Neutral Citation Number: [2018] EWHC 1372 (Ch)

Case No: [2011-013738]

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

INSOLVENCY AND COMPANIES LIST (Chd)

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: [25 May 2018]

Before :

THE HONOURABLE MR JUSTICE HILDYARD

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Between :

	(1) Richard Heis **(2) Michael Robert Pink** **(3) Edward George Boyle** (as the joint special administrators of the MF Global UK Limited (in special administration), and as joint supervisors of the company voluntary arrangement approved on 12 December 2017)	**Applicants**
	- and -	
	(1) FINANCIAL SERVICES COMPENSATION SCHEME LIMITED (2) **ATTESTOR VALUE MASTER FUND LP**	**Respondents**

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Mr. Daniel Bayfield QC and Mr. Adam Al-Attar (instructed by Weil, Gotshal & Manges (London) LLP) for the Administrators and Supervisors

Mr. Mark Arnold QC and Mr. Marcus Haywood (instructed by Burges Salmon LLP) for Financial Services Compensation Scheme Limited

Mr. David Allison QC and Mr. Alex Barden (instructed by Allen & Overy LLP) for Attestor Value Master Fund LP

Hearing dates: 15 - 17 May 2018

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Judgment Approved

Mr Justice Hildyard:

Introduction

1. The Applicants, namely, Mr Richard Heis, Mr Michael Robert Pink and Mr Edward George Boyle, each of KPMG, are (a) the joint special administrators of MF Global UK Limited ("MFGUK") and (b) the joint supervisors of a company voluntary arrangement approved on 12 December 2017 (the "CVA") (the "Administrators" or "Supervisors"). By this application, issued on 23 March 2018 (the "Application"), they seek directions from the Court as to whether and, if so, how, to proceed to implementation of the CVA in the light of the unexpected emergence of substantial claims which have been filed since its approval by creditors and the sole member of MFGUK on 12 December 2017.

2. The application is brought because the issues arising, which concern the interpretation of the CVA, are far from straightforward, and the interests of two groups of MFGUK's creditors are potentially in conflict. In such circumstances, the Applicants have formulated three issues as to the proper interpretation and application of the CVA and the approach that should be taken by them; and they have sought and obtained the approval of the Court for these issues to be argued between court-appointed representatives of the two groups of creditors, whilst themselves remaining largely neutral.

3. The representative parties are:

   (1) Financial Services Compensation Scheme Limited (the "FSCS"); and

   (2) Attestor Value Master Fund LP ("Attestor"), acting by its investment manager Attestor Capital LLP.

4. The Applicants appeared by Mr Daniel Bayfield QC, leading Mr Adam Al-Attar; the FSCS appeared by Mr Mark Arnold QC, leading Mr Marcus Haywood; and Attestor appeared by Mr David Allison QC, leading Mr Alex Barden. Their assistance has been exemplary.

5. The three issues identified and proposed for determination are as follows:

   (1) Should the Administrators confirm that the CVA is not precluded from becoming effective in accordance with the condition precedent at clause 3.1(e) of Section 2 of the CVA ("clause 3.1(e)") in the light of certain Disputed Claims, as such term is defined in Section 2 to the CVA? ("Issue 1").

   (2) Should the Supervisors waive clause 3.1(e) and notify the creditors of MFGUK of the occurrence of the implementation date of the CVA pursuant to clause 3.2 of Section 2 of the CVA? ("Issue 2").

   (3) Should the Supervisors determine that the Disputed Claims are a material impediment to the implementation of the CVA and terminate the CVA pursuant to clause 27.1(c) of Section 2 of the CVA? ("Issue 3").

6. Put summarily, the FSCS seeks (for itself and those it represents) implementation of the CVA and contends that the answer to the first two questions is "Yes", and to the third,

"No"; whereas Attestor contends that the CVA should not now proceed to implementation and that the answer to the first two questions is "No", and to the third it is "Yes".

7. The Applicants not only have adopted a neutral stance: they are seeking to surrender any discretion they may have in determining the Issues to the Court.

8. The hearing of this application has been expedited in circumstances of considerable urgency: the CVA will terminate in accordance with its terms if it is not implemented by 12 June 2018 ("the Lapse Date").

9. Perhaps in light of this urgency, the Application has been confined by agreement between the parties to exclude from its scope any consideration of various complaints earlier aired by Attestor in relation to the Administrators and potential non-disclosure of material information surrounding the CVA. It is now common ground that the resolution of the three identified issues does not entail any criticism of, let alone allegation of misconduct, by the Applicants. Any allegations about the conduct of the Applicants would need to be considered, if at all, in separate proceedings brought at a later time. That confinement of the issues has enabled the matter to proceed without cross-examination, and has also side-lined some earlier complaints about the adequacy of disclosure. Even as so confined, the application has occupied three hearing days, and some 14 lever-arched files of evidence and two of authorities have been put before the Court.

10. One other preliminary matter to note is this. The Application refers, and the issues have been framed by reference to three late claims, being:

    (1) a claim by the German Tax Authority ("the GTA") to claw back certain withholding tax reclaims of EUR c.52m received by MFGUK ("the GTA Clawback Claim") in relation to "cum/ex" trades in German equities carried out by MFGUK on its own account ("the Principal Trades");

    (2) a claim by Deutsche Bank ("DB"), which was MFGUK's custodian and paying agent, for an indemnity in the event that the GTA seeks to recover directly from DB the same amounts ("the DB Mirror Claim"); and

    (3) a claim by DB for an indemnity in relation to potential liabilities arising from "cum/ex" trades carried out by MFGUK on behalf of clients ("the Client Trades"), in the amount of EUR 126m ("the DB Indemnity Claim").

    However, it is only the last which is the real cause of contention, because it relates to a liability which was not anticipated at the time the CVA was approved, whereas the others had been disclosed prior to the meeting (albeit only very shortly before then).

Background

11. MFGUK is a wholly-owned subsidiary of MF Global Holdings Ltd ("MFGH"), a company incorporated in Delaware. Companies in the MF Global group carried on business as broker-dealers in financial markets throughout the world. The group's principal operations were in New York and London, carried on by MF Global Inc and MFGUK respectively. These and other companies in the MF Global group entered formal insolvency proceedings

in the United States and England on 31 October 2011. The Administrators of MFGUK were appointed under the Investment Bank Special Administration Regulations 2011.

12. The Administration of MFGUK has proceeded to the point where (a) after the conclusion of various pieces of litigation by the end of 2013, 99.9% of client assets had been distributed by January 2014, and (b) following a distribution out of the administration estate in August 2016 almost all creditors have received 90p/£ on their claims.

13. Proposals for a CVA have been under consideration since 2016. In their Progress Report of May 2016, when the Applicants as Administrators announced the August 2016 distribution to creditors, they also put forward a narrowing range of potential outcomes for creditors, and explained that they were "evaluating exit options". In late April or early May 2017, the Applicants approached Attestor about a proposal for a CVA, and such proposal was worked up in an iterative process with Attestor and MFGH (MFGUK's largest creditor) over the ensuing months.

Objectives and key choices provided by the CVA

14. The main objectives of the CVA were described in the proposal (and elaborated in section 1 of the CVA Proposal) as being to:

    (1) give unsecured creditors the option to exit the Administration now in exchange for a certain final cash payment shortly upon implementation of the CVA;

    (2) agree a streamlined process for making final distributions to the remaining creditors, once the key issues regarding the remaining liabilities are resolved; and

    (3) save substantial administrative and operational costs going forward as a result of reducing the number of creditors of the estate.

15. The means whereby these objectives are proposed to be fulfilled is, in essence, to divide the creditors into those who wish to exit for a sum certain and immediate from those who wish to continue to participate, to a greater or lesser extent, in the administration with a view to an enhanced but inevitably deferred return.

16. More particularly, the CVA gives creditors the option of becoming *"Exiting Creditors"*, *"Stay-in Creditors"*, or "*Participating Creditors"*, the latter category including the *"Underwriting Creditor"* (in the event, Attestor). The key points distinguishing each of these classes are that upon implementation of the CVA:

    (1) *Exiting Creditors* would be entitled to a further final cash payment of 9.75p/£ on Allowed Claims (as defined in the CVA) to provide a total return for them of 99.75p/£. Exiting Creditors would have no further interest in the outcome of the special administration and, in particular, would receive no further dividend payment, no share in any further (including any unanticipated) asset realisations and would not receive statutory interest if payable.

(2) *Stay-in Creditors* would not be entitled to the fixed cash distribution of 9.75p/£. Instead, they would retain their interest in the outcome of the special administration, and benefit from further asset recoveries and reduction of liabilities, except that they would not benefit from potential recoveries of outstanding German Tax Reclaims from the GTA. Stay-in Creditors would thus be in a half-way house position – they remain interested, but not in the more speculative and longer-term potential upside recoveries of the pending DTT Reclaims and the EU Reclaims.

(3) *Participating Creditors* would fund the cash payment to the Exiting Creditors, which (obviously) they would not themselves receive. On the other hand, they would receive in exchange for the payment a pro rata beneficial interest in the claims of the Exiting Creditors, thereby further increasing their interest as well as their exposure in the estate, and they would continue to participate in and benefit from the administration in their enhanced shares. In particular, they would be entitled to share in the proceeds of any further (including any unanticipated) asset realisations (especially from the German tax reclaims), and would receive statutory interest (if payable).

(4) *The Underwriting Creditor,* Attestor, is a Participating Creditor but has also taken additional risk (in that as such it is liable to fund 30% of the amount payable to Exiting Creditors, the remaining 70% being shared between it and other Participating Creditors *pro rata*) in return for an enhanced share of any recoveries from the DTT reclaims and EU reclaims (see above).

17. As summarised by Ms Anke Heydenreich in her Witness Statement ("Ms Heydenreich's Witness Statement") dated 1 May 2018 on behalf of Attestor the key economic effect of the CVA, if implemented, is that the Participating Creditors (with Attestor bearing the lion's share), in economic terms, put up new money to "buy" the claims of Exiting Creditors for 9.75p/£.

18. The relevant election to be made by creditors as to whether to be an Exiting Creditor, a Stay-in Creditor or a Participating Creditor therefore depends, amongst other things, on that creditor's "*appetite*" for risk. Paragraphs 3.1 and 3.2 of Section 1 of the CVA state as follows in this regard:

> *"3.1 This CVA forms part of the winding-up of the Estate in the interest of creditors.*
>
> *3.2 Given the high degree of uncertainty as to the quantum and timing of further distributions to CVA Creditors, it offers a range of options for creditors to choose from, each of which could reasonably be considered to be in a CVA Creditor's interests, depending on its cash needs, risk appetite and investment profile."*

19. In her Witness Statement, Ms Heydenreich explains some of the potential permutations as revealed by the Estimated Outcome Statement at Schedule 5, Part B of the CVA Proposal:

    a) The anticipated "low case" return envisaged total claims in the estate of £995m (on the basis of the GTA Clawback Claim succeeding) and recoveries of £951m. On that analysis, Participating Creditors would get back £59m of the new money of £64m paid to fund the payment to Existing Creditors. Using the Administrators' measure of recovery against original claims in the estate, that would amount to an overall recovery of 95.7% - so about 4% less than the Exiting Creditors.

    b) The anticipated "high case" return envisaged total claims in the estate of £943m (on the basis of the GTA Clawback Claim not being filed or it being rejected) and recoveries of £1,002m. Participating Creditors could in theory make an overall recovery of 106.2% against original claims in the estate - about 6% more than the Exiting Creditors.

    c) However, in both cases, as Ms Heydenreich explains, the value of that recovery would be significantly diminished by the delay in receiving it (i.e. the time value of money). For example, it was estimated by the Administrators that the Pending DTT Reclaims might take 6 to 8 years to resolve and that the EU Reclaims might take 10 to 12 years to resolve: see CVA Proposal, Section 1A, para 3.16.

    d) For Stay-In Creditors the estimated outcomes were even more circumscribed - between 96.0% and 101.8%. Moreover, these returns would take between 1-3 years.

20. Whilst the CVA contained details of "*estimated*" high and low outcomes that Participating Creditors and Stay-In Creditors might respectively expect to receive in the CVA, it made clear that such projections were estimates only and necessarily involved risk and uncertainty because, by their nature, they were forward-looking. No assurance was given that such projections would prove correct. The "*Important Notice*" which appears at the start of the CVA (at page 3 to 4) states as follows:

    > "*This Proposal contains certain statements and statistics that are or may be forward-looking. The accuracy and completeness of such statements is not warranted or guaranteed. By their nature, forward-looking statements involve risk and uncertainty because they relate to events and depend on circumstances that will occur in the future. Although the Administrators believe that the expectations reflected in such statements are reasonable, no assurance can be given that such expectations will prove correct.*
    >
    > *Without limiting the generality of the immediately preceding paragraph, all statements contained in this Proposal in relation to estimated outcomes for creditors are illustrative only and they cannot be relied upon as guidance as to the actual outcomes for creditors.*"

21. As regards the "*high degree of uncertainty*" as to the quantum and timing of any distribution to be paid to Participating Creditors and Stay-in Creditors, the CVA highlighted "*in particular, the Company's status vis à vis the German Authorities*": see

paragraphs 3.5 to 3.9 of Section 1 of the CVA. In particular, paragraphs 3.7 to 3.9 state as follows:

> "*3.7. … the German Authorities may seek to counter-claim on the Company for the WHT relief already paid out to the Company (referred to as the Potential GTA Claw Back Claim).*
>
> *3.8 The Company's dispute with the German Authorities is not standalone and forms part of a wider discussion across the financial sector in Germany. In fact, during the course of the Administration, the deductibility of WHT for trades in German shares in close proximity to a scheduled dividend payment (referred to as cum/ex-trades or cum/cum-trades) has become a controversial and publicised topic in Germany, leading to a criminal investigation by the German Authorities into a large number of financial institutions.*
>
> *3.9 … the complexity of these issues and their high political profile cause the Administrators to believe that they are unlikely to be resolved for some years to come. ….*"

22. In the event, the vast majority of creditors have elected to become Exiting Creditors, leaving only six Participating Creditors (only four if the MF Global companies are treated as one) and only a single creditor which has elected to become a Stay-In Creditor (though there are a number of other creditors which are to be treated as Stay-In Creditors by virtue of the fact that the category also included Creditors having Disputed Claims as at the Final Claims Date which subsequently become Determined Claims as such terms are defined in the CVA, see Clause 10.1).

23. This preponderance of elected Exiting Creditors can be illustrated by the fact that the Participating Creditors would, if the CVA is implemented, be required to fund a distribution of £64 million to them, compared to an overall theoretical maximum of £82 million had all elected for that status. Consequently, and as was a principal objective of the CVA, the Administrators would have to deal with a considerably reduced creditor constituency, and a streamlined Administration process which should be capable of being progressed at considerably reduced cost.

The terms of the CVA: Section 2 of the CVA Proposal

24. The terms of the CVA itself are at Section 2 of the CVA Proposal. On behalf of Attestor, Mr Allison QC took me carefully through these, as is necessary in order to interpret the clause at the centre of the dispute, clause 3.1(e).

25. As already noted, Clause 3 contains certain conditions precedent to the implementation of the CVA. These are the principal focus of this application and are examined in greater detail below.

26. Clause 4 provides for creditors with '*Allowed Claims*' who have not already received 90p in the pound to receive "*as soon as reasonably practicable after the Implementation Date*" a so-called "*catch-up distribution*" bringing them up to this figure. "Allowed Claims" are

claims (a) provable under rule 284 of the Investment Bank Special Administration (England and Wales) Rules 2011 ("the SAR") and (b) submitted by the *'Final Claims Date'* and accepted by the Administrators.

27. The Final Claims Date is important: it functions as a hard bar date. It was set as 15 January 2018. (In their CVA Mechanics Explanation, the Administrators explain that this requires a total distribution of £1.15 million.)

28. Any claim in respect of which a proof has been submitted by the Final Claims Date, but where the Administrators have not accepted the whole of the proof (and the creditor has not accepted any rejection) is defined for the purposes of the CVA as a "*Disputed Claim*". Clause 10 contains detailed provisions for resolution of Disputed Claims, which in essence follow the SAR regime, in particular permitting an appeal to the Court.

29. Clause 5 deals with the Governance and Litigation Protocols which are to be complied with by the Administrators. As discussed further below, the only assets and liabilities addressed by the Litigation Protocol are those under the GTA Clawback Claim and the Reclaims in respect of Principal Trades. Attestor relies on this as reflecting the common understanding that there was a limited and known universe of remaining actual and potential claims against MFGUK, which included the issues arising from the Principal Trades, but not the DB Indemnity Claim.

30. Clauses 7, 8 and 9 deal with and explain the rights and obligations of the Participating Creditors, Exiting Creditors and Stay-In Creditors respectively. Their contrasting proposed entitlements have already been described, but the following provisions should also be noted:

31. Clause 7.2 makes provision for the calculation of the sum required to make the Exit Payments to the Exiting Creditors under the CVA. Under Clause 7.8, the Exit Payments are only to be made if the CVA has not been terminated.

32. Under Clause 7.9, in consideration of this the Participating Creditors receive, pro rata, interests in the CVA Trust Assets. The creation of the CVA Trust is addressed by Clause 6. Clause 6 makes provision for the Administrators, the Company and the Participating Creditors to enter into the CVA Trust Deed to govern the CVA Trust. It is then provided that the CVA Trust is to hold, on bare trust for the Participating Creditors, the CVA Trust Assets to be comprised of the "Assigned Exiting Creditors' Claims" and the "Assigned Stay-In Creditors' Claims" (as summarised below in paragraphs [34] and [36] respectively), together with all amounts standing to the credit of the CVA Trust Account to be held by the Company as trustee of the CVA Trust.

33. Under Clauses 8.2 and 8.3, each Exiting Creditor will receive its Individual Exit Amount (being its share of the Exit Payments, measured by the amount of its claim multiplied by 0.0975 – i.e. 9.75p/£).

34. Under Clause 8.4, each Exiting Creditor assigns its Allowed Claim (including any rights to future distributions) to the CVA Trustee. All these Assigned Exiting Creditors' Claims become part of the CVA Trust Assets.

35. Under Clause 9.3, Stay-In Creditors are entitled to a final distribution at the point when the Administrators declare that "*all Provable Claims against the Company that would materially affect the value of the proposed payments to the Stay-in Creditors have been finally determined to the satisfaction of the Administrators*". That distribution (the Final Stay-In Creditors' Distribution) is limited to part of the potential upside but (as previously indicated) it does not include the benefit of any receipts by the Company from the "*Pending DTT Reclaims*" or the "*EU Reclaims*".

36. Under Clause 9.7, from the date of the notice of the distribution, each Stay-in Creditor assigns its Allowed Claim (including any rights to future distributions) to the CVA Trustee. All Assigned Stay-In Creditors' Claims become part of the CVA Trust Assets.

37. Under Clause 12, Finance Europe, as the holder of the Subordinated Debt, agrees that it ranks behind statutory interest and non-provable liabilities.

38. Clause 13 contains a set of extensive releases which come into effect in circumstances where the CVA is implemented. These include releases of liability of the Administrators in respect of claims relating to the preparation of the CVA.

39. Clause 26.4 confers upon the Supervisors a power to modify the provisions of the CVA after the implementation date, but subject to a requirement inter alia that the modification "does not materially alter the effect or economic substance of the CVA."

40. Clause 27.1 makes provision for the termination of the CVA. This includes a determination by the Supervisors that there is a material impediment to the implementation of the CVA (or any material part thereof). Clause 27.1(c) is also a specific focus of the Application, and again I shall refer to it in greater detail later.

41. Schedule 14 to the CVA sets out Governance and Litigation Protocols, clarifying that the Administrators, and not the Participating Creditors, will be entitled to exercise all management powers, but also providing for them to consult with the Participating Creditors' Representative in relation to material administration decisions, and also on all matters relating to 'the GTA Proceedings' (including, especially) its possible settlement.

Status of the CVA and principles of interpretation

42. Section 5(2) of the Insolvency Act 1986 ("IA 1986") provides that the CVA:

> "(a) takes effect as if made by the company at the time the creditors decided to approve the voluntary arrangement, and
>
> (b) binds every person who in accordance with the rules –
>
> (i) was entitled to vote in the qualifying decision procedure by which the creditors' decision to approve the voluntary arrangement was made, or
>
> (ii) would have been so entitled if he had had notice of it, as if he were a party to the voluntary arrangement."

43. Thus, the CVA has, by statute, contractual effect, and it has been held (and I take to be clear) that the ordinary principles of contractual interpretation apply (see, for example, *In the matter of SHB Realisations Limited (formerly BHS Limited) (in liquidation)* [2018] EWHC 402 (Ch) especially at [28], and the cases there cited).

44. These principles, which were not a matter of contention, have recently been revisited and clarified at the highest level, including latterly by Lord Hodge JSC (with whom the others on the panel agreed) in *Wood v Capita Insurance Services Ltd* [2017] UKSC 24 at [10]-[14]:

> "10. The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning. …
>
> 11. … Interpretation is, as Lord Clarke JSC stated in the Rainy Sky case (para 21), a unitary exercise; where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. But, in striking a balance between the indications given by the language and the implications of the competing constructions the court must consider the quality of drafting of the clause (the *Rainy Sky* case, para 26, citing Mance LJ in *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd (No 2)* [2001] 2 All ER (Comm) 299 , paras 13, 16); and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest: the Arnold case, paras 20, 77. Similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms.
>
> 12. This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated: the Arnold case, para 77 citing *In re Sigma Finance Corpn* [2010] 1 All ER 571, para 12, per Lord Mance JSC. To my mind

once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each.

13. Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements. Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance. But negotiators of complex formal contracts may often not achieve a logical and coherent text because of, for example, the conflicting aims of the parties, failures of communication, differing drafting practices, or deadlines which require the parties to compromise in order to reach agreement. There may often therefore be provisions in a detailed professionally drawn contract which lack clarity and the lawyer or judge in interpreting such provisions may be particularly helped by considering the factual matrix and the purpose of similar provisions in contracts of the same type. The iterative process, of which Lord Mance JSC spoke in *Sigma Finance Corpn* [2010] 1 All ER 571, para 12, assists the lawyer or judge to ascertain the objective meaning of disputed provisions."

45. The Courts have also, time and again, emphasised that a contract is not to be construed in a vacuum, but in its admissible setting (and see *per* Sir Thomas Bingham MR in *Arbuthnott v Fagan* [1995] CLC 1396), and "the question is not what one party may have meant or understood by the words but rather what a reasonable person in the position of the parties would have understood the words to mean"*: Chitty, On Contracts (32nd ed.), para 13-043. In Arnold v Britton* [2015] AC 1619 Lord Neuberger said as follows in this regard at [15]:

"When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to 'what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean', to quote Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101, para 14. And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v)

commercial common sense, but (vi) disregarding subjective evidence of any party's intentions. ...”

46. To the same end, when construing a document, the court is entitled to look at evidence of the objective factual background, sometimes referred to as the factual matrix. However, that factual matrix must be limited to material known to the parties or reasonably available to them at or before the date of the contract: Lewison, *The Interpretation of Contracts* (6th ed), para 3.17(d).

47. I shall return to consider the principal provisions of the CVA, and most particularly, the provisions of clause 3.1(e) and clause 27.1(c) in the light of these principles and the admissible background context or matrix. However, it is convenient before doing so to explain in more detail the factual circumstances that have given rise to the dispute and which are said to have entirely unsettled the basic economic balance of the CVA and falsified the premises on which it was devised and based.

The sudden emergence of the DB Indemnity Claim and its nature and effect

48. The DB Indemnity Claim was received by the Administrators on Friday 12 January 2018 when DB submitted a proof of debt in respect of it in the sum of €126,724,993.95. That was a Friday, and 3 days before the end of the period for creditors to make a statutory challenge under section 6 IA 1986.

49. The DB Indemnity Claim, which as mentioned previously, is the only one of the three Disputed Claims in respect of which complaint is now made by Attestor, arises out of DB’s role as custodian bank for certain trades entered into by MFGUK in 2011. DB claims that it may be liable to pay to the GTA taxes in respect of those trades, though it disputes that it should be so.

50. There has been a tendency on the part of Attestor to describe the DB Indemnity Claim by reference to its full nominal value of over €126 million and present it accordingly as one of such a size and nature as inevitably must upset the economic premises and commercial bargain said to underlie the CVA and falsify the legitimate expectations of the Participating Creditors in committing to fund up-front the Exit Payments to the Exiting Creditors in return for some future indicatively measured, but ultimately uncertain, upside. That is forensically understandable but legally inaccurate.

51. It is important to note that no such claim has yet been made by the GTA against DB, and no such claim may ever be made. Furthermore, in the event that such a claim were to be made, DB intends to dispute it. It is a claim for an indemnity in respect of any such liability on the part of DB as <u>may</u> arise: it is, therefore, a prospective contingent claim only as between the GTA and DB.

52. Even if the appeal is successful, as a contingent claim, the DB Indemnity Claim would fall to be treated and valued as such by the Administrators, in accordance with the principles explained in *In re Danka Business Systems plc: Ricoh Europe Holdings BV v Spratt* [2013] Ch 506 (CA). It is not a matter of simply waiting to see what happens. This applies notwithstanding that the claim is based on an indemnity: and see per Patten LJ at [43]:

> "In the case of indemnity, it is true of course that the contractual liability of the party offering the indemnity operates as a kind of insurance against the prospective loss. But in the hands of a liquidator who must make a current assessment of the risk of that event occurring, the nature of the indemnity is irrelevant to the assessment of that outcome. There is nothing in rule 4.86 which requires the liquidator to guarantee a 100% return on the indemnity by assuming a worst-case scenario in favour of the creditors. To do so would produce a valuation which, by definition, was unfair to the company and its other creditors and members".

53. What can be (and was) said on behalf of Attestor is that at the least, the risk presented by the DB Indemnity Claim is of a magnitude which might reasonably be thought to alter the balance of risk as struck before its emergence. The Applicants acknowledge this in their evidence. One of their number, namely Mr Michael Robert Pink ("Mr Pink"), accepts that:

> "It is true that if the appeal against the rejection of the DB €126M Proof were to be allowed, the "economics" behind the CVA will be dramatically different from those envisaged in the CVA document".

The Administrators' response to the DB Indemnity Claim

54. Like the other Disputed Claims, the DB Indemnity Claim was rejected by the Administrators after they had taken advice on German law (by which law the claims are governed). Appeals in respect of those rejections have been made and are currently pending before the Court (the "Appeals"). The Appeals will not be determined before 12 June 2018, when the CVA will terminate in accordance with its terms unless it has been implemented: as I understand it, the Appeals raise issues of fact, including as to the German law and its application, and there has never been conceived to be any realistic prospect of them being so.

55. Whilst seeking to maintain studied neutrality, the Applicants have indicated in the evidence submitted on their behalf by one of their number, that, subject to the Court's guidance, they do not themselves consider that the existence of the Disputed Claims means that the CVA is incapable of implementation or that it should be terminated. Unless the Court otherwise directs they consider it appropriate to implement the CVA.

56. The principal elements of their reasoning as summarised by Mr Pink are that:

    (1) The Participating Creditors, including the Underwriting Creditor, are all sophisticated commercial parties with access to legal advice and adequate resources who were afforded facilities for and undertook such due diligence as they considered appropriate.

(2) Although the DB Indemnity Claim is different in nature from the other Disputed Claims, (a) the fact of the GTA's interest in the wider issue as to withholding tax payable in respect of "cum/ex trades" had been publicised and was probably well known to the market and (b) notwithstanding the differences, the common elements and circumstances are such that creditors who were prepared to "take a view" on the merits of the other Disputed Claims might reasonably be expected to take a similar view on the DB Indemnity Claim; and the Administrators have rejected them all.

(3) The risk of unanticipated claims was always present: indeed, the hard bar date or Final Claims Date was designed to invite and clear off "woodwork claims". Further, the bid from the Underwriting Creditor and the elections by the Participating Creditors were not conditional upon there not being any new Disputed Claims between the date of approval and the Final Claims Date or Bar Date.

(4) The value attributable to the DB Indemnity Claim (even assuming that would be appropriate) may bear little relation to its face value. Thus, while the potential impact of the DB Indemnity Claim (if established) may be significant for the Participating and Stay-In Creditors, that is not necessarily so. Much will depend on the value attributable to it, if any.

(5) There remain the same good reasons to implement the CVA as there were at the time of the vote on the CVA.

The FSCS's overall approach

57. That approach is adopted on behalf of the FSCS, which much stressed the contingent nature of the DB Indemnity Claim, the lack of any evidence to suggest that the Administrators were wrong to reject it, and the fact that it was an inevitable feature of the process, emphasised and expressed in this case by the provision for a Final Claims Date, that there was a risk of previously unanticipated claims coming out of the woodwork, especially in circumstances of manifest political interest in Germany.

58. The FSCS accordingly submitted that the DB Indemnity claim, though of considerable nominal value, is just such a claim as the Final Claims Date was designed and intended to flush out; that the Participating Creditors must be taken to have accepted the risk of such claims; and that in reality the DB Indemnity Claim was more of a paper tiger than a real threat, and it invited the Court to "afford great weight to the Administrators' indication as to how they intend to exercise any discretion…conferred upon them".

Attestor's overall position and approach

59. Against this, and as foreshadowed above, Attestor contends that the DB Indemnity Claim presents a material risk in any event which "has radically altered the economics", and that if it were to be allowed:

    (a) The entirety of the remaining administration estate would be likely to be eaten up by the claim.

    (b) Participating Creditors would receive no further distribution and would lose the entirety of their £64m investment – an effective recovery of 67.8%. Attestor, as the Underwriting Creditor, would achieve an effective recovery of just 53.3%.

    (c) Exiting Creditors would still exit with the benefit of the whole of the £64m payment – a recovery of 99.75%.

60. Furthermore, Attestor draws on the Administrators' previous attitude to risk to contend that consistently with their past and prudent practice of reserving in full against all claims, the Administrators should do so in the case of the DB Indemnity Claim pending its determination, in which case:

    (1) There will also be an issue in making so-called catch-up distributions to creditors who so far received less than 90p in the pound, while "Stay-In Creditors" would get nothing beyond what they have already received (this may be considerably less than 90p in the £).

    (2) There will be significant issues arising from the delay and additional expense of dealing with the DB Indemnity Claim.

    (3) On any view, such an outcome would be at odds with the expectations of all parties at the time the CVA was proposed and approved and falsify the commercial calculations and bargain which they maintain underlies it.

Evidence of factual matrix and the underlying "economic bargain"

61. I have referred earlier (see paragraphs [14] to [21] above) to the provisions of section 1 of the CVA itself, which contain a general description by the Administrators of the underlying basis and objectives of the CVA, and draw attention to the risks inherent in the exercise notwithstanding the care and detail of the modelling and forecasts of likely outcomes. Attestor placed much reliance on this section as delineating the commercial boundaries and the essential premises of the bargain. The following further points of relevance to an understanding of the bargain intended to be implemented by the CVA, all derived from section 1 of the CVA, may also be noted:

    (1) Paragraph 3.6, having mentioned that there remained "a number of issues still to be resolved" before a cash reserve of £16.6 million could be released, expressly drew attention to the fact that:

        "it is in particular, the Company's status vis-à-vis the German Tax Authorities which contributes to the large spectrum of potential financial outcomes for the Estate."

    (2) Paragraph 3.8 further stated:

> *"The Company's dispute with the German Authorities is not standalone and forms part of a wider discussion across the financial sector in Germany. In fact, during the course of the Administration, the deductibility of WHT for trades in German shares in close proximity to a scheduled dividend payment (referred to as cum/ex trades or cum/cum trades) has become a controversial and publicised topic in Germany, leading to a criminal investigation by the German Authorities into a large number of financial institutions."*

(3) Paragraph 3.9 went on to acknowledge that the Company is one of the institutions being investigated, though no criminal charges had been brought. It is then there stated that (a) based on advice *"the Administrators also have no evidence to believe that the Company's claims against the German Tax Authorities are invalid"* but that (b) in view of the complexity of the issues delays could exceed 7 or 8 years.

(4) Paragraph 4.3 stated that:

> *"At the Nominees, or Administrators' sole discretion, the Proposal may be withdrawn prior to or at the Creditors' Meetings should events occur which cause the Nominees or the Administrators to take the view that the Proposal is no longer in the interests of Creditors."*

No such discretion is reserved expressly in section 1 in the context of events arising after such meetings.

(5) In Part C, paragraph 12.1 summarised the then remaining assets in the estate, and paragraph 12.2 noted £123.4 million as being held in the Administration bank accounts against reserves (set out in paragraph 13.12).

(6) Also in Part C, paragraphs 12.12 to 12.21 provided further details of the claims against the GTA, and the Potential GTA Clawback Claim against the Company; but there was no mention of any liability in respect of client trades.

(7) And in Part C, paragraph 13.6 further details are given of the reserves held in respect of the GTA Clawback Claim: that being *"prudently"* £45 million even though no claim has yet been received and it is recorded that:

> *"even if received, the Administrators have been advised that there is not a basis for such a claim."*

(8) In the last paragraph of section 1 the following warning was given:

> *"Participating Creditors, by virtue of their ultimately acquiring the beneficial interest of both Exiting Creditors' and Stay-In Creditors' claims that will transfer to the CVA Trust, could benefit additionally*

> *from any outcome above 99.75% in respect of the CVA Trust. Equally, in a 'low' outcome they are exposed to potentially realising less than their 99.75% investment in acquiring their interests in the CVA Trust. Broadly this would create a leverage effect, substantially increasing the magnitude of the Participating Creditors' aggregate financial return/loss beyond the range of the estimated "low" and "high" outcomes."*

62. In addition to this detailed explanation of the background and objectives of the Proposals in section 1, both Respondents sought to bolster their positions by reference to (1) the process preceding and culminating in the CVA and (2) the Administrators' Progress Reports and further material circulated to creditors prior to the meeting to approve the CVA. From the same factual material they derived opposite messages on the essential question as to how the risk of unforeseen eventualities (in this case, unanticipated claims) was contractually allocated.

63. Put very summarily, but I hope not inaccurately, the aim of Attestor was to demonstrate that the economic premise of the CVA was that the risks had, as a practical matter been both identified and quantified, whereas the aim of the FSCS was to demonstrate that even if that were so, the risk of a previously unanticipated claim was always there, never excluded or capped, and accepted as the price of the prerequisite for the accomplishment of the objectives of the CVA, and especially the imposition and enforcement of the Final Claims Date (sometimes referred to as a "hard bar date"), which would provide a bar, but also sounded the final trumpet call to as yet unknown creditors to speak now or forever hold their peace.

64. Thus, for Attestor, Mr Allison advanced three principal themes in relation to the factual matrix:

    (1) That the information provided about the liabilities of MFGUK was in respect of a known and carefully estimated universe – it did not contemplate significant additional claims.

    (2) That all the information proceeded on the basis that full and precise reserves had been made, and would be maintained, for all claims (including claims in respect of which a proof had not been filed).

    (3) That the economics and pricing of the CVA were based on the potential claims in the estate being those which were known of and quantified – they did not make any allowance for significant unanticipated claims.

65. For the FSCS Mr Arnold's submissions took issue, in particular, with the latter point. He emphasised that the Administrators' Progress Reports were replete in every case with warnings that any indication of financial outcomes was just that – indicative and not to be relied upon; that the materials provided to the Underwriting Creditor (including those

made available in a Virtual Data Room) were non-exhaustive and were subject to an express disclaimer to that effect; and that likewise, all financial models were indicative only.

66. Mr Arnold sought to emphasise particularly the extent to which the inclusion of the Final Claims Date/hard bar date within the CVA was a core function of the CVA which was designed to ensure that any claims against MFGUK which had not been made by that date were finally extinguished so that they would not later have to be taken into account. He went on to emphasise that a core purpose of the CVA expressly recognised that new or additional claims might be made before the Final Claims Date. Mr Arnold suggested that if this was not the case there would have been no need to delay the hard bar date or to include within the CVA a process for proving modelled on the statutory rules or to attach to the CVA a proof of debt form to be used for that purpose.

67. In the FSCS's skeleton argument, particular reliance was also placed on the following statement in paragraph 12 of Mr Pink's evidence:

> "... I also disagree very strongly with any suggestion that any of the indicative outcomes, Progress Reports or other documents produced by the Administrators and provided to creditors could ever be taken or relied upon as providing an exhaustive picture of the assets and liabilities (or range of possible outcomes) of the Company's estate. There is always the risk of 'unknown unknowns' (a phrase used often in my industry is "woodwork creditors"). Particularly in the context of a complex insolvency, it would be naive to think that an exhaustive list of a company's liabilities can be produced prior to the passing of a "hard bar date"."

68. The material was copious, but I do not think it necessary to recite at length the extensive evidence cited by Attestor or the ten points advanced in rebuttal on behalf of the FSCS, since none was conclusive, and all are merely pointers in the ultimate adjudication of the true intent and effect of the wording of clause 3.1(e) and 27.1(c) of the CVA. It is sufficient for present purposes to summarise their overall effect.

69. In that regard, it seems to me that the following principal features of the factual background are relevant in determining the meaning and effect of the language in dispute:

    (1) The special administration of MFGUK had already lasted over six years, during which time creditors actual, contingent and speculative had had plenty of time, opportunity and incentive to state their claims;

    (2) The development of the CVA was an iterative process in the course of which bidders for the role of the Underwriting Creditor, including both Attestor and MFG Holdings, were provided with detailed information and the opportunity to comment on the development and finalisation of the eventual proposals;

    (3) Given the length of the Special Administration, and the protracted time frame before, and inherent uncertainty of, material returns in excess of

99.75p in the £, it was all but inevitable, and it was an objective of the CVA, that most creditors would elect to exit;

(4) The risk of staying in, and *a fortiori* the risk of being a Participating Creditor (and at the highest level of risk/reward, the Underwriting Creditor) was material, and in the case of Participating Creditors, it involved funding up front the exit payments in return for a pro rata interest under the CVA Trust;

(5) Detailed financial modelling was undertaken, allowing for prudent reserving for open legal and other disputes, with a view to establishing with as much care as possible the estimated universe of claims, and the various permutations arising according to the result of the German tax claims;

(6) The Administrators were assiduous in seeking to promote a solution which, according to the information available and the modelling constructed would be a fair economic balance for all. An illustration of this was the introduction fairly late in the development of the proposals of the category of "Stay-In Creditor', it having originally been planned that there would only be two categories (Exiting and Participating Creditors). The reason for this appears from Mr Pink's email of 27 June 2017:

> "This additional concept has been introduced by the JSAs because we were concerned that the previous 97 pence exit price did not attribute any material value to the potential for the CVA process itself resulting in significant unproven claims being struck-out in a relatively short period post CVA. If that were to happen under the original proposed structure and pricing, then the cash reserves currently held for those unproven claims would become available solely for the benefit of the Participating Creditors, which would be unfair on the Exiting Creditors. Ideally, we'd like to revert to the simpler 2-option model – Exit or Participate – but the JSAs can only propose that in a CVA if the price offered to the Exiting Creditors adequately reflects the 'upside' benefit that the CVA might deliver in terms of a reduce [sic] creditor pool. The 3-option model is a compromise, aimed at redressing the imbalance."

(7) In addition to the usual reasons for a final bar date, the Final Claims Date/hard bar date was conceived at least in part to force the GTA to show its hand and have its claims and any knock-on indemnity claims determined in England;

(8) Although in certain parts of its evidence Attestor claimed that "there was no suggestion that the Participating Creditors would assume the risk of unknown claims", there was always the theoretical possibility of such claims, and since there was no suggestion ever that the Exiting Creditors

would become obliged in respect of them under the CVA, the other creditors, and especially the Participating Creditors were always exposed in respect of them;

(9) However, the risk must have appeared to be a low one: it seems likely, and it is readily understandable, that no-one envisaged, after so long, that any material wholly unknown unknown such as the DB Indemnity Claim would emerge; the DB Indemnity Claim itself was not envisaged or contemplated, and it was not specifically priced in;

(10) Nevertheless, the Progress Reports and the information provided appears always to have warned against taking the modelling or information as definitive.

70. Against that background, I turn to the particular words by which the parties are deemed to have expressed their agreed allocation of risk, recognising that this is one of many cases where the circumstances that have arisen are not circumstances which the parties foresaw at the time when the agreement came into being, and the question is (and see *per* Chadwick LJ in *Bromarin v IMD Investments Ltd* [1998] STC 244):

> "what should reasonable parties be taken to have intended by the use of those words in that agreement, made in those circumstances, in relation to events which they did not in fact foresee."

Clause 3.1 in more detail

71. Section 2 contains the binding terms of the CVA. Clause 3.1, which appears under the heading "Conditions Precedent", provides as follows:

> "With the exception of the provisions referred to in paragraph 2 (Immediately Effective Provisions of the CVA) of this Section 2, the CVA shall not come into effect and the Implementation Date will not occur until each of the following conditions is satisfied or (in the case of paragraphs 3.1(d) and 3.1(e) below only) waived by the Supervisors:
>
> (a) the decision approving the CVA has become effective pursuant to section 4A of the Insolvency Act;
>
> (b) the Meeting Reports have been filed with the Court;
>
> (c) the Challenge Period has ended;
>
> (d) after the Challenge Period has ended, either:
>
> > (i) no application has been served on the Company by any person under sections 4(A)3, 6(1)(a) or 6(1)(b) of the Insolvency Act or appeal under rule 15.35 of the Insolvency Rules which, if determined in favour of the applicant, would alter the outcome of the Creditors' Meeting; or

(ii) if any such application or appeal has been served prior to the expiry of the Challenge Period, such application has been withdrawn, discontinued, struck out or dismissed; and

(e) if there are any Disputed Claims after the Challenge Period has ended, the Administrators have confirmed that this should not preclude the CVA from becoming effective."

72. The meetings and reports were held and filed in accordance with the rules of the SAR. The "Challenge Period" is defined in Schedule 1 to the CVA as "the 28-day period commencing on the date on which the Meeting Reports are filed at Court"; and the 'Meeting Reports' are defined as each of (a) the Chairman's report to the Court of the Members' decision to approve the CVA pursuant to section 4(6) of the Insolvency Act 1986 and (b) the Administrators' report to the Court of the creditors' decision to approve the CVA pursuant to section 4(6A) of that Act. That period thus coincides with the 28-day period for a challenge under section 6 of the Act, though it should be noted (since of later relevance to the argument of the FSCS) that the statutory challenge period is extended in the case of a person who was not given notice of the relevant qualifying procedure to the end of a period of 28 days after he in fact became aware that it had taken place (see section 6(3) of the Insolvency Act 1986).

73. It is common ground for the purposes of this Application that the DB Indemnity Claim is a "Disputed Claim after the Challenge Period"; that clause 3.1(e) provides for a condition precedent; and that the clause is thus clearly engaged. None of the other sub-clauses of clause 3.1 is applicable: no other condition precedent (all the rest being matters of ascertainable fact or 'mechanical') remains to be fulfilled.

74. Accordingly, the CVA must, but can only, come into effect if and when the Administrators (a) *'confirm'* (b) that the fact of the DB Indemnity Claim *after the Challenge Period* (c) *'should not'* (d) *'preclude'* the CVA from becoming effective. The italicised words, and the absence from the sub-clause of the word "discretion" (see below), indicate the semantic fault lines in the contrasting positions of the parties in relation to clause 3.1(e). Much, as will be elaborated, depends on what meaning is to be given to the phrase "should not", which Attestor contends connotes a value judgement, and the FSCS contends connotes no more than a statement or prediction.

Clause 27.1(c)

75. The interpretation of clause 27.1(c) of section 2 of the CVA, and its relationship with clause 3.1(e), is also disputed.

76. Clause 27.1 provides that:

"The CVA shall terminate on the earlier of:

….

(c) the date on which the Supervisors determine, in their sole discretion, that there is a material impediment to the implementation of the CVA (or any material part thereof); and

(d) the date on which the Supervisors terminate the CVA in accordance with a direction from the Court."

77. None of the parties contended that only impossibility of performance is required to trigger the clause: the FSCS originally suggested that it was necessary to show that the CVA is "incapable of performance" but Mr Arnold conceded that "it may extend slightly wider" though "you would expect it to be a very serious impediment indeed". They were agreed also that the clause, if triggered, conferred a discretion on the Supervisors. It was not disputed that the Supervisors' primary duty is to implement the CVA.

78. Attestor and the FSCS are divided, however, on the question as to what, short of a circumstance preventing implementation, could suffice; and thus also they are divided on the question whether "material impediment" covers the situation where the facts are such that implementation of the CVA in the changed circumstances will produce a materially different result to that envisaged in the CVA Proposal (as Attestor insists it does and the FSCS insists it does not).

79. There is also a dispute as to the inter-relationship (and overlap) between clause 3.1(e) and clause 27.1(c).

Attestor's arguments on clauses 3.1(e) and 27.1(c)

80. Attestor's submissions as to the true interpretation of clause 3.1(e) were summarised in its skeleton argument as follows:

(1) On a proper construction, the purpose of that clause is to deal with a circumstance such as this one: the filing of an unanticipated material claim such as the DB Indemnity Claim which fundamentally alters the assumed state of affairs and commercial bargain underlying the CVA.

(2) In circumstances where such a material claim arises, the Administrators should not confirm that the CVA should go ahead (nor should the Supervisors waive the condition precedent), because to do so would be inconsistent with its commercial purpose, being to ensure that the CVA only proceeds to implementation where it would be consistent with the underlying commercial bargain.

(3) Further and in any event, the existence of the DB Indemnity Claim should preclude the CVA from becoming effective because the making of a reserve in respect of the claim would make it impossible to make the proposed "*catch-up distribution*" required by Clause 4.1, given that such "catch-up distribution" is to be paid to all "Allowed Claims" which are defined to include any Provable Claim, denominated in GBP, submitted

by the Final Claims Date and "accepted by the Administrators in the Administration" (see paragraph [26] above).

81. Mr Allison submitted, as to the italicised words in paragraph [74] above, that the essential words are that the Administrators' confirmation, which is required before the CVA can be implemented, *'should not'* preclude the CVA from becoming effective. Those words, he submitted, are crucial, and they require the Administrators to undertake, not a ministerial step, but a value judgement, to be struck according to whether the Disputed Claim after the Challenge Period is such as to "materially alter the effect or economic substance of the CVA". Mr Allison culled the latter words from clause 26.4 of section 2 of the CVA, which precludes modification of the provisions of the CVA which would have that effect. As in the case of modification, so in the case of such a Disputed Claim, he submitted that such an effect should *'preclude'* the CVA from becoming effective, preventing the Administrators from giving the confirmation requisite to fulfil the condition precedent.

82. Mr Allison submitted that such a clause must in all sense and intention be engaged by an (albeit) disputed claim of €126 million, doubling the exposure to disputed claims. He posed the rhetorical question:

> "..if not this case, what case? If this clause is not engaged by a disputed claim of 126 million, common ground not disclosed to creditors, common ground not priced into the bargain, common ground not listed in the liabilities or taken into account in the estimated outcomes, common ground [if allowed] [my interpolation] dramatically alters the economics of the CVA, what is it directed at?"

83. As to the lack of any reference to "discretion" or the criteria by reference to which it is to be exercised and/or challenged, Mr Allison submitted that (a) although admittedly there are references to the exercise of "discretion" in other parts of the CVA, these references are all in the context of the powers and duties of the Supervisors and there is no such reference in the case of the Administrators acting as such, the explanation being that their duties and the means of challenging them are determined by the Insolvency Act; (b) the value judgement required is well within the ordinary expertise and experience of professional insolvency practitioners (and is analogous if not the same as that required in valuing contingent proofs of debt generally); the word "discretion" would not really be apt in the context, since although the judgement required is to some extent subjective, it is judgement rather than some discretionary assessment which is required to be undertaken.

84. Mr Allison rejected any suggestion that clause 3.1(e) was *ejusdem generis* with the other provisions of the same clause and/or mechanistic or ministerial in nature; and he pointed out that although initially (and indeed in its Position Paper dated as recently as 1 May 2018) the FSCS had contended that clause 3.1(e), like clause 27.1(c) (as to which see later), required the Administrators to give the requisite confirmation unless "the CVA is practically incapable of implementation", they had now withdrawn this strict mechanistic test and were putting forward a much narrower interpretation which lacked any real or sufficient rationale or content.

85. In that regard, Mr Allison rejected as empty the FSCS's revised or new suggestion, elaborated below, that clause 3.1(e) is simply directed to plugging a gap in section 3.1(d) which fails to deal with the particular case of a potential challenge by a person who has not been given notice of the "relevant qualifying decision procedure" (either by inadvertence or because its claim was not yet notified) and to whom section 6(3)(b) of the Insolvency Act 1986 thus applies. He elaborated on this in his oral submissions as follows:

    (1) There is no mention in the sub-clause of a statutory challenge under section 6 of the Insolvency Act 1986;

    (2) The FSCS's interpretation does not invest any meaning in the words "should not";

    (3) The sub-clause as interpreted by the FSCS would be designed to address a concatenation of events so unreal that it cannot reasonably have been contemplated. For it to apply, on that interpretation, the sequence would have to be a creditor who (a) did not receive notice of the meeting prior to it, but (b) does then receive notice, prior to 15 January 2018, of the relevant meeting having taken place (since if they do not their claim would not be capable of being a Disputed Claim), and yet (c) having such notice before 15 January 2018 makes no statutory challenge until some time after that date (since a challenge before that date would be caught by sub-clause 3.1(d)).

    (4) In any event, the sub-clause, on the FSCS's interpretation, does not address the position of someone who puts forward a claim after the Final Claims Date (which is not therefore a Disputed Claim as defined), having had no notice of the relevant event or procedure, and who wishes to and can still make a statutory challenge to the CVA (for example, complaining about the unfairness of the Final Claims Date in its own particular circumstances). Nor, Mr Allison suggested, would the sub-clause, on the FSCS's construction, address the position of a person who was not notified of the meetings but whose claim is allowed, but who wishes to, and under section 6.3(b) can, challenge the CVA as unfairly prejudicial: clause 3.1(d) would not apply, but neither would (on that interpretation) clause 3.1(e).

86. Mr Allison made the further submission that in any event, the existence of the DB Indemnity Claim should preclude the CVA from becoming effective because the making of a reserve in respect of the claim would make it impossible to make the proposed "*catch-up distribution*" required by Clause 4.1, at least if the Administrators, following previous practice, fully reserved funds to meet potential obligations in respect of the DB Indemnity Claim (which would, he submitted, include a "catch-up distribution" in respect of that "shiny new claim" also, which would have to be, but could not be, paid out of the estate (it being common ground that the obligations of the Participating Creditors under the CVA do not extend to covering such a payment).

87. Turning to Attestor's submissions as to clause 27.1(c), its starting point was that (as in the context of clause 3.1(e)) the ambit of the clause must be determined by reference to the

essential economic bargain and the measurements and modelling underlying the CVA. Mr Allison submitted that a "material impediment" for the purposes of clause 27.1(c) includes a circumstance which would result in the CVA, if implemented, having a substantially different effect than was envisaged in the modelling: to quote from Attestor's skeleton argument:

> "…the purpose of the key provisions of the CVA is to enact a particular economic bargain: if their literal effect were to do something quite different, that would be an impediment to the proper implementation of that bargain."

88. Mr Allison referred to the judgment of Lord Mance in *Re Sigma Finance Corporation (in administrative receivership)* [2009] UKSC 2 at [31] to [33], and in particular to his reference in that judgment to the "clear basic scheme", from which it is improbable that the parties would have wished to depart" (see [32]) as the appropriate guide to the reasonable man in understanding the meaning and application of the clause there in dispute, leading to his rejection of a more literal interpretation favoured by the Court of Appeal which led to a result contrary to that basic scheme "that the parties…cannot have contemplated". (In that case, the argument which was ultimately rejected by the Supreme Court involved an attempt to apply literally certain provisions in circumstances where they were never intended to operate; namely the operation of a certain provision designed to ensure continued liquidity in the event of a funding crisis, in a full-blown insolvency situation where they would distort the priorities as between creditors).

89. Mr Allison stressed also that clause 27.1 is not intended to be restrictive as to possible termination events: clause 27.1(d), for example, permits the CVA to be terminated where that is directed by the Court, and suggested that this could extend to issues of fairness.

The FSCS's arguments on clause 3.1(e) and 27.1(c)

90. Mr Arnold on behalf of the FSCS submitted that Attestor's approach to clause 3.1(e) reads far too much into it, and would confer on the Administrators (he would say, without the merest express mention) an extremely broad discretion, the precise ambit of which is entirely unclear as well as inconsistent with the mechanical focus of the remainder of clause 3.1. In the absence of express words, he submitted, it is not plausible that clause 3.1(e) was intended to confer such a broad power to (in effect) "tear up" proposals so long in development; and the absence of any mention of "discretion" in clause 3.1(e) is a powerful further indicator that it was not intended to confer any.

91. Mr Arnold submitted generally that it was (as he put it) "the clear purpose of the CVA to tease out unknown unknowns as well as known unknowns like the GTA, or otherwise to exclude them forever" and that the "hard bar date" some time after the meeting demonstrated that the universe of claims was appreciated to be without limit until then, and would only be finite thereafter. The Participating Creditors (and indeed, though to a lesser extent, the Stay-In Creditors) must be taken to have accepted that risk, even if it was at the time considered remote. The DB Indemnity Claim was unexpected, especially as to its size in terms of its nominal amount at least; and (Mr Arnold seemed to me to be disposed to accept) it was different in character in that the other GTA claims did not concern trades carried on by MFGUK on its own behalf but rather trades carried on

through DB on behalf of MFGUK's clients as did the DB Indemnity claims; but the allocation of risk agreed by way of the CVA was clear, it extended to claims emerging in response to the provision for a Final Claims Date even if these could obviously not before then be identified and Attestor had no basis for escaping its consequences.

92. Mr Arnold particularly emphasised his point that to terminate the CVA by reference to the emergence of the DB Indemnity Claim would undermine, indeed negate, the purpose of the Final Claims Date/hard bar date, and would

> "effectively be to rewrite the bargain between the creditors. If participating creditors had wanted the CVA to be subject to a condition precedent that it would not take effect [if] a large unanticipated claim of a certain size were received, then they could and should have said so. No doubt such a provision would have also made reference to allowed claims, the effect of which would be even more serious, if one assumes an allowed claim of a similar size."

93. Mr Arnold deployed that latter point that clause 3.1(e) makes no mention of Allowed Claims against Attestor's argument that the clause requires a value judgement to be struck: if the clause was intended to ensure that the CVA was not implemented in the teeth of a large unanticipated claim which had emerged after its approval but before the Final Claims Date, it would surely have dealt also with the more potent threat to the economic balance said to underpin the arrangements of a large Allowed Claim. Attestor's argument, he submitted, at one and the same time asked too much of the clause and yet exposed its deficiencies for the purpose avowed.

94. Mr Arnold's explanation of the clause itself, on the other hand, asked remarkably little of it. Although (as previously noted, see paragraph [84]) the FSCS's Position Paper construed clause 3.1(e) as applicable only in the event of the CVA being "practically incapable of implementation", thus substantially duplicating clause 27.1(c), in his skeleton argument for and in his oral submissions during the hearing Mr Arnold put forward a rather different interpretation, and now submitted that the two clauses "are concerned with different situations" which he presented as being as follows:

    (1) Clause 3.1(e) is concerned with a potential challenge to the CVA, made outside the CVA Challenge Period as defined, but within the statutory challenge period under section 6 of the Insolvency Act 1986. There is no such challenge here.

    (2) Clause 27.1(c) is concerned with events which the Supervisors consider will prevent or materially impede any of the steps which are necessary for the implementation of the CVA, which are set out in clauses 4-9 and 11-13 of the CVA. There is no such impediment here.

95. Mr Arnold advanced this new and restrictive interpretation of clause 3.1(e) with some diffidence, claiming for it no more than that it "ticks more boxes" than does Mr Allison's broad interpretation, enables clause 3.1 to be read uniformly and consistently, and avoids any material conflict between the power of waiver vested in the Supervisors and the

provision for confirmation by the Administrators. He rationalised the interpretation by reference to the wording of the clause as follows:

(1) Although the clause does not expressly refer to section 6 of the Insolvency Act, it does so by necessary implication, since the reference to "after the challenge period has ended" must be a reference to the period allowed by section 6 for a statutory challenge.

(2) Clause 3.1(d) already makes express provision for an application under sections 4(A)(3) and 6(1)(a) and (b) but in doing so refers and applies to the usual challenge period prescribed, being the 28-day period after the reports prescribed by section 6(3)(a), and does not address the (out of the ordinary) case of a person who has not been given notice, which is dealt with by section 6(3)(b), which prescribes a challenge period of 28 days after the date on which he became relevantly aware.

(3) The 'gap' is filled by clause 3.1(e), which governs the position of an application made after the Challenge Period as defined in the CVA but before the expiry of the extended period provided for by section 6(3)(b): that being, it was submitted, the whole purpose of clause 3.1(e).

(4) Clause 3.1(e) thus provides for the Administrators to deal with Disputed Claims made after the Challenge Period on the basis that they may give rise to a statutory challenge not dealt with under clause 3.1(d): the Administrators in such circumstances being required to see whether the claimant does indeed bring an application under section 6(3)(b): if it does not, or if the application is determined before the 12 June 2018 date then the confirmation can be given but otherwise not. The task is essentially ministerial or mechanistic. There being no such challenge there can be no problem in granting the confirmation to satisfy the condition precedent.

(5) Mr Arnold further submitted that this was consistent with the discretion given to the Supervisors by the same clause to waive the precondition: that would cover the case, for example, where the Supervisors consider that no late challenge is reasonably likely to be made and/or if it is, it is not reasonably likely to succeed or be such as to "preclude" the CVA becoming effective. Mr Arnold drew attention in this context to the limited ambit of such discretion; and also to the point that the provision for waiver by the Supervisors appeared to be a further argument against reading the clause as conferring a discretion on the Administrators, since there would be no need for two sets of discretionary assessments (or, as Mr Allison preferred, 'value judgements'), one whether to waive a requirement, the other whether to give it effect.

(6) Lastly, Mr Arnold suggested that clause 3.1(e) should be read *ejusdem generis* with the preceding conditions precedent in sub-clauses (a) to (d), and limited, as they are, to the fulfilment of procedural steps of an essentially practical nature, requiring little, if any, subjective assessment or judgment; or, alternatively, the *genus* should be taken from the previous two sub-clauses (c) and (d) and should

be read in conformity with them as being concerned with potential statutory challenges to the CVA.

96. As to clause 27.1(c), Mr Arnold accepted that this does confer a discretion, but pointed out that it does so in terms which confine its application to provisions of the CVA which are required to be implemented on or "as soon as reasonably practicable after the Implementation Date" (including clauses 4.1, 5.1. 6.1, 7.2, 8.1, 9.1 and 13 of Section 2 of the CVA). He conceded further that the word "impediment" does not necessarily connote impossibility, and serious difficulty might suffice, according to the circumstances. But his punch-line was that nothing such as could fittingly be described as an "impediment" had arisen in this case.

97. In that regard, Mr Arnold dismissed Mr Allison's further argument, (which he deployed also as a final argument in respect of clause 3.1(e) to argue that it was such as to "preclude" the CVA from becoming effective), to the effect that for the purposes of paragraph 27.1(c) there was indeed such an "impediment", because if the new DB Indemnity Claim were fully reserved for, no "catch-up" distribution as required by clause 4 of the CVA would be possible since the available funds would be inadequate (see paragraph [86] above). The argument was simply wrong, he submitted, because the declaration for a catch-up dividend had already been made (on 24 August 2016) and could not now be unsettled. Clause 4, he submitted, simply stipulates fulfilment by payment of a pre-existing liability being prior to any later claim and thus binding on the later claimant.

98. He submitted that in this regard the provisions of the CVA are entirely consistent with Rule 150(2) of the SAR, which provides that a creditor who has not yet proved for their debt before the declaration of any dividend is not entitled to disturb, by reason that they have not participated in it, the distribution of that dividend or any other dividend declared before their debt was proved.

My assessment and conclusion on the issues of interpretation

Clause 3.1(e)

99. The fact that Attestor's argument invests so much, and the FSCS's arguments so little, substance in the words of clause 3.1(e) reflects, of course, their diametrically opposed interest (and those of the creditors they respectively represent); but it also demonstrates the polarities of approach where, as here (and as previously noted) the circumstances which have arisen, being "unknown unknowns", were simply not contemplated. The exercise required, which is to determine the application of language to events which none of the parties have foreseen, is obviously a difficult one.

100. Furthermore, in such a context, there seems to me to be a danger of extrapolating from the factual matrix assumptions and understandings as to risks arising from circumstances which the parties did not contemplate. It is one thing to land a party with a risk of a 'known unknown': quite another to impose in retrospect the risk of an 'unknown unknown', as would be the effect of the FSCS's approach. Equally, however, it is also difficult to read into an express provision a protection against what was not in contemplation, as Attestor's interpretation of the CVA entails.

101. It seems to me that in such a context, calling for what Sedley LJ described in *Casson v PJ Ostley Ltd* [2000] BLR 147 as being a creative but consistent application of the rules of construction, the starting point is the words of the disputed clause and the provisions of the contract read as a whole.

102. Adopting that approach, in my view, the starting point as regards clause 3.1(e) is to seek to identify what, reasonably and objectively, the parties should be taken to have had in mind in envisaging that if there were a Disputed Claim after the Challenge Period has ended that might of itself, or in the judgment of the Administrators, preclude the CVA from becoming effective. As Mr Allison put it: "what is the clause getting at?"

103. I agree with Mr Allison that the clause is directed at the potential effect on the CVA of "Disputed Claims" which remain on foot as such after the Challenge Period has ended. I do not agree with him that it cannot cover Disputed Claims which were known at the time the CVA was approved: but I would accept that the concern of the sub-clause is with a Disputed Claim the continued existence or maintenance of which after the Challenge Period has ended has not been factored in as a risk when the CVA was proposed and/or approved. This would suggest that it is some actual or potential effect of a Disputed Claim emerging in the period after approval of the CVA, but before its implementation or lapse, which the parties should be taken as having in mind.

104. What clause 3.1(e) is "getting at", therefore, is the risk that the fact of the continued existence or maintenance of the Disputed Claim (a) after the Challenge Period (b) raises the real possibility that it could or (c) ought to (d) "preclude" (e) the "CVA" from (f) "becoming effective". I turn first to deal with (d) to (f) in reverse order.

105. To conform with the opening parts of clause 3.1, I would construe the latter words (in (f)) as meaning "come into effect". As to (e) in paragraph [104] above, the meaning of the CVA is stated in the definitions provided in Schedule 1 to the Proposal; it means "the company voluntary arrangement between the Company and its CVA Creditors (also defined and meaning any person having a claim in respect of any liability of the Company of whatsoever nature) under Part I of the Insolvency Act on the terms of this Proposal". The "terms of this Proposal" must be the prospectively binding terms of section 2; and in paragraph 1.2 of that section these are distinguished from and stipulated to prevail over "the summary of this Proposal set out in section 1". That, as a matter of semantic analysis, suggests that the confirmation stipulated as a condition precedent relates to something which "precludes" the coming into effect of the binding terms as set out in section 2, rather than some circumstance assessed to be such as to "preclude" the achievement of the "bargain" in terms of economic balance or commercial objectives of the Proposal as more broadly described in Section 1 of the CVA.

106. As to (d) in paragraph [104] above, both the dictionary (OED) and (to my mind, at least) the natural meaning of the word "preclude" is to "prevent from happening" or "make impossible": it is a strong, or (as Mr Arnold put it) "very definite", word, which does not extend, at least as matter of semantics, to mere impediment or unfairness of outcome.

107. As to (a) in paragraph [104] above, the fact that it is the trigger for the application of clause 3.1(e) connotes that it is the continuing existence of a Disputed Claim after the Challenge Period which is identified as a special risk: in other words, that it is not the mere fact of a

Disputed Claim, but its continued existence after the Challenge Period, which appears to be the identified source of that risk. That suggests to me that, as a semantic matter, the clause most naturally is addressed to (and triggered by) some special risk arising from the fact of even a known Disputed Claim continuing in existence after the Challenge Period (which would include the risk of a late statutory challenge pursuant to section 6(3)(b) of the Insolvency Act as identified by the FSCS).

108. That brings me to (b) and (c) (see paragraph [104] above) and the crucial question, which is whether, in the context in which they appear the condition precedent and the words "should not" call for (i) a prediction on the part of the Administrators that it is unlikely that the continuing existence of Disputed Claims after the Challenge Period (and, in particular, the DB Indemnity Claim) will as a practical matter or in reality prevent the terms of the CVA coming into effect (for example, further to a late but successful statutory challenge to the CVA); or (ii) a value judgment as to whether, in the fulfilment of their duties as such, the Administrators can be satisfied that the continuing existence of Disputed Claims after the Challenge Period (and, in particular, the DB Indemnity Claim) does not give rise to a liability (of whatever nature) or risk such as to prevent or make it impossible for the terms of the CVA to come into effect in a manner consistent with the commercial bargain put before the creditors.

109. The latter construction, in other words, requires the stipulation of the condition precedent and the words "should not" to be construed as together connoting the shared expectations of the parties both (a) that the existence of any Disputed Claim after the Challenge Period should require the Administrators to undertake a value judgement and (b) that such value judgement be made according to whether the existence of any Disputed Claim after the Challenge Period means that if the terms of the CVA were to be implemented in such circumstances, the effect would be materially different from that of the commercial bargain envisaged at the time it was put before creditors.

110. That construction further seems to me to require (i) there to be read into the actual words more than would be semantically natural (see my semantic analysis above); (ii) there to be identified a "commercial bargain" beyond the stipulated terms set out in section 2 of the CVA; and (iii) there to be interpolated both a mandate for a value judgement based not on any likely impossibility of giving effect to the terms of the CVA but rather based on their inconsistency with the identified "commercial bargain", and also a standard of comparison and criteria for that value judgement which are not expressed.

111. It would, in my view, further require (iv), the interpolation of restrictions, or some other gloss, on the power given to the Supervisors, whose role and primary duty as such, in contrast to the duty of the Administrators as such to act fairly as between the creditors, are to implement the CVA, to waive either (or both) of the conditions precedent contained in clauses 3.1(d) and 3.1(e). That, as it seems to me, is a stretch: it would seem to me surprising if Supervisors were able (and perhaps even under a duty) to trump or finesse a value judgement entrusted to and then made by the Administrators (though much less surprising if the waiver could only refer to some possibility of a late statutory challenge or essentially mechanical matter, such as dealt with in clause 3.1(d)). I cannot think that this was intended: and if clause 3.1(e) is to be interpreted as enabling and requiring such a value judgement, it seems to me that the tension would have to be relieved by somehow interpolating a limitation on the Supervisor's right of waiver in the context of clause 3.1(e).

Looking at the matter from the opposite point of view, the fact that Attestor's interpretation gives rise to such tension, whereas the FSCS's interpretation does not, tends to suggest that the latter, being more internally consistent and less likely to give rise to conflict, is also more likely to accord with the parties' intentions.

112. These difficulties seem to me to militate in favour of the construction suggested by the FSCS, notwithstanding the rather conspicuously limited scope thereby attributed to clause 3.1(e). However, as explained in recent authority at the highest level (and see especially paragraph [44] above), it remains necessary, as part of the task of the court in seeking to ascertain the objective meaning of the language which the parties have chosen to express their agreement, to weigh the different commercial implications of the rival constructions, it being obvious that commercial men should be taken to have sought to achieve a commercially sensible result. Thus, in *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, at [25] in the judgment of Lord Clarke of Stone-cum-Ebony, with which the four other members of the Supreme Court agreed, the following extra-judicial statement of Lord Steyn was cited with approval:

> "Often there is no obvious or ordinary meaning of the language under consideration. There are competing interpretations to be considered. In choosing between alternatives a court should primarily be guided by the contextual scene in which the stipulation in question appears. And speaking generally commercially minded judges would regard the commercial purpose of the contract as more important than niceties of language. And, in the event of doubt, the working assumption will be that a fair construction best matches the reasonable expectations of the parties."

113. The approach is not altogether straightforward in a context such as this: and three warnings or caveats especially need to be borne in mind. First, is that (as emphasised by Lord Neuberger PSC (with whom Lord Sumption and Lord Hodge agreed) in *Arnold v Britton* [2015] UKSC 36 at [19]):

> "…commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made. Judicial observations such as those of Lord Reid in Wickman Machine Tools Sales Ltd v L Schuler AG [1974] AC 235, 251 and Lord Diplock in Antaios Cia Naviera SA v Salen Rederierna AB (The Antaios) [1985] AC 191, 201, quoted by Lord Carnwath at para 110, have to be read and applied bearing that important point in mind."

114. Secondly, and as appears from the next paragraph of that same judgment:

> "…while commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very

> imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Experience shows that it is by no means unknown for people to enter into arrangements which are ill-advised, even ignoring the benefit of wisdom of hindsight, and it is not the function of a court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party."

115. Thirdly, the fact (as noted previously) is that, this being a case where the parties did not foresee the circumstances at the time of the contract, "the words fall short of the facts" as Sedley LJ memorably put it in *Casson v PJ Ostley [supra]*. In such cases, there is obvious additional difficulty in conjuring from the words (which fell short) and the facts known at the time (which did not include those which have in the event arisen) a reliable guide as to what to take objectively to have been the parties' commercial intentions as regards the unforeseen circumstances in question. The danger of retrospective invocation of commercial common sense, and the temptation of assuming to be reasonable and preferring a commercially fair result to what unexpected developments have revealed to be a bad bargain, are especially acute in such a case.

116. Overall, it has constantly to be borne in mind that the question is not what contractual provision the parties would have made if they had foreseen the events in question; it is whether the language of their contract can legitimately (even if flexibly or by a stretch) be interpreted in a way which offers a solution which is commercially more sensible than another available interpretation of that language.

117. I shall return to these warnings later. For the present, my assessment of the principal predictable commercial consequences of the competing constructions of clause 3.1(e) can be summarised as follows:

(1) Attestor's suggested construction would put all CVA Creditors in the hands of the Administrators, whose value judgement as to whether the relevant Disputed Claim(s) after the Challenge Period would occasion such a monumental shift in the range of economic outcomes (whether in comparison to "no CVA" or in comparison to the 'Estimated Outcome Statement' in the CVA Proposal), and thereby such a departure from the "commercial bargain", as ought to preclude implementation of the terms of the CVA, would determine the fate of the CVA. A judgement that it would occasion such a departure, and the consequent non-fulfilment of the condition precedent, would cause the CVA to lapse. The advantages of the CVA as apparently perceived by 97% of the creditors on the basis of their then state of knowledge would be lost, as would the time and expense of its development, and the future costs savings and streamlined completion of the Administration it was designed to achieve. All creditors would then share exposure to the Disputed Claims but also share the upside of the assets (legal claims) of the CVA Trust. Attestor and other Participating

Creditors would be released from the obligation to fund the Exiting Creditors but would no longer exclusively be entitled to any potential upside of claims subject to the CVA Trust (the acquisition of which was, in my view, the real purpose of the arrangements from their point of view). Stay-In Creditors would lose the benefit of the CVA in terms of a streamlined and less costly administration. Exiting Creditors would lose the benefit of a funded exit, and incur their rateable share of the continuing costs of Administration. For all creditors the advantages of the Final Claims Date/hard bar date would be lost, and all would be exposed to the risk of further claims, which (as I see it) could include the risk of the GTA obtaining in Germany judgments against DB which it could enforce, or which would give rise to enforceable claims under an indemnity by DB which DB could enforce, against the Administration Estate.

(2) The FSCS's suggested construction would save the CVA and preserve its other advantages. It would enable the completion of the main purpose, as I see it, of the arrangements from the Participating Creditors' point of view (the acquisition of the exclusive benefit of the litigation claims/assets to be transferred to the CVA Trust); but it would subject the Participating Creditors to a risk which the DB Indemnity Claim shows may in nominal terms, and possibly even in substance, be very considerable indeed. Of course, in the particular case of the DB Indemnity Claim the risk is subject to the double contingencies to which I have previously referred; but I do not think that the particular example of the DB Indemnity Claim is the litmus test of the construction suggested, even though it is the one under actual consideration.

118. The layers and complexities of these differing commercial consequences of the rival constructions (which may well not be a complete statement of them all) seem to me to illustrate both the give-and-take which underlay the CVA and the difficulty of fastening on any definition of the "commercial bargain" save as expressed in the terms set out in section 2 of the CVA Proposal. Furthermore, and in consequence, they also serve to illustrate the difficulty of the value judgement which on Attestor's construction would be entrusted to the Administrators.

119. As it seems to me the forensic question posed by Mr Allison, "If not this case, what case?" is an arresting one at first blush; but (and harking back to the dangers I identified) there is danger in extrapolating from an expectation that the parties would have wished to deal with just such a case as has unexpectedly arisen a conclusion that their objective intention, in ignorance of such a case, was to do so in the language that they deployed.

120. More generally as to the identified dangers, I have concluded that Attestor's suggested construction oversteps the boundary between on the one hand, what Chadwick LJ in *Bromarin v IMD Investments [supra]* called an "artificial exercise" and what Sedley LJ in *Casson v PJ Ostley [supra]* described as "working creatively" in stretching the words to fit the unforeseen circumstances, and on the other hand, the impermissible creation of a contractual provision to deal with such circumstances in order to avoid a result which in retrospect appears harsh, especially when tested against a particularly extreme case.

121. In my judgment, neither as a matter of semantic nor by resort to a "commercial" construction is it permissible to read into clause 3.1(e) what Attestor requires to be read in to justify and establish its suggested construction. Although the competing construction ultimately offered by the FSCS does accord clause 3.1(e) somewhat restricted application and may be thought to relegate it to a sub-sub clause of sub-clause 3.1(d), that seems to me the remaining and better answer.

122. In those circumstances, and given the urgency of the matter and the time pressures under which this judgment has had to be provided, I do not consider it necessary or advisable to address at any length the issues which would have arisen as to the approach and criteria to be adopted by the Administrators if I had determined that clause 3.1(e) required them to make a value judgement as previously described.

123. I think it suffices for present purposes to state that:

(1) I would not have accepted that the mere fact of a large nominal risk was sufficient to warrant declining confirmation.

(2) I would not have accepted the surrender of discretion, or more accurately perhaps, I would not have taken on the task of the value judgement asserted to be required. In my view, the assessment of the value of the DB Indemnity Claim to be made in accordance with the principles established in *re Danka Business Systems plc* (see paragraph [52] above) would require the valuation of a double contingency by reference to the foreign law applicable to the contingent claims, and commercial factors of which I have no or no sufficient evidence. Even with the benefit of such evidence, the process would engage the Court in a process for which the Administrators would be better equipped. I think that Mr Bayfield QC on behalf of the Administrators ultimately concurred with that view.

(3) It would not in my view be likely to be sufficient for the Administrators to rely on their valuation (at nil) of the claim for the purpose of rejecting DB's proof. The rejection of proof is subject to court review and is different in nature to the exercise required to achieve the value judgement asserted. Further investigation of the contingencies to which the claim is subject, and the real as opposed to nominal value of the claim would be required. As I have said, the difficulties are one of the reasons that have persuaded me against the construction.

(4) I have already sought to indicate the conflicting interests to which the Administrators would also have to have regard.

124. The final issue in relation to clause 3.1(e) that I need to address in this context is Mr Allison's further or alternative argument (see paragraph [86] above) that even if no value judgment is reserved to and required of the Administrators to justify them declining to provide the confirmation required to satisfy the condition precedent if they were to consider that the emergence and continued existence of the DB Indemnity Claim after the

Challenge Period falsifies the "commercial bargain", the need to make provision in respect of the DB Indemnity Claim means that the provisions of clause 4.1 of section 2 of the CVA cannot be satisfied, and nor therefore can the condition precedent.

125. I agree with the relatively short answer to this point provided both by the Administrators (in their Skeleton Argument at paragraph 24) and by Mr Arnold (as summarised in paragraph [97] above). As appears from the Administrators' evidence, and as clarified further in a document entitled *'CVA Mechanics Explanation'* which by paragraph 9(3) of an Order made dated 11 April 2018 I directed be produced to explain how, if the CVA were to proceed, the existence of the Disputed Claims would affect the mechanics of the CVA, the catch-up distribution relates to CVA Creditors who have Allowed Claims as at the Final Claims Date. It does not therefore include Disputed Claims. It is intended to pay all CVA Creditors 90p/£, and the relevant CVA Creditors who have not already received 90p/£ have claims of £8,214,937. The relevant dividend has already been declared in respect of the remaining distribution to be paid and is therefore protected against the effects of any reserve to be made for the DB Indemnity Claim. As noted by Mr Arnold, all this is entirely consistent with the SAR.

126. Accordingly, in my judgment, there is no reason for the Administrators not to give the confirmation necessary to satisfy the last condition precedent, subject to Attestor's arguments by reference to paragraph 74 of Schedule B1 to the Insolvency Act 1986 and the principle in *Ex Parte James*, which I address later.

Clause 27.1(c)

127. Having already traversed the principles to be applied, and the arguments in respect of clause 4 on which Attestor chiefly relied in this context (as well as in the context of clause 3.1(e), I can be briefer in my assessment of the argument in relation to clause 27.1(c) (which is set out in paragraph [76] above).

128. Clause 27.1(c) plainly differs from clause 3.1(e) in that (a) it vests an express discretion (b) solely in the Supervisors (note, not the Administrators) which (c) may be exercised even after the CVA is brought into effect if there is (d) a "material impediment" to its implementation. It was common ground that "material impediment" may extend to something less than something such as to "preclude" implementation, and as Mr Allison put it "wider than practically impossible".

129. However, I do not accept Mr Allison's wider argument that it extended further than that to reflect the concept expressed in clause 26.4 (in the rather different context of the power of modification) of something such as to "alter the effect or economic substance of the CVA". Nor do I accept his argument from that platform, that "where the economics are so different, we do say that this is a material impediment". That is more than a stretch: it is an impermissible extension from a provision with an entirely different focus.

130. For my part, I see no real difficulty in construing the words "material impediment to the implementation of the CVA". I agree with Mr Arnold that the question invited is simply whether the Supervisors, in their sole discretion, determine that there is something which makes it difficult, if not quite impossible, to take the steps required for implementation in accordance with clauses 4 to 9 and 13 of section 2 of the CVA.

131. The Supervisors have not suggested any such impediment; and nor does the CVA Mechanics Explanation (prepared, admittedly, by the Administrators, though it is to be noted that presently at least the same individuals act as both Administrators and Supervisors). On the contrary the CVA Mechanics Explanation explains the basis on which they have concluded that there is no "material impediment", at least on the interpretation of the clause which seems to me to be obviously correct. (Of course, the Supervisors are required to keep this under review: but I take that to be the position as they see it at present.)

132. I have already explained, albeit in the context of clause 3.1(e), why it seems to me that Mr Allison's argument based on clause 4 is wrong (and see paragraph [125] above).

133. In short, therefore, I have concluded that clause 27.1(c) offers in the present circumstances no basis for terminating the CVA, or determining not to bring it into effect. That also avoids any somewhat theoretical stand-off between the same people wearing different hats as Administrators and the Supervisors.

Paragraph 74 of Schedule B1 and the principle in ex parte James

134. My conclusions on the issues of construction require me to address the arguments raised by reference to the provisions of paragraph 74 of Schedule B1 to the Insolvency Act or on the basis of the principle in *ex parte James* to the effect that the Court has a power which it should exercise to direct the Administrators not to do what, in line with my earlier conclusion, they are otherwise required to do by the terms of the CVA. I turn to address those provisions and that rule, again necessarily briefly given the pressing time constraints incidental to the lapse date for the CVA.

135. Paragraph 74(1) of Schedule B1 provides that:

> "A creditor or member of a company in administration may apply to the court claiming that—
>
> (a) the administrator is acting or has acted so as unfairly to harm the interests of the applicant (whether alone or in common with some or all other members or creditors), or
>
> (b) the administrator proposes to act in a way which would unfairly harm the interests of the applicant (whether alone or in common with some or all other members or creditors)."

136. Attestor submits that the Court should not cause the Administrators to fulfil the condition precedent and clear the way for the CVA to be given effect since that would be to require them to act in a manner which would "unfairly harm" its interests and those of the Participating Creditors it represents. The burden of the submission, as it seems to me, is that the exercise of legal rights may be challenged if, and thus should not be exercised in such a way as, to cause unfair harm (an approach or principle analogous to that evident in other circumstances, such as in the context of Unfair Prejudice Petitions under section 994 of the Companies Act 2006).

137. It appears from various cases cited to me that paragraph 74 has recently come to be more broadly construed than previously. It clearly applies to what is described by David Halpern QC (sitting as a deputy High Court Judge) in *Re Meem SL Ltd* [2017] EWHC 2688 (Ch), [2018] Bus LR 393 as the "paradigm case…where the administrator treats the applicant (either alone or together with other creditors) less favourably than another creditor or creditors: and see *per* Norris J *in Re Coniston Hotel (Kent) LLP* [2013] EWHC 93 (Ch), [2013] 2 BCLC 405, but it may be that it also applies where there was "*a lack of commercial justification for a decision causing harm to the creditors as a whole*": *per* Nicholas le Poidevin QC (sitting as a Deputy High Court Judge) in *Hockin v Marsden* [2014[EWHC 763 (Ch), [2014] Bus LR 441).

138. Plainly there is some overlap between paragraph 74 and the much older, but originally more restricted, principle named after the decision in *Ex Parte James, re Condon* (1874) LR 9 Ch App 60. The overlap, and the also developing and potentially extended application of the principle in *Ex Parte James,* is plain from the approach of David Richards J (as he then was) in the *Lehman Waterfall IIB Litigation* [2015] EWHC 2270.

139. In that case, David Richards J explained the principle as follows:

> "174 The principle in Ex parte James has been described as anomalous but it is a well-established principle providing a means by which the court can control the conduct of its officers. Administrators, liquidators in a compulsory winding-up and trustees in bankruptcy are all officers of the court and subject to this jurisdiction. The case to which the principle owes its name, like a number of cases immediately following it, concerned the retention by a liquidator or trustee in bankruptcy of money paid under a mistake of law. At that time, money paid under a mistake of law was not recoverable, but the court directed that its officer should not stand on his strict legal rights but should return the funds, notwithstanding that the effect was to deprive the creditors of funds which would otherwise be available for distribution among them. The rationale for the principle was that, although irrecoverable at law, the officer of the court could not in all conscience retain the money, given the circumstances in which it had been paid. It would amount to an unjust enrichment of the estate. Although the principle was first developed and exercised in these circumstances, subsequent cases applied it in other circumstances and it cannot now be said to be confined to particular categories of case.
>
> 175 The touchstone for the application of the principle has been expressed in different terms over the years. In Ex parte James itself, James LJ said that the trustee:
>
>> "ought to set an example to the world by paying it [the money paid under a mistake of law] to the person really entitled to it. In my opinion the Court of Bankruptcy ought to be as honest as other people."

176 In Re Wigzell [1921] 2 KB 835 , Salter J, in a judgment which was strongly endorsed by the Court of Appeal in that and subsequent cases, said that the "jurisdiction should be exercised wherever the enforcement of legal right would, in the opinion of the Court, be contrary to natural justice." He went on to say:

> "The effect of exercising the jurisdiction which these decisions have asserted and defined is to deprive the creditors of money which is divisible among them by law. I feel sure that such a power should not be used unless the result of enforcing the law is such that, in the opinion of the Court, it would be pronounced to be obviously unjust by all right-minded men."

177 In the same case in the Court of Appeal, Lord Sterndale MR said that the court would not allow its officer to do "something which in its opinion is dishonourable and not high-minded." Younger LJ considered that it applied where it would be "unconscionable" for the officer to stand on his strict legal rights.

178 Walton J reviewed the authorities in Re Clark [1975] 1 WLR 559 . He repeatedly in his judgment expressed the relevant test as one of unfairness. So, for example, at p.563, he said:

> "Stating the matter in very broad terms indeed for the moment, and deliberately using for the purpose "unemotive language", the rule provides that where it would be unfair for a trustee to take full advantage of his legal rights as such, the court will order him not to do so …"

179 When applying the principle to the facts of the case before him, namely whether the trustee should recover the amount of two cheques paid to a supplier to the bankrupt, he said at p.567:

> "The question as I feel it ought to be posed is simply: "Is it fair that the trustee should recover the amount of these two cheques from Texaco?""

He said that he had no hesitation in answering that it was not.

180 It might be said that Walton J used the word "unfair" as synonymous with dishonourable or even dishonest, but I very much doubt it. Walton J was not a judge known for a lack of precision in his use of language and his repeated use of the word unfair in his judgment demonstrates in my view the concept which he had in mind."

140. David Richards J went on to cite the summary offered by Lord Neuberger in *Re Nortel GmbH* [2013] UKSC 52, [2014] AC 209 at [122]:

> "a principle has been developed and applied to the effect that "where it would be unfair" for a trustee in bankruptcy "to take full advantage of his legal rights as such, the court will order him not to do so", to quote Walton J in In re Clark (a bankrupt), Ex p The Trustee v Texaco Ltd [1975] 1 WLR 559 , 563. The same point was made by Slade LJ in In re TH Knitwear (Wholesale) Ltd [1988] Ch 275 , 287, quoting Salter J in In re Wigzell, Ex p Hart [1921] 2 KB 835 , 845: "where a bankrupt's estate is being administered … under the supervision of a court, that court has a discretionary jurisdiction to disregard legal right", which "should be exercised wherever the enforcement of legal right would … be contrary to natural justice". The principle obviously applies to administrators and liquidators: see In re Lune Metal Products Ltd [2007] Bus LR 589 , para 34."

141. Attestor seeks to pray in aid three related reasons why, under the principles in paragraph 74 of Schedule B1 and in *Ex parte James*, the CVA should not come into effect:

    (1) The DB Indemnity Claim is a material new claim which was not envisaged by any party, and it would be unfair to require the Participating Creditors (and the Stay-In Creditors) to bear the burden of that, to the benefit of the Exiting Creditors.

    (2) The information provided to creditors, particularly in relation to the Client Trades which underlie the DB Indemnity Claim, was materially incomplete.

    (3) The Participating Creditors have not had the opportunity to challenge the CVA under IA 1986 because they were unaware of the DB Indemnity Claim until after the deadline.

142. These three reasons were elaborated at considerable length in paragraphs 173 to 214 of Attestor's Skeleton Argument. I have read carefully, but do not intend or have time to recite, all that detail. However, Mr Allison pithily summarised the principal thrust of his case in his oral submissions in reply, as follows:

> "…in view of the Disputed Claims that we see, it would be unfair to force one group of creditors, the Participating Creditors, to fund £64 million of exit payments, when we know that the disputed claims universe is materially different from that contemplated by and disclosed to the creditors in the Proposal."

143. It is convenient to start with a brief adumbration of my views as to the extent of the jurisdiction vested in the Court by statute and practice under Paragraph 74 and the principle in *Ex parte James* respectively:

(1) As a general matter, a jurisdiction based on fairness (what Mr Allison described in the context of Paragraph 74 as "a free-standing fairness jurisdiction") said to be capable of subjecting the exercise of legal right to an ultimately subjective standard, rather like one based on public policy, may become an unruly horse. Its application must be cautious for its own protection and safe development.

(2) The past reluctance of the Court to deploy Paragraph 74 outside the context of the exercise by an office holder of his or her powers in a discriminatory manner thereby liable to be productive of objective unfairness (see *In re Coniston Hotel (Kent) LLP [supra]* at para. 36) may be based on such considerations. Paragraph 74 seems to me to be focusing on the case where an office-holder's conduct or proposed conduct discriminates against the applicant, and it tempers or qualifies the Administrator's powers to act in the interests of the creditors generally by providing a protection against such discrimination. I would, with respect to the learned Deputy Judge in that case, be wary of intervening on the potentially much broader basis of "a lack of commercial justification for a decision" (*cf Hockin and others v Marsden and another [supra]* at [19]) at least in the absence of actual perversity.

(3) Although, as acknowledged previously, the two overlap, there are distinctions between Paragraph 74 and the common law principle established in *Ex parte James.* The principle in *Ex parte James* focuses at least primarily on the restriction of legal rights conferred on an office-holder by virtue of that office where such restriction is necessary to prevent the unjust enrichment thereby of the estate. Without such a principle, such an office-holder might, after all, be bound to secure the unfair advantage for the estate which those legal rights enable.

(4) I would not question the correctness of the view expressed in the *Lehman Waterfall IIB Litigation [supra]* that the principle would extend to preventing the waiver or release of the currency conversion claims concerned by (in effect) a sidewind. I also accept of course (as I am bound to do) that the principle has come to be capable of also extending more generally to preventing the exercise of the legal rights vested in an office-holder by statute in a manner plainly contrary to natural justice (see *Re Nortel GmbH* [*supra at [140]*]). But I have, with all respect, become less convinced that some more general concept of "unfairness" is a sufficient test (*cf* David Richards J's *obiter* statement in that regard at [183] in the *Lehman* case).

(5) Further, there is a difference between, on the one hand, controlling by reference to the Court's view of fairness the exercise of a right or discretion vested in an office holder as such, and, on the other hand, intervening in the exercise of contractual rights or obligations derived from a contract to which the office holder may be a party, but which

confers and regulates contractually the rights and obligations of all the parties to it in accordance with the terms they have willingly agreed.

(6) The Court should be especially reluctant (and I should have thought usually abstain even if it has the power) to direct or re-direct an office holder on the basis of fairness in a way or context which will affect and potentially undermine or unbalance bilateral (or multilateral) rights or obligations enjoyed under a contract freely entered into.

(7) There is danger also in extending Paragraph 74 and/or the principle in *ex parte James* as a catch-all to cover complaints where the law has already provided a remedy, even if that remedy is subject to restrictions (of time, for example) which cannot by the time of the complaint any longer be fulfilled.

144. All these counter-indications seem to me to apply in this case. I accept the FSCS's overall argument that it would be to overreach itself, undermine the contract established, and wrong, for the Court to direct the Administrators not to give the confirmation required by clause 3.1(e) or the Supervisors to terminate the CVA pursuant to clause 27.1(c), whether having regard to Paragraph 74 or on the basis of the principle in *ex parte James.*

145. In such circumstances, and as I have already indicated in passing (see paragraph [142] above) I do not think it necessary or practicably feasible in the time available to go through each factual ground sought to be relied on by Attestor. But put summarily, and by reference to Mr Allison's own helpful summary of the real thrust of his factual case in this context, I do not accept that there is any unfairness in seeking to uphold the contract between the creditors which the CVA represents, which has been approved by some 97% of the creditors (even if some may now regret that), and which this court has determined after full argument should, according to its terms on their true construction, be given effect. Nor do I consider that either the lack of any reference to the Client trades, or the possibility of a claim such as eventually emerged in the form of the DB Indemnity Claim (being, at least for the purposes of this application, an 'unknown unknown') or the sequence of events before disclosure of the DB Indemnity Claim to Attestor justifies the subversion of the contract on grounds of 'fairness', 'natural justice' 'unconscionability' or 'unfair harm'. Finally, I would not accept that either Paragraph 74 or the principle in *ex parte James* can properly be deployed to end-run the time restrictions for statutory challenge, even if such a challenge would be available in the case of a consenting creditor.

Conclusions

146. It follows that in my judgment, the answer to Issue 1 is "Yes": the CVA is not precluded from becoming effective in the light of the identified Disputed Claims after the Challenge Period.

147. In light of my conclusion on Issue 1, I do not think it appropriate or justified, as regards Issue 2, to require the Supervisors to waive the relevant condition precedent.

148. In answer to Issue 3, I do not consider, in the existing circumstances and on the basis of the present evidence at least, that the Supervisors should or should be directed to determine

that the Disputed Claims require them to terminate the CVA pursuant to clause 27.1(c) of section 2 of the CVA.

149. The urgency of this matter, to which I have earlier made reference, is obvious and considerable. Any matters arising should, to the extent possible, be addressed at the hearing listed for Friday 25 May 2018, when, in the unusually pressing circumstances, I shall treat this draft as read, whilst reserving the right to effect changes to it in accordance with the usual rules applicable in the case of an oral judgment.

150. I am grateful to Counsel and their respective teams, and those involved indirectly also as persons whose interests are represented, for their patience and assistance.