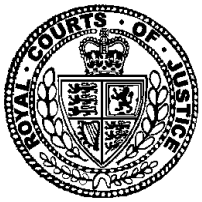

Neutral Citation Number: [2018] EWCA Civ 1781

Case No: A2/2017/0792

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
HH JUDGE KEYSER QC
3482 of 2017/BR-2015-02338

IN THE MATTER OF MR MOISES GERTNER
IN THE MATTER OF THE INSOLVENCY ACT 1986

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30 July 2018

Before :

LORD JUSTICE PATTEN
LORD JUSTICE FLOYD
and
LORD JUSTICE COULSON

- -

Between :

MOISES GERTNER	**Appellant**
- and -	
(1) CFL FINANCE LIMITED	
(2) DAVID RUBIN	**Respondents**

- -
- -

Mr Gabriel Moss QC and **Mr James Knott** (instructed by Teacher Stern LLP) for the **Appellant**
Mr Stephen Atherton QC and **Ms Blair Leahy** (instructed by Mishcon de Reya LLP) appeared for the **First Respondent**

Hearing dates : 17 and 18 April 2018

- -

Approved Judgment

Lord Justice Patten :

1. In June 2008 the First Respondent, CFL Finance Limited ("CFL"), lent the sum of £3.5m to a Gibraltar company called Lanza Holdings Limited ("Lanza"). Lanza is owned and controlled by certain Gertner family trusts and the appellant, Mr Gertner, provided a personal guarantee for the debt. Lanza defaulted and in November 2010 CFL sued Mr Gertner on his guarantee for some £1.7m together with compound interest from June 2008 which was payable under the loan agreement in the event of a default.

2. In October 2011 the proceedings were compromised on terms recorded in a Tomlin Order under which Mr Gertner agreed to pay £2m to CFL by instalments together with a further £50,000 on account of its costs. It was a term of the settlement that if Mr Gertner failed to make the instalment payments as agreed then the entire amount claimed in the proceedings would become due and payable. By early 2013 that had happened. Later in March 2015 Mr Gertner's solicitors, Teacher Stern, offered CFL the sum of £10,000 in full and final settlement of the debt which was stated then to amount to £2,185,973. With interest this would have increased to £10,857,183 but Mr Gertner disputes his liability for interest even though under the terms of the settlement with CFL interest was payable.

3. In the event the negotiations came to nothing and on 11 September 2015 CFL served a statutory demand on Mr Gertner in respect of the debt which with interest was then over £11m. An offer was made to settle the debt with a payment of £487,500 which was rejected but no application was made by Mr Gertner to set aside the statutory demand. CFL presented a bankruptcy petition on 6 October 2015 which was served on 22 October 2015 and the hearing of the petition was fixed for 23 November 2015.

4. On 20 November 2015 CFL was served with a proposal by Mr Gertner for an IVA. This included CFL as a creditor in a sum of £11,128,611. Although no application had been made for an interim order, CFL agreed to the hearing of the bankruptcy petition being adjourned over the creditors' meeting and it now stands adjourned generally with liberty for it to be restored.

5. In Mr Gertner's Estimated Statement of Affairs attached to his IVA proposal his father was shown as a creditor in the sum of £28,666,666. The proposal stated that his father had agreed to subordinate his claim for dividend purposes to those of the other unsecured creditors whose claims totalled £582,809,270. Of these the largest debt was £547,261,182 owed to Kaupthing Bank hf ("Kaupthing").

6. Mr Gertner's liability to Kaupthing is based on a personal guarantee dated 19 September 2008 which was given to secure loans made to Crosslet Vale Limited ("Crosslet Vale") which was another Gertner family company. The loans had been made to finance various investments by Crosslet Vale including in September 2008 the purchase of some 18.5m shares in Kaupthing. Crosslet Vale also defaulted and proceedings for the recovery of the loans and under the guarantee were commenced by Kaupthing in October 2010. Mr Gertner was sued for over £300m. The proceedings were stayed by agreement and negotiations took place. Mr Gertner has asserted in evidence that the loan made in September 2008 was part of a fraud on the part of Kaupthing's directors and was therefore unenforceable. But that point has

never been pursued in the litigation and no discount was made on account of it when formulating the IVA proposal.

7. Mr Gertner's IVA proposal was prepared with the advice and assistance of the Second Respondent, Mr Rubin. He is a well-known insolvency practitioner and was consulted by Mr Gertner on the advice of his solicitors. Mr Rubin has filed evidence in which he says that he had not acted for Mr Gertner or his wife prior to November 2015 and that he was and is independent of the parties. According to his evidence, he was personally responsible for undertaking the investigations into Mr Gertner's affairs which preceded the formulation of the IVA proposal and for the investigations which have taken place since then in response to the present proceedings.

8. The proposal was signed by Mr Gertner on 18 November 2015. In it Mr Gertner refers to his various business activities and to his having provided personal guarantees to various financial institutions:

> "The major liability is in connection with a shortfall on a loan with Kaupthing Bank which was secured on my personal guarantee and some mining assets and I have been in negotiations with them for some time.
>
> CFL Finance Limited have presented a bankruptcy petition in the High Court of Justice with a hearing date of 23 November 2015 in respect of an aggregate sum claimed of approximately £11 million, which is disputed.
>
> In these circumstances I sought the advice of Insolvency Practitioners. I consulted David Buchler of Buchler Phillips Limited and David Rubin of David Rubin & Partners Limited and having reviewed my financial affairs, they advised me to put a proposal to my creditors for an Individual Voluntary Arrangement."

9. So far as material, the IVA proposal was that:

> "1. A third party will make a one-off lump sum payment to the Supervisors of £487,500 which will be used to make a distribution to creditors and meet the costs of the Arrangement. This sum will be held prior to the creditors meeting by the Nominees and will only be released to the Supervisors once the Arrangement becomes unconditional and the 28 days prescribed by section 262(3)(a) of the Insolvency Act 1986 for challenges has elapsed. This should be sufficient to pay a dividend of approximately 0.07p in the £ to unsecured creditors.
>
> 2. The claim of HM Revenue and Customs which is estimated at £32,678 will be paid in full from the one-off lump sum received by the Supervisors.

> 3. Should I receive any windfall/inheritance during the term of the Arrangement, details shall be notified to the Supervisor immediately and such funds shall be paid as contributions into the Arrangement up to the value of creditors' claims in full. …"

10. The proposal contains the usual terms about the remuneration of the Supervisor and the payment of his costs. In Appendix A Mr Gertner's assets are stated to be nil. After taking into account the liabilities to creditors (including those mentioned earlier), the deficiency as regards creditors is estimated in the sum of £611,508,614. Mr Gertner stated in the proposal that he considered a voluntary arrangement would be preferable to bankruptcy because the costs would be less than the statutory fees and bankruptcy would prevent him from continuing as a director of Fordgate Management Limited ("Fordgate") and might jeopardise his future earning capacity. The outcome comparison contained in Appendix B shows that in the absence of the third party contribution, the creditors would receive nothing by way of dividend in a bankruptcy as opposed to the projected dividend in the IVA of 0.07p in the pound.

11. On 19 November 2015 Mr Rubin as a Joint Nominee made his report under s.256A(3) IA 1996 in which he recommended the proposal. In the report Mr Rubin states that the proposal is based on information provided by Mr Gertner:

> "a) **Debtors circumstances.**
>
> The debtor has provided information as to his present financial circumstances. Based on the information received, I am satisfied that the true position as to the debtor's assets and liabilities are not materially different from that which is represented to the creditors by the Proposal and the documents annexed thereto.
>
> b) **Basis on which assets are valued.**
>
> I have made no independent investigation of the debtor's statement of affairs. I have relied upon the debtor's comments that he has no assets and that the matrimonial home is owned by his wife.
>
> c) **Debtor's estimate of liabilities.**
>
> The claims of the creditors have been ascertained from statements available and from explanations given by the debtor. I have no reason to doubt the reliability of the debtor's estimate of the liabilities to be included in the Arrangement.
>
> d) **Debtor's co-operation.**
>
> The debtor has fully co-operated with me during my involvement in the preparation of the Proposal.
>
> e) **Discussions with any major unsecured creditors**.

> Kaupthing Bank hf are the major creditor and represent almost 90% in value. Their solicitors Simmons & Simmons LLP have confirmed in correspondence that their clients' current intention is to support Mr Gertner's voluntary arrangement.
>
> ….."

12. On this basis Mr Rubin stated that the proposal was feasible and fair to the creditors and the debtor and was an acceptable alternative to bankruptcy.

13. The creditors' meeting to consider and vote on the proposal was scheduled for 17 December 2015. On 16 December 2015 CFL's solicitors, Mishcon de Reya, wrote to Mr Rubin raising a number of queries about details of the IVA proposal. They asked for information about any assets of Mr Gertner which had been placed into family trusts and for details of his earnings from Fordgate. They noted that Mr Gertner was a party to arbitration proceedings in Israel which appeared to include claims for high-value assets and asked for details of the litigation and why any possible recoveries were not included in the proposal. In relation to Kaupthing, Mr Rubin was asked why Kaupthing was allowed to vote in the full amount of their claim when the claim was disputed and still ongoing. More specifically, they said that they had been informed that Kaupthing had decided not to pursue a claim in bankruptcy against Mr Gertner because they had accepted an offer from Mr Gertner for a payment amounting to 1% of their claim (i.e. £4m) which was significantly higher than what was on offer to the other creditors. They asked Mr Rubin a series of questions including when Mr Rubin became aware of this agreement and whether Kaupthing would receive both a payment under the IVA and also the £4m.

14. Mr Rubin replied on 16 December 2015. He confirmed that the investigations leading to the preparation of the proposal were limited to information provided by Mr Gertner and whatever other evidence could be found in the press. He promised that if Mr Gertner was discovered to have made some material mis-statement then he, Mr Rubin, would be the first to take action. He said that he had asked for information on the points raised about asset dissipation and the family trusts. In relation to Kaupthing, he said:

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

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

15. On 16 December 2015 there was also an exchange of correspondence between Mishcon de Reya and Simmons & Simmons who acted for Kaupthing in which Mishcon de Reya referred to the information they had received about an agreement with Mr Gertner under which Kaupthing would receive both the £4m and a dividend in the IVA. In their letter in reply Simmons & Simmons accused CFL of being involved in co-ordinated action to seek to interrupt the IVA. They said that Kaupthing did not propose to engage further with them. The letter concluded in these terms:

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

16. On 16 December 2015 Simmons & Simmons lodged Kaupthing's completed proxy form and a proof of debt in the sum of £557,467,416.37. The proof of debt referred to the High Court proceedings issued in October 2010 and stated that it was unclear whether and to what extent the defendants intended to defend the claim. The proxy form authorised Mr Gerard Hayes to vote on Kaupthing's behalf in favour of the acceptance of the IVA proposal.

17. What remained undisclosed at this time was that on 11 December 2015 Kaupthing had entered into a settlement agreement ("the KSA") with Crosslet Vale, Mr Gertner, his brother Mendi Gertner and Laser Trust (a trust established in Gibraltar by Mr Leib Levison who was the third party providing the payment of £487,500 under the terms of the IVA proposal). The KSA referred in its recitals to the dispute between Kaupthing and Crosslet Vale in relation to the facility agreement of 4 December 2006 and to the High Court proceedings commenced by Kaupthing in October 2010. Recital (D) recorded that:

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

18. Clause 2.1 provided:

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

19. The "Dispute" is defined as the dispute between the parties relating to the 4 December facility agreement: see recital (A). The "Proceedings" means the action commenced on 22 October 2010.

20. So far as material, clause 3 provided:

> 3.1 Laser Trust shall pay Kaupthing the total sum of US$6 million by close of business on 15 December 2015. The parties agree that it is a fundamental term of this agreement that Kaupthing be in receipt of the payment of US$6 million by close of business on 15 December 2015 and that Kaupthing may in its absolute discretion, treat this agreement and any related agreements as having been repudiated in the event that payment is not received by close of business on 15 December 2015.
>
> 3.2 Interest shall accrue and be payable on any part of the US$6 million that is not paid in accordance with clause 3.1 at the rate of 6 per cent per annum above the base rate for the time being of the Bank of England from the date on which the relevant sum became due, until, but excluding, the date of actual payment.
>
> ...
>
> 3.4 The obligation on Laser Trust to pay Kaupthing the sums set out in clause 3.1 and the interest in clause 3.2 is absolute.
>
> …..
>
> 3.6 On or before execution of this agreement the parties shall enter into or procure that the relevant parties enter into and adhere to the profit sharing agreements in substantially the form of the draft agreements in Appendices 2, 10 and 11 regarding the future profits of Indus Trading Limited, Maskelyn Limited and Readinse Limited respectively.
>
> 3.7 The parties shall use their best endeavours or procure that the relevant parties use their best endeavours to facilitate the enforcement of the security (by way of share transfer) granted over the land in Úherce u Nýřan and Nýřany

> charged to Kaupthing pursuant to the mortgage agreement dated 4 December 2006 between Kaupthing (as security agent) and Mayfield Plzeň sro (as security provider) including by entering into, within 7 days of the execution of this agreement, an agreement in substantially the form of the draft agreement at Appendix 3.
>
> 3.8 The parties shall use their best endeavours or procure that the relevant parties use their best endeavours to facilitate (i) the enforcement of the security granted over or (ii) transfer to Kaupthing of the shares in Katanga Mining Limited charged to Kaupthing pursuant to the security agreement dated 11 January 2008 between Pitchley Properties Limited (as charger) and Kaupthing (as security agent)."

21. It is common ground that the US$6m was paid to Kaupthing in accordance with clause 3.1. The profit sharing agreements set out in the Appendices referred to in clause 3.6 are with the three named companies each of which is a claimant in the arbitration in Israel that was referred to in the correspondence mentioned earlier. The claim is being pursued by Mr Gertner and his brother, Mendi, against a Mr Dan Gertler and various of his family trusts and companies. The arbitration includes a cross-claim. The evidence of Mr Gertner is that the claims have been brought by him and his brother on behalf of the Gertner family trusts but the effect of clause 3.6 of the KSA and the profit sharing agreements was to give Kaupthing an entitlement to share in any recoveries made in the arbitration in return for a release of the named companies from certain liabilities to Crosslet Vale and the Gertner family trusts. The profit sharing agreements appear to have been executed either on or before 11 December 2015. They refer in their recitals to the dispute between Kaupthing and Crosslet Vale arising out of the facility agreement and to the October 2010 proceedings. Recital (C) which refers to that dispute states:

> "Those parties have settled their differences on a binding basis by way of a settlement agreement dated 11 December 2015."

22. The draft agreement referred to in clause 3.7 is expressed to be made between Kaupthing, Irongate B.V. (a Netherlands company) and Mayfield Plzeň s.r.o. (a company registered in the Czech Republic). It provides for security in the form of "Irongate's 100% participation in Mayfield" to be acquired by Kaupthing in partial discharge of Crosslet Vale's debt. The evidence is that this agreement has not been executed, although no explanation or reason for this has been provided.

23. The shares in in Katanga Mining Limited comprised in the charge to Kaupthing referred to in clause 3.8 had also neither been sold nor transferred to Kaupthing. Once again, no reason for this has been given.

24. Clause 5.1 of the KSA provided:

> "The parties shall, within 90 days of:

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

25. The draft agreement contained in Appendix 6 included an irrevocable assignment by Kaupthing to Laser Trust of all its rights under the Facility Agreement and the various guarantees together with a general release of Kaupthing from all its own liabilities and obligations under those agreements. The acquisition by Kaupthing of the security contemplated by the agreement referred to in clause 3.7 and the transfer of the Katanga shares contemplated by clause 3.8 are therefore intended to lead to the release of the debtor's liability under the guarantees together with the indebtedness which they secure. But none of that had occurred as of the date of the creditors' meeting although Kaupthing had received the US$6m from Laser Trust and had entered into the profit sharing agreements which gave it a potential share in the recoveries in the Israeli arbitration. But the KSA itself contained in clauses 6 and 7 an agreement not to sue and a general release which are central to whether Kaupthing remained a creditor entitled to vote in relation to the IVA proposal and in what amount. Clauses 6 and 7 provide:

> "6.1 Each Gertner Party, Laser Trust and Crosslet Vale agree, on their own behalf and on behalf of each of their Related Parties, not to sue, commence, voluntarily aid in any way, prosecute or cause to be commenced or prosecuted against Kaupthing or its Related Parties any action, suit or other proceeding concerning the Potential Claims, in this jurisdiction or any other.
>
> 6.2 Kaupthing agrees, on behalf of itself and on behalf of its Related Parties not to sue, commence, voluntarily aid in any way, prosecute or cause to be commenced or prosecuted against the Gertner Parties, or any of them, or Crosslet Vale any action, suit or other proceeding concerning the Potential Claims, in this jurisdiction or any other, save that nothing in this clause shall be construed as either (i) preventing Kaupthing enforcing its rights under this agreement or (ii) constituting a release or

> discharge of the rights and obligations of the parties under the Facility Agreement.
>
> 7.1 With effect from the date of this agreement, each party hereby releases and forever discharges, all and/or any actions, claims, rights, demands and set-offs, whether in this jurisdiction or in any other, whether or not presently known to the parties or to the law, and whether or not (sic) in law or equity, that it, its Related Parties or any of them ever had, may have or hereafter can, shall or may have against the other parties or any Related Parties arising out of or in connection with the Dispute or Potential Claims, save that nothing in this clause shall be construed as either (i) preventing Kaupthing enforcing its rights under this agreement, or (ii) constituting a release or discharge of the rights and obligations of the parties under the Facility Agreement, any and all related guarantees and, for the avoidance of doubt, the rights and obligations arising out of the arrangements referred to at clauses 5.2(A) to (C) of this agreement."

26. 'Potential Claims' and 'Related Parties' are defined terms with the following meanings:

> "'Potential Claims' means all and/or any actions, claims, rights, demands and set-offs, whether in this jurisdiction or any other, whether or not presently known to the parties or to the law, and whether in law or equity, that it, its Related Parties or any of them ever had, may have or hereafter can, shall or may have against the other party or any of its Related Parties arising out of or connected with the matters set out at (A) to (C) below, save that nothing in this definition or in this agreement shall be construed as either (i) preventing the parties enforcing the rights and obligations arising pursuant to this agreement, or (ii) constituting a release or discharge of the rights or obligations of the parties under the Facility Agreement:
>
> (A) the Dispute (including the Proceedings);
>
> (B) any previous agreement between or act by the parties or their Related Parties or any of them; and
>
> (C) any other matter arising out of or connected with the relationship between the parties up to and including the date on which this agreement becomes binding on the parties pursuant to clause 2.1.
>
> 'Related Parties' means a party's subsidiaries, parent (including ultimate parent), any subsidiary of any such parent, assigns, transferees, representatives, principals, agents, employees, officers, directors or family members (including former representatives, principals, agents, employees, officers,

> directors or family members) or any other associated entity or person; and any entity or person associated with any trust or similar structure established for the benefit of any of the foregoing, including for the avoidance of doubt the Moises Gertner Trust, the Mendl Gertner Trust or the Gertner No 1 Settlement and, prior to its dissolution, Orgate."

27. The creditors' meeting took place on 17 December 2015. Mr Gertner was not present but his attendance was not compulsory. CFL was represented by Ms Blom-Cooper and Mr Lynch of Mishcon de Reya who took a note of the meeting. This records that Mr Rubin explained how he came to be consulted about the IVA proposal and referred to the correspondence with the creditors which this had generated. Ms Blom-Cooper told Mr Rubin that a number of questions had been raised about the debtor's assets and liabilities which in her view had not been answered. She stated that CFL's position was that the information should be provided before the proposal could be approved.

28. One of the questions directed to Mr Rubin concerned the arbitration in Israel. Mr Rubin confirmed he was aware of the arbitration but deferred to Mr Rabinowicz of Teacher Stern who said that Mr Gertner was only a nominal claimant in the proceedings and had no financial interest in them. Mr Rubin is also recorded as accepting that his investigations were "thinner than they should be", although in evidence he said that this was stated in relation to points raised in Mischon's letter of 16 December.

29. Ms Blom-Cooper asked for the meeting to be adjourned. Mr Rubin said that because the meeting could only be adjourned for up to 14 days that would not give sufficient time for further investigation of the facts surrounding Mr Gertner's assets and liabilities. He suggested that in the event that Mr Gertner was found to have omitted material facts that would form the basis of an application by the Supervisor for his bankruptcy which was almost certain to be ordered. He recommended that there be no adjournment of the meeting. The request for an adjournment was rejected and the proposal was approved. According to Mr Rubin's Rule 5.27 Report, creditors representing 97.85% in value (including of course Kaupthing) voted to approve the proposal. CFL and one other creditor with 2.15% by value of the creditors present or represented voted against. Under IR 5.23(2) a resolution to approve a proposal must be passed by a majority of three-quarters or more (in value) of those creditors present and voting at the meeting whether in person or by proxy. It follows that if Mr Rubin had rejected Kaupthing's entitlement to vote or had admitted it for only a nominal value, the proposal would not have been approved.

30. On 15 January 2016 CFL issued an application against Mr Rubin and Mr David Buchler, the Joint Supervisors of the IVA, and against Mr Gertner for an order under s.262 IA 1986 revoking or suspending the approval of the IVA or an order under IR 5.22 reversing or varying Mr Rubin's decision as chairman of the creditors' meeting to admit Kaupthing either to vote at all or vote as a creditor for more than a nominal amount. These orders were sought on the grounds that the IVA was unfairly prejudicial to the interests of CFL as a creditor or alternatively on the grounds that there had been some material irregularity at or in relation to the creditors' meeting. The grounds relied on in support of the application were that Mr Gertner had failed to give full and frank disclosure of his assets and income and that approval of the IVA

was obtained by the vote of Kaupthing whose proceedings against Mr Gertner had not by then been settled or determined and which was party to an undisclosed collateral arrangement outside the IVA with Mr Gertner which would result in Kaupthing receiving payments over and above the dividend in the IVA in settlement of its purported debt.

31. The application was supported by a witness statement from Ms Blom-Cooper of Mishcon de Reya which sets out the background and events leading up to the creditors' meeting. This included the correspondence referred to with Mr Rubin and with Simmons & Simmons. In her witness statement Ms Blom-Cooper says:

> "Under the IVA Proposal as they stand Kaupthing will receive just £394,000 being 0.07% of Kaupthing's debt. However, as stated above it is now clear that Kaupthing have entered into a collateral arrangement with a third party in relation to this debt.
>
> …..
>
> I believe that the only reasonable inference is that Kaupthing has been induced to accept the objectively meagre terms of the IVA Proposal in exchange for entering into a collateral arrangement with the Debtor and/or his associates which has not been disclosed in the IVA Proposal."

32. Mr Gertner made a witness statement in which he says that he is not the creditor or settlor of the Gertner family trusts which were managed by trustees in Gibraltar and that he is a discretionary beneficiary under only two of the trusts. The distribution of assets and income under the trusts is a matter for the trustees over whom he has no control, although he has in the past received distributions. He accepts that he is a claimant in the arbitration because he was a party to many of the agreements relevant to the claim. But in [22] he states that he has no personal entitlement to any recovery that may be made in the arbitration. That will be for the benefit of the trusts. In [60]-[61] in response to Ms Blom-Cooper's evidence about the existence of a collateral arrangement with Kaupthing, Mr Gertner said this:

> "60. I understand that the suggestion is made by Ms Blom-Cooper that an "associate" of mine has entered an agreement with Kaupthing by which Kaupthing will achieve a greater recovery of its debt than my other creditors. I note that in certain paragraphs of Ms Blom-Cooper's statement it is also alleged that I personally have entered into such an agreement, but in paragraph 47 she alleges that the agreement is with a "third party". Whilst I am not certain whether "associate" is meant to have any special meaning in this context I can confirm for the avoidance of doubt that I have not (nor has any entity in which I am interested, nor anyone on my behalf) entered into any agreement with Kaupthing by which it is entitled or will be entitled to any of my assets over and above the portion to which they will be entitled under the IVA.

> 61. What Kaupthing does have (as is clear from the correspondence from Simmons & Simmons exhibited to Ms Blom-Cooper's statement) is an understanding with the primary debtor/borrower, Crosslet Vale Limited, which was another family Trust owned company. It was in respect of lending by Kaupthing's to Crosslet Vale that I gave the guarantee which is the source of my liability to Kaupthing. In relation to the arrangement with Crosslet Vale I am not sure I can improve on what Kaupthing, through its solicitors Messrs Simmons & Simmons, has explained to the supervisors in their letter dated 16 March 2016 (pages 105-122), a copy of which the Joint Supervisors have kindly supplied me with. With respect to Kaupthing, that letter and the information contained in it more than answer the various allegations made by Ms Blom-Cooper in her statement and accords entirely with my understanding. Kaupthing's position is clear and its rationale for supporting the IVA fully explained."

33. The letter from Simmons & Simmons which is referred to does not in terms mention the KSA that had been entered into. In relation to the alleged collateral agreement, it stated:

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

34. The letter also said that no arrangement had been made under which Kaupthing would receive additional value in the form of a payment from Mr Gertner or his assets.

35. On 6 October 2016, as part of a wider ranging application by CFL for disclosure, HH Judge Pelling QC ordered Mr Gertner to provide copies of documents including documents relevant to any arrangement between Kaupthing and Mr Gertner or Kaupthing and a third party in relation to the sums claimed by Kaupthing and the settlement of Kaupthing's claim. In compliance with this order, copies of the KSA were disclosed by Mr Gertner to CFL on 28 October 2016.

36. Section 262 IA 1986 provides:

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

37. The entitlement of creditors to vote at the meeting is governed by IR 5.21 which states:

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

38. Any issues about entitlement to vote are for the chairman of the meeting to resolve subject to the right of any creditor or the debtor to appeal. IR 5.22 provides:

> "(1) Subject as follows, at the creditors' meeting the chairman shall ascertain the entitlement of persons wishing to vote and shall admit or reject their claims accordingly.
>
> (2) The chairman may admit or reject a claim in whole or in part.
>
> (3) The chairman's decision on any matter under this Rule or under paragraph (3) of Rule 5.21 is subject to appeal to the court by any creditor or by the debtor.
>
> (4) If the chairman is in doubt whether a claim should be admitted or rejected, he shall mark it as objected to and allow votes to be cast in respect of it, subject to such votes being subsequently declared invalid if the objection to the claim is sustained.
>
> (5) If on an appeal the chairman's decision is reversed or varied, or votes are declared invalid, the court may order another meeting to be summoned, or make such order as it thinks just. The court's power to make an order under this paragraph is exercisable only if it considers that the circumstances giving rise to the appeal are such as give rise to unfair prejudice or material irregularity."

39. An appeal under IR 5.22(3) is not limited to a review of the chairman's decision. The Court is entitled to approach the matter of entitlement *de novo* and is not confined to considering only the evidence that was available to the chairman at the meeting. For present purposes, this means that the Court can consider the challenges to Mr Rubin's decision to admit Kaupthing to vote in respect of the entire amount of its debt against

the terms of the KSA even though that agreement was not available to be considered by the chairman at the meeting and was not disclosed until much later.

40. The IR 5.22 appeal and the application under s.262(1) were pursued on three grounds at the hearing which took place before HH Judge Keyser QC (sitting as a judge of the Chancery Division) on 29 and 30 November, 1 and 2 December 2016. CFL contended that:

(1) there had been a material irregularity in the conduct of the creditors' meeting consisting of the chairman's decision to allow Kaupthing to vote in respect of the entire estimated value of its debt. The effect of the KSA had been that Kaupthing had compromised its claim against Mr Gertner so that the claim on the guarantee (and the underlying indebtedness to which it related) were no longer enforceable. Alternatively, the indebtedness, if still enforceable, was contingent and for an unliquidated or unascertained amount and should have been valued (in accordance with IR 5.21(3)) in the sum of £1;

(2) Alternatively, and in any event, the admission of Kaupthing to vote was a material irregularity because the KSA involved a breach of the obligation amongst creditors to act in good faith; and

(3) As a result of the KSA, the IVA proposal was unfairly prejudicial to CFL because CFL was thereby denied the opportunity to pursue Mr Gertner through the medium of bankruptcy as a result of Kaupthing's support for the proposal based on the KSA and the secret benefit which the KSA conferred on Kaupthing.

41. The judge held ([2017] EWHC 111 (Ch)) that on the true construction of the KSA the debt based on Mr Gertner's guarantee liability had either been extinguished or was no longer enforceable. Kaupthing was therefore no longer a creditor. Alternatively, the debt was contingent and therefore unliquidated or unascertained. In these circumstances, Mr Rubin should either have rejected Kaupthing's vote or valued its claim at a nominal £1 in accordance with IR 5.21(3). On the second issue of material irregularity, he held that the KSA breached the principle of good faith between creditors because it enabled Kaupthing to benefit from the US$6m and the opportunity to participate in the recoveries in the arbitration (which were not available to other creditors) and thereby acted as an inducement for Kaupthing to support the IVA proposal as a result of which the other creditors would be limited to a dividend based on a share (with Kaupthing) in the £487,500 provided by Laser Trust.

42. But the judge rejected CFL's argument that the IVA proposal was also unfairly prejudicial to its interests as a creditor. He held that, on the authorities, the unfair prejudice complained of must derive from the terms of the IVA itself. In this case, the IVA treats all creditors equally. CFL's complaint is about how the IVA came to be approved.

43. Mr Gertner appeals against the judge's decision on material irregularity. CFL cross-appeals against his rejection of its case on unfair prejudice.

Material irregularity: the construction of the KSA

44. As the judge observed, the KSA exhibits in its drafting a carefully chosen balance between the provision to Kaupthing as creditor of certain specific benefits and the preservation of certain of its rights until the completion of all aspects of the consideration provided by clause 3 in return for the ultimate release of those rights in accordance with clause 5. One senses from reading Judge Keyser's judgment that the judge may have thought (with some justification) that the failure to enter into the clause 3.7 agreement and to deal with the Katanga Mining shares was not readily explicable given the ability of the parties to make the payment of the US$6m and to enter into the profit sharing agreements by the 15 December date. But on the basis that the obligations under clause 3.7 and 3.8 had not been complied with by the date of the creditors' meeting, the judge was faced with having to decide whether that meant that Kaupthing remained a creditor of Mr Gertner under the 19 September 2008 guarantee in respect of the liabilities of Crosslet Vale.

45. Both before the judge and on this appeal Mr Gertner placed considerable emphasis on clause 2.1 which provides that the agreement shall not be binding on the parties "as a settlement" of the dispute and the proceedings between Kaupthing and Mr Gertner until all of the agreements referred to in clauses 3.1 to 3.8 have been executed. This is said to be re-inforced by the words at the end of the definition of "Potential Claims" where it refers to "any other matter arising … up to and including the date on which this agreement becomes binding on the parties pursuant to clause 2.1". Mr Moss QC for Mr Gertner says that this should be read as indicating that the KSA is conditional on fulfilment of the obligations contained in clause 3 so that it can have no contractual operation as a compromise or discharge of Mr Gertner's indebtedness to Kaupthing unless and until that event occurs. Moreover, clauses 3.1 to 3.8 should, he says, themselves be read as conditions imposing no obligation on the counterparties to provide any of the consideration specified. If, however, they are performed then the parties come under the obligations set out in clause 5 and once Kaupthing's rights under the facility agreement and the guarantees are assigned to Laser Trust then Kaupthing will, of course, cease to be one of Mr Gertner's creditors. Until then it is clear, says Mr Moss, both from clause 2.1 and also from the saving provisions at the end of clause 6.2 and 7.1 that Kaupthing's status as a creditor is maintained. Its rights under the facility agreement and the guarantees are preserved as they must be in order for them to be assigned in due course to Laser Trust in accordance with clause 5.1 and clause 6.2 does not include any agreement by Kaupthing which prevents it from voting in support of the IVA in the meantime.

46. The judge rightly commenced his analysis of the contractual terms by saying that it was important to construe any particular term against the background of the whole agreement. He rejected the argument (if that is what it amounted to) that the effect of clause 2.1 was to prevent the KSA from taking immediate effect as a valid and binding contract. That, he said, was inconsistent with recital (D) to the agreement and with the mandatory nature of the terms of clause 3 which require parts of the consideration to be put in place by the designated parties in many cases by a specified date. In his view, the KSA draws a careful distinction between the basic contractual indebtedness to Kaupthing under the facility agreement and the guarantees and the right of Kaupthing to enforce those rights by some form of claim or demand. Kaupthing is therefore prevented by clause 6.2 and 7.1 from suing on the facility

agreement and guarantees and has released the rights which it has arising out of the Dispute as defined in the KSA but does not thereby release its rights or the obligations of Mr Gertner under the facility agreement and the guarantees. The effect therefore of clause 6.2 was that Kaupthing could not, from the date of the agreement, sue for the debt but the debt would remain in existence and be capable of assignment. The judge said:

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

47. The judge then turned to consider what his construction of the KSA meant in terms of Kaupthing's status as a creditor for the purposes of voting on the IVA proposal. CFL had contended either that the debt had ceased to exist or, at the very least, that it was no longer enforceable. The judge thought that the former was the better view:

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

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

48. I agree with the judge that the KSA was not conditional in the sense that neither party came under any contractual obligations on the execution of the agreement and clauses 6 and 7 had no operation at the time of the creditors' meeting. At the time when the KSA was signed on 11 December Kaupthing was undoubtedly a creditor of Mr Gertner and had commenced proceedings against him under the guarantee. Although Mr Gertner had formally contested liability, there is nothing to indicate that he had any serious defence to the claim and Kaupthing as his largest creditor was in the position to pursue him into bankruptcy unless satisfactory arrangements could be made for the compromise of its claims.

49. Both the KSA and the IVA proposal involved the provision of funds by a third party (Laser Trust) which would not be available in the event of a bankruptcy. But the KSA was clearly more generous and made provision for Kaupthing alone. If it was to

be effective there was clearly a need on both sides to have some contractual certainty in the form of an executed agreement which bound both Kaupthing and Mr Gertner (together with the other relevant parties) to a compromise of the claims and removed from Kaupthing its ability to enforce its rights under the guarantee if appropriate by petitioning for his bankruptcy. It also seems to me obvious that although Kaupthing was not required under the KSA to support the IVA proposal, the consideration provided for under the KSA was a considerable incentive to do so. Had the IVA proposal failed (which it would have done without Kaupthing's support) the only alternative would have been bankruptcy in which event there would no longer have been any commercial purpose in seeking to compromise the claims of Mr Gertner's largest creditor. Kaupthing could have been left to prove in the bankruptcy for whatever dividend was ultimately available. The purpose of the IVA proposal and the KSA was to avoid that outcome.

50. In these circumstances, there is no reason to give the KSA anything less than its most obvious meaning. Recital (D) confirms that the KSA itself is a binding contractual settlement of the dispute and there are similar statements in the recitals to the profit sharing agreements that were entered into at the same time. But that does not mean that the KSA necessarily operates as a release of Kaupthing's claim or its rights under the facility agreement and the guarantees. For the machinery and terms of the settlement one needs to look closely at the clauses which follow.

51. Mr Moss, as I have mentioned, identifies clause 2.1 as in effect the lynchpin of his case on construction. But one needs to look at the wording more carefully. The KSA is stated not to be binding "as a settlement of the Dispute" (which includes the proceedings) until the provisions of clause 3 have been complied with. But that does not mean, as I read it, that the KSA itself is not binding until that time. Such an interpretation would not only contradict recital (D). It would also be inconsistent with the provisions of clause 3, 4, 6 and 7 all of which imposed unqualified obligations on various parties to the agreement and are not in terms conditional on or subject to clause 2.1. It seems to me that clause 2.1 can be given proper effect by treating it as deferring the ultimate settlement of the Dispute, as defined, until all the consideration has been paid or provided. Once that occurs the provisions of clause 5.1 come into operation leading, as I have explained, to the assignment of Kaupthing's rights and the debt to Laser Trust and the termination of its status as a creditor of Mr Gertner. But even short of that point, the other obligations imposed on the parties continue to operate according to their terms and these include most relevantly clauses 6 and 7.

52. I accept Mr Moss's submission that the saving provisions in clauses 6.2 and 7.1 were obviously inserted to preserve the contractual indebtedness and Kaupthing's other rights under the guarantees so that they could be assigned as choses in action to Laser Trust. The more difficult question is what effect the rest of the clauses have upon Kaupthing's position as creditor. The judge's view, as I have explained, was that having agreed not to prosecute the action (which was also stayed under a Tomlin Order in accordance with clause 4) and having released all and any claims relating to the guarantees there was no longer any subsisting debt in respect of which Kaupthing remained a creditor. The judge described the argument that a debt could remain in existence whilst no longer being enforceable as a legal sleight of hand but he also considered that if this was a legal possibility it still meant that Kaupthing was no longer a creditor of Mr Gertner as at the date of the creditors' meeting.

53. In my view the judge was wrong about this. I can see no reason in law why a creditor cannot preserve the existence of a debt owed to him whilst at the same time agreeing to take no steps himself to enforce the liability. There may be all sorts of reasons why a creditor may agree to forbear suing to enforce the debt. But that seems to me to be different in kind from a release of the liability or the indebtedness itself and, absent express agreement to that effect, it should not impinge on the creditor's right to participate in a decision of the general body of creditors as to whether the insolvency of the debtor should be managed through an IVA as opposed to the process of bankruptcy or prevent the creditor from participating in proving for his debt and qualifying for a dividend once other creditors have taken action against the debtor.

54. CFL relied on the analogy of a statute barred debt in respect of which the creditor could neither sue nor present a petition in bankruptcy: see *Ridgeway Motors (Isleworth) Ltd v ALTS Ltd* [2005] 1 WLR 2871; *Mittal v R P Capital Explorer Master Fund* [2014] BPIR 1537. But this is not a case involving a statute barred debt where the expiry of the limitation period bars enforcement of the debt for all time by anyone including an assignee. There is nothing in the KSA which limits the rights of Laser Trust to enforce the liability post assignment of the debt. All that clause 6 and 7 do is to protect Mr Gertner against Kaupthing by restricting its right to enforce the guarantees.

The value of the debt: IR 5.21(3)

55. That leaves CFL's alternative argument that the debt owed to Kaupthing was in the circumstances of the KSA contingent and (it is said) therefore either unliquidated or unascertained in amount. As mentioned earlier, the right to vote on the IVA proposal at the creditors' meeting is given to every creditor who has notice of the creditors' meeting: see IR 5.21(1). The creditor's vote is calculated by reference to the amount of the debt owed to him at the date of the meeting: IR 5.21(2)(b). But where the debt is for an unliquidated amount or is of an unascertained value it is to be valued for voting purposes at £1 unless the chairman agrees to put a higher value on it: IR 5.21(3).

56. These provisions broadly reflect the criteria for proving in a bankruptcy. Although s.267(2) IA 1986 restricts the right to petition to creditors who are owed a debt in a liquidated sum which is payable either immediately or at some certain future date, a creditor may prove in the bankruptcy for any "bankruptcy debt": see s.322(1). This is defined in s.382 as including any debt or liability for which the bankrupt is or may become subject to and s.382(3) states:

> "(3) For the purposes of references in this Group of Parts to a debt or liability, it is immaterial whether the debt or liability is present or future, whether it is certain or contingent or whether the amount is fixed or liquidated, or is capable of being ascertained by fixed rules or as a matter of opinion; and references in this Group of Parts to owing a debt are to be read accordingly."

57. Section 383(1) defines "creditor" in similar terms. There is therefore no doubt that creditors with unliquidated debts or with future or contingently payable debts are all creditors for the purposes of IR 5.21 and the only issue is as to how their debts should

be valued. For the purposes of IR 5.21(3) what matters is not whether the debts are contingent but whether they are for an unliquidated or unascertained amount. In certain circumstances a liability under a guarantee may be unliquidated. This issue was considered by this court in *McGuiness v Norwich and Peterborough Building Society* [2011] EWCA Civ 1286. But it is not suggested that Mr Gertner's liability to Kaupthing was prior to the KSA unliquidated or, for that matter, unascertained. The only issue is whether the effect of the KSA was to put it into that category.

58. CFL's argument, which the judge accepted, was that the debt was contingent because it could not be enforced by Kaupthing unless there was a failure by Mr Gertner and the other counterparties to comply with the obligations under clause 3 amounting, presumably, to a repudiatory breach of the agreement. Once released from the restrictions of the KSA, Kaupthing would then be free to enforce the guarantee by petitioning for Mr Gertner's bankruptcy. The judge recognised that there is an obvious distinction between whether a debt is contingent or unliquidated and unascertained and he quoted a passage from the judgment of Mellish LJ in *Ex parte Ruffle, In re Dummelow* (1873) LR 8 Ch App 997 at 1001 where this was considered in the context of s.16(3) of the Bankruptcy Act 1869 which allowed a creditor to vote at a meeting in respect of "any unliquidated or contingent debt". Mellish LJ said:

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

59. In *HMRC v Maxwell* [2010] EWCA Civ 1379 Lord Neuberger said at [57]:

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

60. As the cases referred to in *Maxwell* show, there will be cases where the liability will be unliquidated or unascertained (e.g. a claim for damages) and those where it will also be contingent and, as a consequence, unascertained. An example of the latter is *Chittenden v Pepper* [2006] EWHC 1511 (Ch) where a landlord's claim for future rent was held to be dependent on the lease not being forfeited and the premises

remaining unlet for a further two years. This contingency meant that this claim was both unliquidated and unascertained.

61. But in this case we are not concerned with a debt which, due to a contingency, may never come into existence or whose amount may vary depending on future events. Mr Gertner's liability to Kaupthing was, as I have said, liquidated and ascertained prior to the KSA and the only issue is whether it lost that character as a result of the restrictions on its enforcement which Kaupthing agreed to. Mr Gertner's case is that the debt remained liquidated and enforceable because of clause 2.1 and that as at the date of the creditors' meeting the settlement provisions had not yet come into effect because of the non-compliance with clauses 3.7 and 3.8. The liability still existed. Although, as I have already explained, I do not accept Mr Moss's argument about the effect of clause 2.1, I do accept that the KSA did not render Mr Gertner's debt to Kaupthing either unliquidated or unascertained. Although enforceability of the debt by proceedings became arguably contingent on the non-performance of the obligations under clause 3, the debt remained both liquidated and ascertained in amount. Nothing in the future compliance of the Gertner parties with clause 3 could affect the amount which Mr Gertner owed under the guarantee. If, as I have concluded, the debt or liability under the guarantee remained in existence then it was in a liquidated amount. It is not a case like *Chittenden* where the existence and quantum of the debt or liability also depends on the contingency. I do not therefore accept the argument that because the debt is in one sense contingent on the performance of clause 3 of the KSA, it is necessarily unliquidated or for an unascertained amount. The latter is not the necessary consequence of the former. There was not therefore a material irregularity as a result of Mr Rubin's decision to allow Kaupthing to vote in respect of the entire value of Mr Gertner's liability under the guarantee. IR 5.21(3) had no application and Kaupthing's entitlement to vote fell therefore to be calculated in accordance with IR 5.21(2)(b).

Material Irregularity: The Good Faith Principle

62. This brings me to Mr Gertner's next ground of appeal which challenges the judge's conclusion that Kaupthing's position under the KSA breached the principle or requirement for good faith between creditors and so amounted to a material irregularity within the meaning of s.262(1)(b) IA 1986. Given his conclusions about whether the Kaupthing debt remains valid and enforceable, it was not necessary for the judge to decide this point. But he did consider it in some detail in his judgment and CFL rely upon his reasoning in their Respondent's Notice as an additional ground for upholding the judge's order.

63. This part of CFL's challenge to the IVA involves some criticism of the secrecy with which the KSA was negotiated and agreed and the failure of the debtor to make full and proper disclosure of its terms to the other creditors prior to the meeting. There is a factual dispute as to whether the terms of the KSA were disclosed to Mr Rubin. But his evidence on this was both vague and unsatisfactory and the judge was entitled to find that there had been no proper disclosure. However, the real thrust of CFL's argument on this point does not depend on the issue of non-disclosure. The objection to the KSA is that it provided (and was intended to provide) a significant inducement to Kaupthing to vote in favour of the IVA thereby foreclosing the ability of the other creditors to secure any further investigation into the assets of Mr Gertner through the medium and with the benefit of the powers of the trustee-in-bankruptcy. And it

achieved that result by providing Kaupthing with a significant material advantage over the other creditors in the form of US$6m and the other consideration provided under clause 3 of the KSA and through the profit sharing agreements which will enable Kaupthing to participate in the recoveries from the arbitration. The creditors are not therefore on an equal footing in the consideration of the merits of the IVA proposal over a bankruptcy or in relation to the benefits which they obtained from the approval of the proposal.

64. The good faith principle was referred to by Malins V-C in *McKewan v Sanderson* (1875) LR 20 Eq 65 in the following terms:

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

65. It is clear from this formulation of the principle that this is not simply a re-iteration of the rule embodied in all insolvency legislation that the general unsecured creditors should share *pari passu* in the available assets of the insolvent estate. The principle can be breached if a creditor receives a collateral advantage from a third party in return for entering into the arrangement. In *Cadbury Schweppes Plc v Somji* [2001] 1 WLR 615 the debtor had proposed an IVA with his creditors under which they would receive 5 per cent of their debts. Cadbury Schweppes ("CS") and three banks rejected the offer and the creditors' meeting was adjourned. In the meantime, a friend of the debtor made proposals to these three creditors (with the knowledge of the debtor) under which they would receive payments or their debts would be purchased in return for their support of the IVA proposal. The banks accepted this offer but CS rejected it. At the adjourned meeting the banks (without disclosing what had happened) voted in favour of the proposal and it was agreed.

66. CS challenged the approval of the IVA under s.262(1)(a) IA 1986 on the ground that it had caused them unfair prejudice. No allegation of material irregularity was made under s.262(1)(b). They also petitioned for the debtor's bankruptcy. The judge (Anthony Boswood QC) held that there was no jurisdiction to set aside the IVA on grounds of unfair prejudice because the prejudice must be found in the terms of the arrangement and not in matters outside it such as the private inducement made to the banks to support the proposal. The correctness of this view about the scope of s.262(1)(a) forms the basis of CFL's cross-appeal in the present case. But the deputy judge held that the undisclosed arrangements with the banks made the IVA unenforceable because they breached the principle of equality between creditors which was preserved as a matter of good policy under the statutory provisions for the approval of an IVA.

67. The deputy judge conducted an impressive survey of the older authorities which I do not propose to repeat. One of the quotations was from the judgment in *McKewan v Sanderson* mentioned earlier. To much the same effect Cockburn CJ said in *Dauglish v Tennent* (1866) LR 2 QB 49 at pages 53-4:

> "In order that such a deed should be binding on the creditors, it is essential that there should be the most perfect good faith between the debtor and all his creditors. It is very true that it does not appear that the preference is to be obtained from the assets, or that all the creditors will not receive an equal distribution of the assets; but it is a wrong ground to rest the validity of a composition deed upon, to say that the creditor looks only to the equal distribution of assets. There may be cases in which a man might not be capable of deciding for himself whether he would accept the composition, and would rather trust to the judgment of a body of creditors than to his own, whether it was advisable for him to execute the deed; and he is entitled by the agreement into which he enters to insist that the concurrence of the other creditors shall have been obtained by fair means; and if it were obtained by a promise from the debtor to give something more to some creditors than to others, the deed would be fraudulent and void, as between the debtor and the other creditors who were not parties to the arrangement. "

68. The judge held that although CS could not rely on s.262(1)(a), there had been a material omission under s.267(1)(b) in the information made available to creditors such as to make the IVA unenforceable. He therefore proceeded to make a bankruptcy order. The debtor's appeal was dismissed: see [2001] 1 WLR 615. The Court of Appeal held the principle of good faith had not been abandoned or excluded by the statutory machinery introduced by IA 1986. It held that the judge was wrong to conclude that the IVA was rendered void by the failure to disclose what had happened. The question whether it could stand was to be determined by reference to what was likely to have happened at the creditors' meeting had the arrangements with the banks been disclosed. But on the basis that the non-disclosure did constitute a material omission in the information supplied to creditors at the meeting, the judge was entitled under s.276(1)(b) IA 1986 to make a bankruptcy order.

69. Robert Walker LJ said:

> "24. … Although the English law of bankruptcy now has the appearance of a complete statutory code, it is built on foundations which owe much to past judicial creativity and development of far more meagre statutory material going back to Elizabethan times, the first "modern" statutes being the Bankruptcy Act 1869 (32 & 33 Victc 71) and the Debtors Act 1869 (32 & 33 Victc 62). The deputy judge's impressive survey of the old law shows that in relation to compositions and arrangements with creditors the court did impose a strict requirement of good faith as between competing unsecured creditors, and prohibited any secret inducement to one creditor

> even if that inducement did not come from the debtor's own estate. There is no strong presumption that a similar principle must be found in the new regime set out in Part VIII of the 1986 Act, but (to put it at its lowest) it would be no great surprise to find it there in one form or another.
>
> 25. In applying the terms of section 276(1)(b) to the facts of this case the deputy judge followed the approach of Rimer J in *Apton New Homes v Tack* (unreported) 19 June 1998. In order to determine whether there had been a material omission he asked himself whether, had the truth been told, it would be likely to have made a material difference to the way in which the creditors would have considered and assessed the terms of the proposed IVA. I consider that that is the correct approach, so long as the question is to be answered objectively, and so long as it is borne in mind that as well as the creditors which were represented at the meeting on 20 December 1999, Mr Cooper held proxies for a number of creditors which were not present by their own representatives. Had Mr Cooper been informed on that day of an important new development which ought to be reported to those for whom he held proxies it would on the face of it have been his duty to adjourn the meeting and report to the other creditors, even if that meant having to obtain an extension of time (under section 376 of the Act).
>
> …..
>
> 34. In his conclusion that the IVA was void the deputy judge did in my respectful view err by over-reliance on the old law, to which he devoted a large part of his judgment, and by insufficient regard to the terms and policy of Part VIII of the Act. Legal certainty is important if the debtor, the creditors and the supervisor are to know where they stand. That is no doubt the reason for the short limit for challenge imposed by section 262(3), and the prohibition on other challenges on the ground of irregularity imposed by section 262(8). Mr Mark Phillips, appearing with Dr Fidelis Oditah for Cadbury, submitted that the secret deal found by the deputy judge was more than an "irregularity at or in relation to the meeting".
>
> 35. That submission has some force, but I do not accept it. The approval of an IVA at the creditors' meeting is of central importance to the whole of Part VIII, as appears from section 260. If a proposed IVA has apparently been approved by a creditors' meeting, the only routes to challenge or circumvent it are in my judgment a direct challenge under section 262(1) or an indirect challenge by means of a bankruptcy petition under section 276(1)."

70. Although the order under consideration in *Cadbury Schweppes* was not made under s.262(1)(b), it is evident from what Robert Walker LJ says in [35] that he regarded

that provision as a potential means of enforcing the principle of good faith in relation to the approval of an IVA. But the jurisdictional question was put beyond doubt by the decision of this Court in *Kapoor v National Westminster Bank plc* [2011] EWCA Civ 1083. Here the National Westminster Bank and HMRC did challenge the approval of an IVA on the basis of a material irregularity under s.262(1)(b). At the creditors' meeting two creditors voted in favour of the proposal. One of these was a company owned by a family trust connected to the debtor which had originally been owed £8.5m by the debtor. The company was treated as an associate of the debtor within the meaning of IR 5.23(4)(c) and the resolution would have been invalid if more than half the creditors in value voting for it were associates of the debtor. To avoid this difficulty, the company assigned £4m of its £8.5m of debt to an individual (Mr Chouhen) who was not an associate of the debtor in return for a payment of £100,000 and 80% of the recoveries made in respect of the assigned debt. At the meeting both the company and Mr Chouhen voted in favour of the proposal. If Mr Chouhen's vote was left out of account then the vote in favour of the proposal would have been invalid under IR 5.23(4).

71. The Court of Appeal held that the principle of good faith was included within the concept of material irregularity under s.262(1)(b). Etherton LJ said:

> "[64] Those are formidable submissions. I have nevertheless reached the conclusion that the good faith principle applies to the facts of the present case and, by virtue of its application, there was a material irregularity within s 262(1)(b) of the 1986 Act at or in relation to the creditors' meeting which approved Mr Kapoor's IVA. The irregularity was in treating the resolution approving Mr Kapoor's IVA as passed when, for the purposes of r 5.23(4) of the 1986 Rules, more than half in value of Mr Kapoor's creditors voted against it, if Mr Chouhen's vote was excluded as it should have been.
>
> [65] The good faith principle articulated in the authorities considered by the deputy judge in *Somji*'s case, and acknowledged by the Court of Appeal in that case, is not restricted to the non-disclosure of secret deals benefiting one or some of the creditors. Although the facts in all those authorities did concern such a situation, the good faith principle, as articulated by the deputy judge and approved by the Court of Appeal, encapsulated 'the fundamental rule that there should be complete good faith between the debtor and his creditors, and between the creditors inter se'. In *Dauglish v Tennent* (1866) LR 2 QB 49, for example, in which the court declared void a deed by which the defendant assigned all his estate to trustees on trust for distribution equally amongst all his creditors, Cockburn CJ said (at 53–54): 'In order that such a deed should be binding on the creditors, it is essential that there should be the most perfect good faith between the debtor and all his creditors.'
>
> [66] In *Mare v Sandford* (1859) 1 Giff 288 at 294 Stuart V-C said:

> 'The principles of this Court, which stamp a transaction of this kind with illegality, are not of a very refined kind. They are consistent with the ordinary principles of morality recognised by all mankind. And, moreover, where the Court has interfered to set aside such a transaction, it has done so on the ground of public policy, and of the transaction being such as the law should, in the highest degree, discountenance.
>
> The object of the bankrupt[cy] laws is to secure an equal distribution of property among the creditors, so that none shall have any advantage over another… '

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

[68] The arrangement given effect by the assignment in the present case was patently intended, and intended only, for the purpose of subverting that legislative policy. The contrary is not asserted on behalf of Mr Kapoor. It is at one extreme end of a spectrum of transactions of questionable legitimacy, that is to say consistency with the legislative policy underlying r 5.23(4). The assignment was not a sham, but it does not fall far short of it. Not only was the arrangement wholly uncommercial, from Mr Chouhen's perspective, in that it inevitably involved him paying more for the assignment than he would ever realise and retain in respect of the assigned debt, but, as Mr Smith forcibly submitted, the obligation to return to Crosswood 80% of the distributions received by Mr Chouhen under the IVA meant that in reality Crosswood only ever parted with a small part of its economic interest in the assigned debt. The assignment was

> designed to confer voting rights on Mr Chouhen with a value of £4m, but to part with only a fraction of the true financial value of the assigned debt.
>
> [69] The expression 'material irregularity' is not defined. I agree with Mr Smith that the well established good faith principle applicable to agreements between a debtor and creditors is capable of colouring, and should colour, the meaning of that expression. That reflects the approach of the Court of Appeal in *Somji*'s case. In my judgment, interpreting s 262(1)(b) against the background of the good faith principle and the legislative policy reflected in r 5.23(4), it was a 'material irregularity at or in relation to … [the] meeting' approving Mr Kapoor's IVA to take into account Mr Chouhen's vote for the purposes of r 5.23(4) when to do so would give effect to an arrangement solely, patently and irrefutably designed to subvert the legislative policy underlying that provision and without any commercial benefit intended or claimed for Mr Chouhen. It was an uncommercial arrangement inconsistent with any notion of good faith between Mr Kapoor and his independent creditors, or between Mr Chouhen and Crosswood, on the one hand, and the independent creditors, on the other, and was designed solely to subvert a critical principle of legislative policy as to the conditions for approval of an IVA. That is a perfectly apposite example of 'irregularity', giving the word one of its normal meanings as something which is lacking in conformity to rule, law or principle (see the *Shorter Oxford English Dictionary*)."

72. The particular vice of the arrangement in *Kapoor* was the transfer of part of the company's debt in order to avoid the effect of IR 5.23(4). Although the assignee was not technically an associate of the debtor, he was part of an arrangement designed to secure the approval of the IVA by relying on a debt that would otherwise have been disqualified. Mr Moss submitted that *Kapoor* involved a specific attempt to subvert the legislative policy behind IR 5.23(4) and could not be regarded as laying down some broader principle which prevents a third party from making payments to creditors with no recourse to the debtor's own funds. In the present case, Kaupthing has always been a creditor of Mr Gertner entitled to vote at the meeting. It was not required as a term of the KSA to support the IVA proposal and even had the terms of the KSA been fully disclosed prior to the meeting, the result Mr Moss says would have been the same. Kaupthing would still have voted for the proposal. Any non-disclosure of the KSA was not therefore material because even had it caused every other creditor to vote against the proposal, the outcome would still have been the same. CFL can therefore only succeed in showing that there was a material irregularity if the effect of the KSA was to disqualify Kaupthing from voting on the IVA proposal.

73. In terms of the policy considerations affecting payments to creditors by third parties, Mr Gertner relies on two cases in which the courts have had to consider CVAs in respect of football clubs under which football creditors (as defined) were paid in full by a third party. In one case this was the person who had agreed to purchase the club

on its exit from administration. In the other it was the Premier League. Under the insolvency policy of both the Football and the Premier League, an insolvent club must exit via a CVA approved by its creditors under which the debts due to football creditors must be fully paid or secured. Football creditors include other clubs which are owed transfer fees, players with unpaid wages and other football organisations to which money is owed. In the case of the Premier League, money that but for its insolvency would otherwise become payable to the club from television rights is used by the League to pay football creditors during the period of administration rather than being paid to the administrators and applied *pari passu* between all the club's creditors.

74. In *IRC v Wimbledon Football Club Ltd* [2004] EWCA Civ 635 the Revenue applied under s.6(1) IA 1986 for an order revoking the CVA on the ground of unfair prejudice or material irregularity. The ground relied on for the application was that the CVA contravened s.4(4)(1) IA 1986 which prohibits the approval of a proposal under which any preferential debt is payable otherwise than in priority to non-preferential debts. The administrators had agreed to sell the club to a purchaser as a going concern on terms that the purchaser would pay the football creditors in full and that the creditors would agree a CVA under which the assets of the club (after payment of the costs of the administration) would be used to fund a dividend of 30p in the pound to preferential creditors and the non-preferential creditors would receive nothing. The Revenue contended that s.4(4)(a) had been infringed by the payment by the buyer of the debts due to the non-preferential football creditors. This was dismissed by Lightman J whose decision was affirmed by the Court of Appeal.

75. In his judgment Neuberger LJ accepted the club's argument that the proposal for the purposes of s.4(4)(a) did not include the agreement under which the buyer would pay the debts due to the football creditors out of his own monies:

> "[54] In the present case, third party assets, namely the Buyer's monies (or, more likely, monies made available to the Buyer) are to be used to pay the Football Creditors. It would be unfortunate, indeed, surprising, if those monies, which do not, and never will, belong to the Company legally or beneficially, and have in no way been contributed to by the Company, should nonetheless be caught by s 4(4)(a). Such a result would seriously hamper a regime which is intended to be flexible, and would render it much less likely that third parties would be prepared to provide assets to assist in the achievement of a voluntary arrangement. It would also be surprising if those monies which do not fall within the direct ambit of the Proposal, and are not reflected in the price paid to the Company, should fall within the ambit of s 4(4)(a).
>
> [55] Further, there is no logical or commercial reason for preferential creditors seeking priority as against non-preferential creditors in relation to payments made by third parties from their own money. A creditor, whether preferential or otherwise, can justifiably expect to look to the assets of his insolvent debtor (or any guarantor of the debtor) for repayment; indeed, in some circumstances, he may justifiably expect to

> look to third parties who have received cash or other benefits from the debtor. However, there does not appear to be any good reason why a creditor should be entitled to look to a third party who, from his own free money and (possibly) for good commercial reasons of his own, has chosen to pay one or more other creditors of the debtor."

76. It followed from this that there was no material irregularity in the proposal nor did it cause the creditors unfair prejudice. The football creditors were paid off in full by the club's new owner and the net assets of the club were used to pay the preferential creditors in accordance with s.4(4)(a).

77. In *HMRC v Portsmouth City Football Club Ltd* [2010] EWHC 2013 (Ch) Mann J heard a s.6 application by HMRC in which the Premier League rules requiring the payment of football creditors in full were challenged as unlawful and contrary to public policy because they contravened the principles of *pari passu* distribution and the anti-deprivation principle. The football creditors had already been paid in part by the Premier League out of monies from television rights and the balance was due to be paid sometime after the approval of the CVA. Under the Premier League rules which apply during the administration or insolvency of a club, the right to receive monies from television rights is suspended and the League is entitled at its discretion to use the monies to pay the football creditors. The monies therefore cease to be payable to the club or to its administrators. Notwithstanding this, the football creditors were allowed to vote in respect of their claims at the meeting even though the CVA assumed that they would be paid in full in due course by the Premier League. As part of a wide challenge to the proposal, HMRC contended that the proposal was unfairly prejudicial to its interests as a creditor because it approved past and future payments in full to the football creditors and also involved a material irregularity insofar as football creditors were permitted to vote notwithstanding that they had or would receive payment of their debts in full.

78. Mann J rejected these arguments. He held that unless the rules could be said to be unlawful (which he was unable to accept), they resulted in the payment of the football creditors out of assets which would not otherwise be available to creditors of the club in the administration or under the CVA. On the question of unfair prejudice or material irregularity attributable to the football creditors being able to vote at the creditors' meeting, he said:

> "74. I have found this point a little more troublesome than some of the others, but in the end I find that it suffers the same fate – it does not amount to unfair prejudice. If it were the case that these creditors had no real interest in the CVA at all then there might be something in it. Why should those with no interest in the CVA at all, and who were being paid outside it, be entitled to force unwilling creditors into a CVA which is not approved by a requisite majority of that smaller class? However, as Mr Sheldon pointed out, that is not quite this case. The football creditors do have an interest in the CVA being approved. If it is not approved, and if there is a liquidation, then their contracts of employment come to an end. They may or may not get ones that are as favourable in that event, but if they

> continue into the new company after the CVA then the balance of their present contracts will be honoured. Mr Sheldon also submitted that they would also have an interest in the event that they were not in fact paid with moneys coming from the Premier League, but that seems to me to be a technical possibility only. Nevertheless, they are creditors, and they do, as creditors, have what can be described as a real interest in the outcome. In the circumstances, troubling though this point is, I do not think it amounts to unfair prejudice. Furthermore, in the end, HMRC have been bound into a CVA which can only leave them financially better off than a liquidation, on the assumptions on which I have to operate for the purposes of this application and appeal. That, too, is not unfair in my view."

79. There are a number of obvious parallels between the arrangements considered in the football club cases and the arrangements under review on this appeal. There is no suggestion that the funds which Laser Trust will provide to finance the KSA are in any sense assets that belong to Mr Gertner or would otherwise be available to his general creditors including CFL. Nor can it be said that Kaupthing has no interest in the conduct of Mr Gertner's insolvency given that even with the benefit of the KSA it will not be paid in full. I also accept Mr Moss's submission that the mere fact that some (but not all) creditors will receive preferential treatment in the form of payment by a third party does not *ipso facto* constitute a material irregularity in relation to the approval of the IVA. But the focus of the challenge in this case is slightly different. Putting aside for the moment questions of non-disclosure, what Kaupthing received under the KSA was a significant financial advantage over what Mr Gertner had offered to his other creditors under the proposal. There has been much argument and not a little evidence about whether the terms of the KSA were intended, so to speak, to buy Kaupthing's vote. But it is in my judgment obvious, as I have already said, that, looked at objectively, the additional consideration was intended to act and must be presumed to have acted as an inducement to Kaupthing to support an arrangement which would avoid Mr Gertner's bankruptcy. Although Kaupthing was not in terms required to vote in favour of the proposal, it had every incentive to do so and the KSA was deliberately drafted in such a way as to enable Kaupthing to remain a creditor at the time of the meeting. The remaining creditors by contrast would be limited to the dividend provided under the proposal and any further investigation of Mr Gertner's asset position (including, for example, in relation to the claims in the arbitration) would be effectively stifled.

80. In circumstances where the considerations referred to by Etherton LJ at [67] of his judgment in *Kapoor* were very much in issue, the principle of good faith does, I think, require to be strictly applied. The objection to the KSA is that it provided Kaupthing with a collateral advantage not available to other creditors which placed it in a position of conflict with the interests of the other creditors. That was in my view a breach of the good faith principle which disqualified Kaupthing from voting on the proposal to the potential detriment of CFL and the remaining creditors. I agree with the judge that the good faith principle is not confined to vote buying of the kind exemplified by *Somji* nor do I accept that the test of whether the IVA should be revoked on grounds of material irregularity depends on whether disclosure of the arrangement could have made a difference to the outcome in the way that Mr Moss

puts it. *Somji* was not decided under s.262(1) and concerned only whether there was a material omission in the information provided to creditors in the proposal document. In *Kapoor* where the challenge was brought under s.262(1)(b), it is clear from [64] of the judgment that the vote of the creditor who is party to the collateral arrangement falls to be excluded. Here Kaupthing was allowed to vote without disclosing a material and obvious conflict of interest and without its vote the proposal would not have been approved. The judge said:

> "First, the KSA radically alters the commercial significance of the Proposal for Kaupthing as compared with the other creditors. For CFL and others, the opportunity offered by a bankruptcy was to be replaced by a return that might be regarded as *de minimis*. Upon the approval of the Proposal, those creditors would, for example, lose any chance to investigate whether potential benefits of the Gertler Arbitration would be the beneficial property of Mr Gertner. Instead they would have a share in what was left of the £487,500 after HMRC had been paid off and the costs of the IVA had been discharged. Kaupthing, by contrast, was to receive a share of whatever proceeds were recovered in the Gertler Arbitration. In his cross-examination (day 2, pp. 89 - 90) Mr Gertner confirmed his expectation as to the scale of the benefit that Kaupthing would receive: "The offers to settle [in the Gertler Arbitration] are into the hundreds of millions that have been made, so therefore what I say to you is that any amount that the bank will receive is a substantial amount. It's not a small amount that the bank is keeping. ... How much will be out of litigation, I have no idea, but I do not think that it will be whole [i.e. full payment of the amount claimed by Kaupthing], but it will be substantially more than other creditors who borrowed at such a time of very high assets would have repaid the bank, so I hope and I pray that it will be a substantial amount." The consequence seems to me inevitably to be that Kaupthing's commercial interests in the outcome of the creditors' meeting were quite different from those of the other creditors. Indeed, the fact that approval of the Proposal would tend to put investigation of the beneficial interest in the Gertler Arbitration out of the reach of the other creditors indicates the clear conflict that arose between Kaupthing's interests and those of the general body of creditors. I regard this as a breach of the principle of good faith."

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

82. I would therefore dismiss the appeal on these grounds. In the circumstances, it is unnecessary and I do not propose to deal with CFL's other argument which is that the wider objections to the IVA proposal raised by the KSA are also capable of constituting unfair prejudice under s.262(1)(a) IA 1986.

Lord Justice Floyd :

83. I agree.

Lord Justice Coulson :

84. I also agree.