds therefore receive nothing.
95. The CVA, by contrast, has the assets realisable at the Compromised Creditors Payment Fund amount to £396,000. There is deducted from that £221,000 of anticipated costs. The balance comes down to £141,150 for the unsecured creditors. They are in at 22.29 million, but in order to arrive at the outcome of an estimated 1.3% one must strip out from those contingent liabilities and claims which brings creditors down to just under 10 million. Those are stripped out because in so far as they are contingent liabilities they are £1 and, as I read it, outside the CVA, just payable by the Company; but if within the CVA then not material.
96. On page 30 of the proposal (I refer to it that way because the heading is clause 1.2 which is out of place) referring to Guarantee Creditors, there is confirmation of the two natures of claim against the Company, and re-confirmation that if there is to be enforcement of the guarantees against the Shareholder the Shareholder would not be able to discharge the liability. The estimated outcome statement in relation to the Shareholder, which is set out at Part 2 of Schedule 3, “demonstrates that in this scenario the return to the unsecured creditors of the Shareholder would be 5.3%”. Then reference to the 7.5% as compensation for the release and the 1.3% as being better than the zero.

97. The Shareholder estimated outcome statement is an important document. It shows two columns, book values in the left column, administration estimated outcome in the right. The book values of its assets are 3.6 million in round terms, about 2 million in an administration. The costs of realisation in an administration are just over 1 million. The million when applied to creditors of nearly £18 million produces 5.3%. Those £18 million of creditors include £11,685,868 of contingent legal claims. There is no comparative recovery on the book value basis but there is a shortfall between the assets available of the 3.6 million and the unsecured creditor figure in this instance of 12.3 million. There is a difference because without an insolvency event certain bank guarantees it seems are not brought in.
98. There is a section on voting rights, also headed "Part 2". Part 2 section 1 headed "Arrangements of voting", 8.10, "voting is by value alone based on the value of a Creditor's debt as at the date of the Creditors' meeting as ascertained by the Chairman". Paragraph 8.11 refers to the Chairman's powers under rule 15.33 and rule 15.31, and gives a description of those in terms of rule 15.33(1) and 15.31(3). There is further reference to 15.31(3) at paragraph 9.3. At paragraph 10, votes in relation to creditors, 10.1 confirms that rules 15.31 and 15.33 apply to the ascertainment and the entitlement of creditors wishing to vote and then, a little bit unhappily, 15.2 says rule 15.33(3) applies to any claims, and it then sets out a description which is in fact of rule 15.31(3).
99. Newlon suggests that this amounts to a material mis-statement within the Proposal. I cannot agree with that. There is simply a failure to describe by one digit one of the Rules. The Rules are otherwise identified within the same section and otherwise set

out. Anybody could look them up, and, moreover, Newlon had existing legal advice. There is nothing in the point.

100. Moving through the documents, clause 20 is headed "Full and final settlement", and confirms that the provisions of the CVA constitute and compromise of all CVA claims. Clause 30.9 confirms that if the CVA is terminated effectively early, the compromises and releases only affected under the terms of the CVA shall be deemed never to have happened. There is a concern on behalf of Peabody that it is wrapped up into this arrangement even if it fails, but that is misplaced. Peabody is also concerned that there is no obligation on the supervisor to terminate in the event that a creditor complains about non-receipt of funds under clause 30.8. That is right, but is in no way unusual, and these days may even be standard, as Mr. Weaver said. It is a matter which is rightly left in the hands of supervisors to cover a situation where, for example, the payments have actually been brought up-to-date but not yet distributed.
101. Let me just finish the Proposal by looking at schedule 11, which is the company's statement of affairs as at the 22nd April 2022. Again, we see the same book values and realisation estimates: so, 3 million realisation, 500,000 in an administration. Peabody notes that there is reference here as there is in the other estimated outcome statements to floating charge holders, and they say that is unduly misleading to a reader because there are not any. Actually the fact that there are not any is recorded in the notes to each of these schedules and, again, therefore, I do not think that there is anything in the point. It would also be obvious enough from reading down through the figures.
102. I turn to the Applicants' submissions. I rather regret not being more precise when I ordered a list of issues last summer. What emerged was not, as I had anticipated from

my use of perhaps imprecise language, the points in issue, but instead open findings of fact which the parties were going to ask me to determine. That was unhelpful because as we discussed at the hearing itself the evidence in support ranged wide and not always clearly save in expressing the grievance of Newlon and of Peabody. Thus, having had the benefit of oral closing on Friday, I have endeavoured to confine the submissions to those made orally, or in the skeleton arguments for trial. I do so bearing in mind Mr. Weaver's observation that there is a risk otherwise that certain matters relied on may never have been covered in the evidence when they could have been.

103. Newlon's submissions have been, if I may say with respect, which I mean, reflective of its position on the voting on which it abstained. They reflected as well Mr. Varley's evidence that he would be unable to say definitely what Newlon would have done had particular information been different. It was, Mr. Varley openly acknowledged, a speculation. In so far then as one is gauging the objective reaction of creditors to material irregularities, Newlon has a difficulty in being unable to show that even its own view would have changed. Mr. Brown also acknowledged that the various allegations of material irregularity were to be taken as a cocktail rather than as single drafts; a cocktail of a slightly imprecise formulation.
104. Under material irregularity, as alleged by Newlon, I am going to address first the point that schedule 12 the list of Critical Creditors misstates creditor balances. It is described in the heading as a "list of Critical Creditors and their balances as at 29th April 2022". It will be recalled from the definitions that critical creditor arrears were in contradistinction to later debts arising, and meant all moneys which are owing by the Company to them as at the Effective Date. It takes little to elide the definition

with the heading of critical creditors. On any reasonable view this is describing the balances as at 29th April 2022. Those balances are said to total £3,970,985. Nowhere is it said in the Proposal that the actual balance as at the Effective Date is something different; it is nowhere said that it is actually a great deal lower than the nearly £4 million figure.

105. The evidence now is that the outstanding amounts as at the Effective date to the Critical Creditors were £804,337. That was first revealed in the evidence of Mr. Burke. The £4 million is a figure over the entire course of all these critical contracts. We know from the terms which we have already read that in the event of an administration of the Company, the contracts would cease. Perhaps as Mr. Burke says the result would be that the Critical Creditors would submit claims for the full amount. But there is no reason to suggest that any office holder would admit them in that amount when ex hypothesi the entire works for which there was this fixed price have not been carried out. The claim might be one for quantum meruit; it might be one for a fixed price subject to a counter for work not done; it might just be a simple damages claim.
106. It follows as well that Mr. Burke was wrong at the meeting to admit the Critical Creditors for the figures ascribed to them in schedule 12. They were not the sums outstanding at the meeting date to those creditors.
107. There has therefore been a failure of disclosure on the part of the Company as to the Critical Creditors. The next question is of what materiality is that irregularity. As to the voting, the resolution would have been passed even if one ignored all Critical Creditor votes (and that of course is too extreme because they are entitled to prove for something): the 75% majority would remain.

108. Mr. Brown suggested that the materiality rested in the impression that the Proposal gave that voting power would rest with the Critical Creditors, such that some creditors might just decide not to vote because there was no point. Again, that does not seem to me to work. The Critical Creditors at £4 million were amongst creditors totalling £22.5 million. The Critical Creditors admitted to voting at around £3 million were among voting creditors of £16.5 million. I am therefore not satisfied that those two points lead to a material irregularity.
109. Also relied on as a material irregularity by Newlon is a failure by the nominees to respond to its letter of 17th May. It was sent at 11.42 by Ms. Pargin at Devonshires to the three nominees. It enclosed the quantum expert report at £2.3 million, and it said, "We look forward to hearing from you by return". It addressed a number of issues, including that under the terms of the expert report the value of Newlon's claim was no less than £2.3 million and therefore it invited admission of the claim in that amount. There was a response from the Company at 15.43 the next day, so very shortly before the time for submitting proxies which Newlon then did. Mr. Burke had also indicated by telephone before lunch on 18th May that he would respond, but he did not.
110. Nobody has pointed to any duty resting on a nominee to answer correspondence come what may. The nominee may well be, as Mr. Burke said he was and I accept, very busy before this meeting. Further, from just before four o'clock on 18th May he knew, or the information was there for him to know, that Newlon was abstaining. It is not therefore surprising that he spent his time investigating the other proofs of debt of creditors who were voting. If Newlon wished to raise questions then the place to do it was at the meeting at which it could, if necessary, ask for an adjournment. Indeed, Mr. Brown was at the meeting and asked questions.

111. Even if this were an irregularity, it would not be material for the questions of reliance which I identified at the outset in respect of Newlon's material irregularity allegations, but also because I reject the suggestion that because Newlon was a contingent creditor, and other creditors were, in the event, admitted to vote in full, it can be inferred that the response would have been that Newlon would have been admitted in full. The evidence of Mr. Burke was that that was a case-by-case analysis and we are left with Mr. Varley's mere speculation as to what Newlon would have done. Even if admitted at £2.3 million, Newlon would not upset the voting figures. That would be so even with the Critical Creditors admitted to vote at the current debt figures rather than the larger ones. For the same reasons, while it was illogical of Mr Burke to admit Newlon for the £549,930 VAT figure without admitting for the principle of £9.7m (which Newlon does not for this trial now aver is the correct figure), it made no difference.
112. Peabody also raises certain material irregularities. One of them is that it was unclear how it was going to be treated under the terms of the proposal. It was confused by what was meant by "Retained Contract Critical Creditor" and what the effect of that would be given that there were disputes on each side, and that therefore the Company might be saying that Peabody had already breached an agreement and therefore should be treated as a Non-Critical Creditor. That point, I think, is answered by the Valley House contract plainly being treated separately as a Retained Contract Critical Creditor. As Mr. Weaver confirmed, it is the Company's position, albeit I accept that this is not so clear in the Proposal, that in the event that it was indeed Peabody that turned out to be the Creditor, its claim would be met in full so long as it had not fallen into the Non-Critical Creditor capacity by not complying with the terms of the Valley House contract.

113. As to Rosebank, Peabody is a contingent creditor, but in fact it was allowed to vote at the meeting in the full amount marked as "Disputed". If there is an irregularity in all of that, which I am not disposed to find, I cannot see how it was material.
114. Secondly, Peabody insists that the Proposal is misleading because it does not treat it explicitly as a Creditor of the Company in respect of Valley House. No doubt that is its belief, but as the witnesses acknowledged, it is too early to say which of the two is going to end as the Creditor of the other. At best, it seems to me that this point might be put on the basis that, for example, in the description under the key terms of the Valley House Claim fund, there seems to be a contemplation that while moneys may be owed to Peabody, it is the Company which is going to end up as the Creditor, not Peabody for the substantial amount which it says is due; but again Peabody was admitted to vote.
115. It is also said that there is no provision for Peabody to be paid if it is a Retained Contract Critical Creditor, a point which we covered; and that there is no visibility, if it does have such entitlement, as to how such a payment would be funded. That is true beyond the general expressions of the continuation of the Company business which affect the Critical Creditors as a whole.
116. As to the retained Contract Critical Creditors, that is a class of Peabody and Paragon. Peabody has already voted against the proposal, Paragon did not vote at all, and its claim is significantly larger. So far as relevant, because it is a post-CVA event, the Paragon contract has now been renegotiated. Peabody is standing outside the arrangement in so far as it is a Retained Contract Critical Creditor and is only brought within it if it breaches the contract. There is no complaint about the latter provision.

Again, I do not see that the lack of visibility as to funding through the CVA and indeed beyond it is material.

117. Other material irregularities raised by Peabody tie in, as Mr. Mace said, to its unfair prejudice arguments which themselves relate to the Shareholder Estimated Outcome Statement. That statement gives its own description: "Estimated outcomes to Creditors of Mizen Properties Limited as at 22nd April 2022."
118. Mr. Burke said that its purpose was to work out the impact on the Shareholder in the event that the Shareholder entered administration, which of course it did not; therefore, he said, to establish the level of claims or the level of dividend that would be payable to those creditors. That is right because as we heard earlier, the 7.5% was to be compensation for the monetary rights represented by the claim against the Shareholder.
119. As Mr. Weaver acknowledged in his cross-examination of Mr. Varley, what this document does not do is show the financial position of the Shareholder at all. One cannot glean its financial position. This is a snapshot as at a date. In order to ascertain what its financial position was, one would need a balance sheet and a profit and loss, and one can add a list of creditors and debtors and perhaps a cash flow forecast as well, especially given that but for the hypothesis, the Contingent Creditors would fall due at different times and that even under the CVA, the Shareholder had its ongoing obligations to fund.
120. I have already described the document. Mr. Mace's attack on it focused on three elements: the assets, the administration costs and the contingent claims. His point is a simple one. An increase in assets will result in an increase in the 5.3% outcome. So too will a diminution in either the costs or the creditors' claims.

121. We can put the administration costs on one side because they were not pursued vigorously by Peabody. Perhaps not surprisingly, as he is both the insolvency practitioner involved and he assisted in compiling the document, Mr. Burke, when it was suggested to him that the £1,075,000 was an awful lot of money to realise just over £2 million of assets, thought it was entirely reasonable. There was no particularised challenge to that, but Mr. Burke did describe why he thought it was reasonable: it included the unwinding of the Shareholder's positions and joint ventures and so forth. I am not therefore in a position to discount the costs element.
122. As to the assets, Peabody's concern is that there is no full disclosure from the Shareholder, and that matters because it was discovered before the meeting that, as it was then thought in early March, the Shareholder had disposed of its interests in Mizen Build Limited to a connected party. That did not appear anywhere in the Proposal. There was further concern because it was raised on behalf of Peabody by Mr. Mace at the meeting and was simply batted away on behalf of the Company. Mr. Mace, having asked about the Mizen Build deal, asked, "Were there other Shareholder transactions?" He was told, "As far as we are aware, no. We have seen nothing in the accounts. We have to rely on info provided by parents", parent companies, I suppose; "What you are asking for is delving into the parents' sensitive commercial information". That was not a full and open disclosure of the position of the Shareholder's position.
123. On 25th May, so after the Proposal had passed, Mr. Tansey wrote as director of the Shareholder to the Company. He said that the disposal of Mizen Build Limited had been on 1st February 2022. "As at 31st January, its management accounts had showed a net worth of £914,664". The Shareholder had received a total value of

£912,550 in respect of its interest. “We are happy for you to share this information with Quantuma... for further circulation to your creditors”.

124. In cross-examination, Mr. Tansey was unable to say how that consideration had been paid: whether, for example, it was set off against other debts. He thought some at least would have been paid by dividend, declared presumably by Mizen Build.
125. So what we have is a disposal by the Shareholder of a significant asset, shortly before the Proposal was circulated, at a time when the Company was insolvent, and when if it entered an insolvency process so too was the Shareholder, and at a time when Quantuma was advising, albeit I think at the beginning of February informally, because its formal instructions came later that month. It had been advising informally since August 2021.
126. It is important to recognise in this case that the Shareholder's guaranteed liabilities are being compromised not by its own CVA or scheme, but by the Company's. It follows that there are no direct obligations of disclosure on it, and actually its disclosure has been limited to this Estimated Outcome Statement. If it needed it, the lack of disclosure can be proved by considering that the Proposal was one that was put to the Shareholder as well as to the Company's creditors. It is the Company which was providing the information and providing it to the Shareholder in respect of, amongst other things, the guarantee which the Shareholder owed to the various Guarantee Creditors. Whatever, even the Company's obligation was to provide full and frank disclosure of all matters appropriate to enable its Creditors, including the class of Guaranteed Creditors, to reach an informed decision. There is no good reason why, given the release of the Guaranteed Creditors, the disclosure as to the Shareholder

ought not to have been the equivalent of a CVA or a scheme had the Shareholder proposed one.

127. Even if that is too stringent a test, it is impossible to think that any Creditor would have renegotiated a position as to the guarantee based upon the Estimated Outcome Statement alone. No reasonable Creditor would do that. It would seek just the sort of information as to the Company's trading history and forecast which has already been described. That disclosure is disclosure which, it seems to me, falls within rule 2.3(1). Specified in that rule is the obligation on the Company making the proposal to confirm its awareness of circumstances which might give rise to claims under sections 238, 239, 244 and 245. There is no equivalent statement from the Shareholder's directors as to whether that would apply to it, notwithstanding that on this hypothesis the Shareholder is entering administration and the administrators would therefore make investigations into just those sorts of matters.
128. What we have then, even by itself, is a transaction which requires an explanation and a transaction which would be dealt with explicitly were this the Shareholder's own arrangement.
129. The Proposal tells us almost nothing about the Shareholder, but we learned a little bit in cross-examination. Mr. Burke said that its cash would "swing and move with its trading", and Mr. Tansey acknowledged that its trading would include disposing of its interests in other companies or joint ventures. It therefore sounds as though there may well be other transactions which would have to be considered by way of disclosure under 2.3 or otherwise just under fair disclosure. Neither Mr. Burke nor Mr. Tansey could say where in the estimated outcome statement was the product of the Mizen Build transaction. There are possibilities. It might be in, for example, "Other

debtors". Nor could they say what had been done with the money. I recognise that the explanation for that may be innocent because we do know that before the CVA, the Shareholder put in £4.4 million. Perhaps this was part of those arrangements, we do not know. Neither do we know, because Mr. Tansey could not say, over what period the £4.4 million had been invested. It was suggested to him that it had been just over the six months before the proposal was circulated, but he did not know. Neither did he know how the Shareholder had obtained the money to make that significant unsecured investment.

130. Even stopping there, this was a manifest irregularity as to the disclosure necessary to this arrangement. Further, it was material to the Guaranteed Creditors whose debts were being released because they were not being given full information as to what their position was, because there were indications of prior dealings and therefore the possibility of value and therefore the possibility of their claim being more, and because anyway there would be a generation of enquiries by those who were just to receive pence in the pound in respect of this debt from a different entity and the circumstances in which it was incurred.
131. As to the liabilities challenge to the Shareholder's Estimated Outcome Statement, the contingent legal claims are in at £11,685,868, a very precise figure. We have already seen that the "Guarantee Creditors" definition at the least includes -- it may entirely comprise, we do not know -- the Schedule 14 list. The Company had supplied that list to Mr. Burke, who had then discussed it with management and senior management. He said that "the list included some definite guarantees, some we think we may have." It included, in his view, all those "likely or potentially" with guarantees with the purpose that they should be compromised. That schedule was by itself an inaccurate

tool for the compromise of guarantee liabilities. In fact, Newlon, which is in the list, has no guarantee and neither does Richmond House. NHBC, which does, may -- we cannot say more on the evidence -- be to an extent double-counted in respect of the St Luke's Square project because St Luke's Square also appears in that list.

132. Making the obvious connection between this Schedule 14 and the contingent legal claims in the Shareholder's Estimated Outcome Statement, it follows that no creditor, as Mr. Mace said, would be in a position to determine the value of the Guaranteed Creditor claims. In fact, that was so anyway. The £11.6 million odd figure is entirely unexplained. Schedule 14 has the grand total of £25, £1 for each of those creditors named within it.
133. Again, this is primarily a class issue. The only creditors with a direct interest in the level of guarantees were the Guarantee Creditors themselves, but for the general body, so far as the guarantee claims were less, the viability of the Proposal increased. For the main class, the Guarantee Creditors, again these are figures which impinge directly on the potential pence in the pound outcome which must have been central to their commercial analysis of the Proposal. It seems to me that the class is entitled to a full explanation as to how that figure was arrived at, and who was within it. Again, this by itself constitutes a material irregularity.
134. In fact, we now know that the £11.6 million figure -- we know this from Mr. Burke's oral evidence -- was made up of £4 million attributed to NHBC, £1.4 million attributed to Peabody and £4.6 million attributed to Paragon, a total of £10 million. There is then an allowance for other guarantees which were not owed to Company creditors. Mr. Burke said it was an estimate of claims where there was "some degree

of confidence that they existed and the values relating to them”. The figure was intended as “prudent and conservative”.

135. One can see, just from that, the sort of questions that might have been asked by creditors had they been told the make-up. The £4.6 million Paragon debt was the very debt that the Proposal said was going to be renegotiated to put the Company into a positive position on the contract, in other words, it was going to come out. If we deduct the £4.6 million from the Estimated Outcome Statement then the outcome, leaving all the other figures in place, actually comes out at a tad over 7.5p. It follows on its face, and turning now to unfair prejudice, that the vertical comparator of 5.3p is at the least very doubtful.
136. I said I would come back to Re New Look Retailers Ltd and the factors -- I cannot call it a test -- identified by Zacaroli J at paragraphs 190 and onwards. Here, we have the situation that the separate class of Guarantee Creditors was outvoted by Critical Creditors and indeed by Non-Critical Creditors as well. The Guarantee Creditor class was not ever likely to be large enough to itself affect the vote.
137. As to the fair allocation of assets point, what happens under the Proposal- under the arrangement as it now is- is that the source of assets has changed from the Shareholder to the Company. To the extent that the Shareholder supports the Company in providing funds for distribution through the Compromised Creditors' Payment Fund, it was doing so for the benefit of all creditors of the Company rather than paying the specific contractual rights which it, as Shareholder, owed. Even the 7.5p or even the 5.3p which appears in the Estimated Outcome Statement was not an assured return, and yet the return of the 5.3p in the Estimated Outcome Statement was, on that bare document, a return which would have been obtained on 28th

February from the Shareholder. The only fund bearing the guaranteed claims is the Compromised Creditors' Payment Fund and that itself is subject to deductions for Supervisors' fees and perhaps legal challenge which will reduce it and might feasibly leave it at zero.

138. There is an additional point, and again I want to emphasise it is additional and does not feed into the main reasoning, which is this. There is not, on the face of the Company's Estimated Outcome Statement, any obvious prospect of payment of the 7.5p because that Estimated Outcome Statement generates only the 1.3p which is to go to Non-Critical Creditors. Now, I recognise that Mr. Weaver has a strong point and a correct point in saying that this was not raised at the evidence stage, and therefore it had not been answered. He said that it could have been answered. However, what that indicates is that there is no explanation on the face of these documents, which were the documents which were in front of creditors.
139. On the nature and extent of different treatment and impact, the impact of outvoting the Guarantee Creditors and the removal of their rights was obviously severe. As to the different treatment, the Guarantee Creditors were losing their contractual rights in a situation where little disclosure was given as to their value and where even if this were to be a negotiation between reasonable businessmen, that would be on the basis of significantly more information than had been provided. The Guarantee Creditors were instead sharing the Fund with certain creditors of the Company, who had had the benefit of the disclosures in the Proposal as to the Company's position; and from which the costs were to be deducted without, as I say, any assurance that their return would even equal that indicated by the Shareholder Estimated Outcome Statement. That was at a time when Critical Creditors, who themselves were pre-proposal

creditors for £800,000, were to be paid in full, utilising the benefit of moneys from the Shareholder to support the Company's trade.

140. The justification point is that it was necessary to compromise the Guaranteed Creditors to prevent the Ricochet Claims, and thereby to prevent the Company from going down. As Mr. Weaver says, I must, and I do, accept that a compromise was necessary, but that does not, without more, justify the relative impact or the lack of votes as a separate class, or the lack of information, or indeed the compromise of the Guaranteed Creditors in this way.
141. Again by way of addition, what is interesting about the Paragon information which has come out, in other words the information that Paragon is within the £11.6 million of creditors in the Shareholder's EOS, is that if provided earlier it could have been related back to the negotiations with Paragon which are adverted to in the Proposal. Therefore, one alternative would have been for the compromise of Guarantee Creditors either to take account of a revised Paragon figure, or to be entered into only after the deal with Paragon, a necessary hypothesis of the CVA to be viable, had been done.
142. As to the approval by others of the same class point, there was one other voter who had a guarantee. Actually, they voted in favour of the proposal. They were Mizen Nether Street Limited. They were therefore a connected creditor and they were owed just £6,564.
143. Finally, this result could not have been approved by a Part 26A plan on this evidence. It does not begin to align with the evidence that one would have on such a claim.

144. It follows, in my judgment, that there is clear unfair prejudice to Peabody in the approval of the CVA.
145. For the avoidance of doubt, I disagree with the Company's position that all that the Shareholder's creditors would be interested in would be its past figures. The Shareholder was promising large support within the Company CVA: £200,000 float, up to £396,000 guarantee funding the Valley House claim. Those were moneys which but for the compromise would be the Shareholder's assets available to the Guarantee Creditors whose debts were contingent and would not, but for the notional insolvency of the Shareholder, otherwise all fall due at once.
146. Insolvency of the Shareholder is a necessary hypothesis. But the actuality is that through the compromise of the guarantee claims, the Shareholder was not to enter insolvency. The guarantees were instead to be settled via the third party company. I think the Guarantee Creditors would be interested and entitled to know how the Shareholder would have settled the claims otherwise.
147. It is also seems to me that the chain, (1) Company insolvent, (2) notional Shareholder insolvency, (3) therefore only receipt of amounts by reference to the Shareholder's notional insolvency, is syllogistic.
148. Those are in the event side observations.
149. Unfair prejudice was also raised by Newlon. Mr. Brown acknowledged that business continuity can justify differential treatment, and he assumed it to be a social good, which I take it is a purpose behind the Insolvency Act; certainly, company rescue is the fundamental policy behind this aspect of the Insolvency Act.

150. He pointed to the treatment of the Connected and Critical Creditors and the Shareholder as being starkly different to Newlon's, and he said unfair. Mr. Weaver acknowledged that the prejudice was clear, the question was unfairness.
151. There is certainly a stark difference, particularly with Newlon as a Contingent Creditor for £1 for each of its heads of claim which it values at £2.3 million. The situation is not much better if it is characterised as a Non-Critical Creditor in getting its 1.2p. The Shareholder, as we have heard, has been deferred, and Critical Creditors are being paid in full. It is right that the evidence was there was no investigation by the nominee or indeed by others as to whether the Critical Creditors would accept less than 100p on their current debt as the price for continuing their contracted services. The connected creditors as a class have no special treatment.
152. What these submissions do not do is concentrate on why the starkness of difference is wrong. While one can point to Mizen Gwynne Road Limited as a connected creditor treated as a Critical Creditor, the directors had confirmed in the Proposal they had considered and deemed to be essential to the Company's business those in the Critical Creditor list; and this debt was only for £6,636 for introducing construction work. Another connected Critical Creditor, Mizen Build Limited, Mr Brown in closing very fairly took no point on, because its £268,000 odd debt is for sourcing materials on behalf of the Company at cost and because it can obtain better credit terms.
153. I am therefore unable to find unfair prejudice in that scenario.
154. The second head raised by Newlon is that the Nominees ought to have ensured that the Proposal was fit to be put before creditors and it ought to be serious and viable. It is said that it is not viable and ought never to have been proposed in this form; that the Company was "spiralling into insolvency", on the 2018-2021 figures we have already

looked at; that there could be no serious expectation of profitability; and that the Company was reliant on the Shareholder for soft loans which under the Proposal were to continue with the Shareholder bound to support the Company at least with a £200,000 float. It is also alleged under this that the Shareholder could not service its debts, but that is not the evidence: Mr Burke insisted the Shareholder was solvent, and given the terms of Peabody's challenge, the likelihood is that the Shareholder's position on notional insolvency is actually better than that shown.

155. Mr. Brown went through the various existing projects in cross-examination, the upshot of which is that £80,000 is still anticipated at some point on Uxbridge. On Valley House, no one knows the outcome. The Paragon contract, yes, it was £2.5 million down, it has been renegotiated and Mr. Tansey expects it now to be profitable.
156. Again, looking into the present and beyond the parameters of what was known to the creditors at the time, the first two payments have been made by the Shareholder.
157. Assessing the Proposal within the parameters of what was known at the time, the disclosure of information was not such in my judgment as to mean this was not a viable proposal, and it was plainly serious. Moreover, the Creditors have voted on the face of the Proposal very largely for its acceptance. They are commercial companies looking after their own interests. This is not a Proposal which has some fundamental flaw in the forecast or its mechanism which makes one able to say that it is bound to fail. Neither, even looking at the current information, can one reach that conclusion.
158. For those reasons, I find against Newlon on its application; but I find for Peabody on its application.
