Neutral Citation Number: [2021] EWHC 1341 (Ch)

Case No: **CR-2021-000675**

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

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

Date: **22 April 2021**

Before :

Sir Alastair Norris

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Re :

In the Matter of Provident SPV Limited	**Claimant**

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Barry Issacs QC, Adam Goodison and Ryan Perkins (instructed by **Clifford Chance LLP**) for the **Claimant**

Hearing dates: **22nd April 2021**

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APPROVED JUDGMENT

Barry Isaacs QC, Adam Goodison and Ryan Perkins for **Provident SPV Limited**

Tom Smith QC for the **Financial Conduct Authority**

Philip Hinks for **Jonathan Yorke** as Independent Customer Advocate

Sir Alastair Norris **Thursday, 22 April 2021**
(**2.00** pm)

Ruling by **SIR ALASTAIR NORRIS**

1. The Provident Finance Group ("the Group") provided credit to those on low or moderate incomes for whom mainstream credit was not available, perhaps because of a poor or limited credit history. The Group offered a number of financial products to customers in the UK and Ireland, with the common characterisation of their being small, short-term loans.
2. Amongst such loan providers within the group this present application concentrates on two.
3. Provident Personal Credit Limited ("PPC") was incorporated in 1917 and operated under three brand names.
   (a) "Provident" focused upon home credit where loans were offered in face-to-face transactions, with fixed repayments collected through doorstep cash collections. The terms were of between 13 and 104 weeks and the typical loan range was in the range of £100 to £2,500.
   (b) "Satsuma" was launched in 2013 and focused upon online lending, where the entire transaction was conducted remotely. The loans had terms of up to 12 months, with weekly or monthly repayments. Typically loans were in the range of £100 to £1,000.
   (c) "Glo" was launched in 2014 but it ceased transacting new business in October 2016. It was another online provider but one where the borrower provided a guarantee. The terms were from one to five years and the loans were in the range of £100 to £7,000 and were often applied in debt consolidation or vehicle purchase circumstances.

4. The second company, Greenwood Personal Credit Limited ("Greenwood"), was incorporated in 1912 and it was acquired by the group in 1977. In 2014, PPC acquired Greenwood, took an assignment of its loan book and in practice assumed Greenwood's obligations to its customers. Greenwood also operated in the home credit market, offering loans of terms of between 14 and 52 weeks in amounts of £50 to £500. It ceased trading separately in 2014.

5. In argument and evidence PPC and Greenwood have been together referred to as "the Lenders". Since 6 April 2007, about 73 per cent of the loans advanced by the Lenders have been for £500 or less; and 98.08 per cent have been for less than £1,500. The small size of the loans means that upon default recovery is uneconomic, so the loans are either written off or the receivables sold at a discount to a debt purchaser, who promises not to damage the business of the Lenders.

6. Some eight debt purchasers have been used by the Lenders, amongst them the PRA Group, Cabot and Vanquis (an associated Group company). About 14 per cent of the Lenders' loan book has been the subject of such assignments.

7. When making their loans, the Lenders did not always properly assess the sustainability, suitability or affordability of the loan they were offering to the borrower or the guarantor. This has led to redress claims for the recovery of interest paid and costs. The Lenders faced 395 such claims in the year 2014-2015, 22,380 such claims in 2019-2020 and 58,933 claims in the year 2020-2021. This increase from 400 to 59,000 annual claims was in part caused by a change of focus by claims management companies to target short-term, high-cost lending. Whilst in 2014-2015 the Lenders accepted 9.8 per cent of the claims made, with a value of just under £50,000, by 2021 they were accepting liability in 48.7 per cent of the claims, with a value of £44.36 million.

8. Where claims are rejected by the Lenders, they are sometimes subject to review by the Financial Ombudsman Service (“FOS”). As a result of these reviews, redress increased; for example in 2020-2021, to a total of over £60.3 million. About 32 per cent of the complaints to the FOS are upheld. The references to the FOS generate fees which are payable to that service. For the period April 2019 to March 2021, the total fee liability in respect of claims relating to the Lenders is some £16.27 million.

9. At present there are some 45,000 existing claims including 15,000 with the Financial Ombudsman Service. I will refer to these (together with claimants whose claims have been accepted or adjudicated but who remain unpaid, and potential claimants) as “redress creditors”. There is an emerging difference of view between short-term high-cost lenders on the one hand and the Financial Conduct Authority on the other as to the application of a decision of the Commercial Court in Kerrigan v Elevate Credit [2020] EWHC 2169 Comm when assessing affordability: so these current claims may be more contentious than past claims.

10. Since 2017, when PPC decided to replace its self-employed collection agents with employed “customer experience managers”, its business has declined and its active customer base has shrunk. To this has been added the drastic increase in redress claims and in the investigation fees payable to the FOS. The pandemic has also severely impacted collection rates. This has meant that for the year ending 31 December 2020 PPC suffered a loss of some £123.2 million.

11. PPC has in the recent past been able to maintain liquidity only by support of Group members. Its current liability under intra-group loans stands at something over £292 million. Until recently there was a “letter of comfort” from a company further up the organisational chain indicating (i) that there would be no demand for repayment of the intra-group liabilities and (ii) that there would be ongoing support with additional funds until 1 January 2022. That letter had no contractual effect, but provided comfort enabling the accounts to be signed off. However, that letter has now been withdrawn in view of the rapid increase of liabilities in respect of redress claims and the fees payable.

12. Absent the proposed scheme, the evidence of the Chief Financial Officer of the Group (who is a director of PPC) is that PPC will have no alternative but to file for insolvency proceedings if the scheme is not sanctioned. PPC's parent prepared an “estimated outcome statement” (“EOS”)

relating to the insolvency of PPC and Greenwood on assumptions made by the directors. The EOS projected a nil return for redress creditors in the event of an insolvency. That internal EOS was the subject of a review by PwC. It was a review as to the outcome *upon the assumptions made by the directors*. It was not a completely independent EOS. The review suggested that the outcome predicted by the directors was reasonable.

13. The PwC report is thus not to be regarded as an independent report on the current solvency or upon the return in an insolvency. In some circumstances, particularly where it is necessary to gain the confidence of many small creditors, it may be preferable to have an entirely independently produced EOS by professionals who acknowledge a duty to redress creditors; but that said, there are no apparent flaws in the present EOS in evidence. No doubt the directors in preparing it were aware that the focus of their duties had shifted from shareholders to creditors at a time of imminent insolvency and they have prepared the EOS with a proper regard to the duties of accuracy and balance in the presentation of the information.

14. It is proposed, as indicated, that the position be remedied by the promotion of a scheme of arrangement. For that purpose, Provident SPV Limited ("the Company") was incorporated on 2 November 2020 with the specific object of promoting the scheme and of entering into a Deed of Contribution and Indemnity whereby it assumed liability to proposed scheme creditors. It did so on 14 March 2021.

15. This machinery was regarded as preferable to the alternative of having two inter-conditional schemes (for PPC and Greenwood) respectively because (i) it avoided the occurrence of an event of default which might have prejudiced other commercial arrangements of PPC; and (ii) it simplified the process of distribution.

16. The proposed scheme adopts a now familiar structure. The Company will be provided with the sum, in the instant case £50 million, to a fund a compensation fund and will be provided with about £15 million in respect of the costs of administering that fund. All the scheme creditors must submit their claims before a six-month bar date. The claims are those which arise in relation to loan agreements entered into before 17 December 2020 (the date upon which the Lenders resolved to put the scheme to the Financial Conduct Authority ("FCA")). The insertion of a cut-off date responds to a specific request of the FCA.

17. The claims will be subjected to an automated analysis based upon the characteristics of past successful claims. There are 4 million potential Claimants and 20 million transactions to be examined. Claims rejected by this screening process can be then referred to an independent scheme adjudicator, as can claims where the compensation level is challenged. The proposed adjudicator is a partner in Norton Rose Fulbright, the Global Head of their Financial Services Division, whose impressive CV forms part of the scheme documents.

18. The current borrowers can set off any redress which is awarded to them. Defaulting borrowers whose loans have sold under the third party arrangements to which I have referred would not be able to benefit in this way: but they are to receive special treatment to achieve equivalence.

19. When all claims have been so determined there will be a pro rata distribution. The size of the dividend in that distribution cannot at present be quantified. It could be as low as 1.38 per cent of the gross value of the redress claim, but it will probably be in the range of 5 to 10 per cent depending upon how many claimants actually advance redress claims.

20. These arrangements have been subject to comment from three sources. First, the FCA required a report under section 166 of FISMA from a "skilled person". That skilled person reviewed the methodology for identifying claimants, for assessing their claims and for calculating the

compensation, to ensure that the process would result in a reasonably fair outcome. The skilled person has reached the view that the proposed methodology is appropriate to achieve that end.

21. Secondly, the Group caused to be appointed an independent person (Mr Yorke) to act as a customer reviewer and independent customer advocate. His task was (i) to review the representations that had been made by creditors of PPC and of Greenwood who were affected by the scheme (ii) to consult with the specialist media with a view to understanding any concerns about the scheme in general and (iii) to produce a report summarising those issues. Mr Yorke has reviewed customer responses - some 300 summaries that were provided to him by the Company in respect of which he has read the relevant underlying communications. He has further done random sampling to see whether the summaries provided to him were complete and accurate. He has also consulted with one specialist commentator, Debt Camel, to provide a partner for discussion as to elements which might raise concern. It is apparent from his report of 20 April 2021 that none of the communications which he has considered objected to the holding of a single class meeting, nor was there any concern in that regard expressed by Debt Camel. Nor were there any procedural concerns, for example as to the pace at which the matter was proceeding, expressed. Mr Yorke made various suggestions as to improving communication with scheme creditors by the use of social media and by the way in which the families of deceased creditors were to be treated for communication and participation purposes. These concerns had been taken on board by the Company and the final arrangements shaped having regard to them.

22. The third outside view was that expressed by the FCA. There had been engagement between the Company and the FCA from the outset and the observations of the FCA had been taken on board in the formulation of the scheme and of the scheme document. The result is that the FCA, whilst not supporting the scheme as a whole, does not suggest that there is anything which stands in the way of the convening of a scheme meeting. Its objections, as it recognises, relate largely to the content of

the scheme and will require to be addressed at the sanction hearing. I will return to those objections at the end of this judgment.

23. This is an application for an order convening a single meeting of the scheme creditors. The role of the court at such a hearing is very well settled. I need simply refer for a recent summary to Re Noble Group [2018] EWHC 2991 per Snowden J at paragraphs [60]-[76] for a thorough discussion and to the Practice Statement dated 26 June 2020.

24. It is not my role at this hearing to consider any issues going to the merits of the scheme. It is my role to consider, first, whether adequate notice of the convening hearing has been given which affords a fair opportunity for scheme creditors and others affected to raise issues; secondly, to consider threshold issues relating to the existence of jurisdiction; thirdly, and most importantly, to consider class composition questions; fourthly, to consider arrangements for ascertaining the wishes of screen creditors; and lastly to consider whether, at this stage, I can perceive a "road block" such as would prevent the approval of the scheme even if it were agreed to by the requisite statutory majorities.

25. I will consider, first, adequate notice of the convening hearing. The Practice Statement letter was sent out on 15 March 2021 and also posted on a dedicated website on that day. A thorough tracing exercise had been undertaken to identify recipients of the letter. Some were contacted by e-mail (where they had authorised that method of communication) and were sent an electronic link to the Practice Statement Letter and a covering letter. Others were contacted by post over the period 19-22 March 2021. Of those receiving notification by post, 98.4% of addressees would have received the communication by 25 March 2021; and the remainder would have received it by 27 March. There was additional press coverage of the circulation of the Practice Statement letter. I consider that a

period of approximately five weeks before the holding of the convening hearing to be entirely adequate.

26. The Practice Statement letter itself is of daunting length, particularly having regard to the constituency to which it is addressed. But at the end it contains in a highlighted box a summary of the scheme and of the purpose of the convening hearing; and I am satisfied that the Practice Statement Letter served the purpose intended.

27. I can therefore turn to the second question, which is whether there are any threshold issues relating to the existence of jurisdiction. This is familiar territory and I can cover it very shortly.

28. I am satisfied that the Company is "a company" within section 895 of the Companies Act 2006. I am satisfied that the proposed scheme is properly called a "compromise or arrangement" since it demostrates the requisite elements of "give and take". On the Company's part it will establish a fund and it will obtain a release of claims against the Lenders. The scheme creditors will give up their legal and statutory rights against the Lenders and will instead receive rights under the scheme to have their claims adjudicated and their compensation assessed and paid.

29. The scheme utilises both a special purpose vehicle and an artificial assumption of liability to establish the necessary creditor relationship between the Company and the redress claimants. This is a course which has been adopted in a number of cases; but I am content to rely on the thorough consideration of the propriety of these arrangements by Zacaroli J in Instant Cash Loans [2019] EWHC 2795 and in Re Gategroup Guarantee [2021] EWHC 304 and by Trower J in [2020] EWHC 3064. There is nothing which goes to the jurisdiction arising out of those arrangements.

30. I can then turn to what is often the major concern at these hearings, namely class composition. Once again, the principles are well settled and well known, and it would be pointless for me to add my

summary to the many that already exist. I simply remind myself of the fundamental principle identified by Bowen LJ in Sovereign Life Assurance v Dodd [1895] 2 Q.B 273 at 283, that those who are compromising their rights or entering into an arrangement should meet together unless their rights are so dissimilar as it make it impossible for them to consult together with a view to their common interest. I draw out from that summary one strand referred to in many authorities and recently applied by Zacaroli J in Re MAB Leasing [2021] EWHC 152 at [33], that there can be dissimilarity (and indeed material dissimilarity) but such dissimilarity can be accommodated within a single class. What is required is such a degree of dissimilarity as to make it impossible for scheme creditors to confer together, namely, that is there is an absence of any community of interest. In submissions, Mr Isaacs QC emphasised the observation of David Richards J in Re Telewest Communications plc [2004] BCC 342 at [40] that the question was whether there was more to unite than to divide, a heuristic that has been adopted by many judges, again recently by Zacaroli J in the MAB Case to which I have already referred. That is a sufficient recitation of the principles.

31. Here what is proposed is a single class of redress creditors. It is a fact that no-one has suggested anything else, but the proposal must still be subjected to independent scrutiny by the Court. I agree that since every redress creditor is offered the same commercial deal (surrender of their claim to prove in an insolvency in respect of their redress claim in return for the right to share in a compensation fund in respect of their assessed or adjudicated claim) the starting point is that there should be a single class. The issue then becomes whether that class should be fractured.

32. The first possibility is that there should be a difference drawn between borrowers and guarantors. Borrowers are able to claim redress in respect of interest on loans which ought not to have been granted. Guarantors are able to claim repayment of principal in addition to interest paid in respect of loans that ought not to have been granted. But both are unsecured claims in an insolvency. There is in present no reason to treat them differently. That approach is reinforced by the fact that

guarantors comprise only 0.024 per cent of potential claimants (about 1,000 out of 4.2 million redress creditors) and it would be inappropriate to constitute so small a class with a potential power of veto. So that does not fracture the class.

33. But then it was suggested that there might be a fracturing of the class between current borrowers and former borrowers. Current borrowers would be able to exercise a right of set-off and thereby obtain full value, pound for pound, in respect of redress received by them; whereas former borrowers would only receive a dividend of perhaps 5 per cent on the full value of their redress claim. This is a difference of circumstance, not a difference of rights. Set off exists in insolvency and under the scheme; and no-one suggested that there is any significant difference between those set-off rights. What makes the difference in outcome is not the rights conferred by the scheme, but the personal circumstances of the borrower.

34. Then it was suggested that there may be a distinction between current borrowers from PPC and borrowers whose loans had been sold; the 14 per cent of assigned loans to which I have earlier referred. Current borrowers will obtain redress from PPC and can set it off, but by reason of PPC's dealings with their loans, borrowers whose loans have been assigned to third parties will be unable to exercise set-off rights. Recognising this, there has been an endeavour to obtain an equivalence of treatment. The Company has sought to obtain what are called "balance reduction agreements" from current third party owners of the debt. It has received comfort letters from three: PRA, Cabot and Vanquis. And it is seeking to obtain letters of comfort from others. In addition the Company is willing to offer (and the scheme document contains) an undertaking to use reasonable endeavours to procure comfort letters from all eight third party debt owners.

35. The question is: how does one analyse the position in the event that those comfort letters are not forthcoming, and there is a no debt reduction agreement? The position then would be (i) that the

borrower whose loan had been assigned to a third party would receive a dividend on the gross value of his claim (not, as in the case of a current borrower, on the net value of the redress claim after adjustment for set-off) but have no set off; and (ii) that the borrower's equitable rights are preserved can be deployed by way of equitable set off against liabilities to a third party assignee of his debt. This position comes about not because of any feature in the scheme itself but simply because of the circumstances which in any event exist and which would be in play in an insolvency. The matter is, I think, a question to be considered in fairness assessment at the sanction hearing, rather than being a matter for class composition.

36. In the circumstances, I consider that a single class meeting may be convened. The outcome of that meeting will of course have to be considered at the sanction hearing, for the fact that a matter does not cause a fracturing of the class does not means that it is irrelevant to questions of fairness.

37. I can now turn to the next matter for my consideration which is whether the arrangements for ascertaining the wishes of the scheme members are satisfactory. Section 895 of the Companies Act 2006 requires an Explanatory Statement to be sent; and the nature and content of that Statement is the subject of guidance in paragraphs [14] and [15] of the Practice Statement of 26 June 2020. It is not my function at this hearing to approve the Explanatory Statement, but I should, if possible, identify any glaring deficiencies.

38. I have considered the draft Explanatory Statement, particularly in the light of the constituency to which it is addressed. It is again a daunting document, some 150 pages in length. It is not to be expected that redress creditors will read it word for word, cover to cover. It is to be accompanied by a short, personalised letter. It is to be supplemented by the fact that it is to be posted on the Web. It contains an accessible summary; and it will receive additional support (upon which many may be expected to rely) (i) using social media; (ii) utilising an updated" Frequently Asked Questions"

section on the website; and (iii) from the posting of videos explaining matters. Given the requirements for completeness and accuracy in an Explanatory Statement, I think this is all that can be done to communicate the relevant material to scheme creditors. It may be anticipated that considerable press comment will be generated so that scheme creditors will one way or another come to know of the scheme meeting, its purpose and its date.

39. It is proposed that the scheme meeting should be held some nine weeks after the circulation of the scheme documents by e-mail, by post and by advertisement in the Metro, The Daily Mail, and in The Sun. This seems to me to provide an adequate period for reflection and the taking of advice.

40. It is proposed that there shall be a virtual meeting which takes account of the current guidance as to what is required: see Castle Trust Direct [2020] EWHC 969 at [42]-[43]. At the scheme meeting, voting will be assessed by reference to the likelihood and size of a redress creditors claim. This will be achieved by passing through an automated process all redress claims potentially coming through. There is a four-stage filter, the object of which is both to quantify the claim, and to weight it, having regard to the likelihood of its success, by reference to the stage in the automated process at which the claim is established. This methodology also seems to me to be sufficient. The weighing of multiple, unliquidated, relatively small claims against a claim of the size and nature of that advanced by the Financial Ombudsman Service in respect of fees presents obvious difficulties. I consider that the proposed arrangements strike a fair balance.

41. This brings me to the final matter for consideration, which is whether there is to be a "road block" in the way of scheme approval, something which, even if the scheme meeting approves the proposed compromise or arrangement, prevents it from being implemented. Conventionally, a "road block" is viewed as a legal or technical defect: although I have myself expressed the view *obiter* that it might

also cover matters contrary to some public policy: Re Patagonia Gold [2019] EWHC 2688 at [7] and Re Elegant Hotels [2019] EWHC 3699 at [9].

42. I would here note two points. First, it is right that the proposed scheme applies only to a particular section of the creditors of PPC. It is established (for example see Sea Assets v Garuda [2001] EWCA Civ, 1696) that such an approach is entirely legitimate. It will fall for consideration at the sanction hearing whether in the circumstances it is fair. So, I am satisfied that the particular scheme structure does not inevitably mean that it cannot be approved.

43. Second, I should under this head consider the stance of the FCA set out in its letter of 19 April 2021. I have already indicated that the FSA accepts that it cannot object to the holding of a scheme meeting and to its convening by order. The points of objection which concern the FCA go to sanction. Equally, the FCA does not suggest that the nature of its complaints and the issues it raises will have such an influence at the scheme meeting, that it can *now* be said that to render the convening of that meeting pointless. I must therefore be circumspect about what I say at the convening hearing in relation to the FCA objections. But I would comment on one of those objections.

44. Mr Smith QC for the FCA submitted that the value of the redress claims caught by the scheme is projected to be something like £3.6 billion. Those claims are to be satisfied by distributions out of a a fund of some £50 million. Thus to achieve the solvency of the Lenders the scheme creditors suffer a headline reduction in their claims of some £3.5 billion. By contrast, the Lenders' shareholders are contributing the sum of £50 million. The evidence describes this as "the best reasonable estimate of the maximum amount which is affordable for the group" (though no analysis is set out to support that estimation). Nor are there any other creditors making a contribution to maintaining the solvency of the Lenders. Mr Smith submits that it ought to be open at the sanction hearing to raise the

question whether this is a fair allocation of the benefit of retaining solvency (particularly where it is proposed that the shareholders shall take the entire benefit of the ongoing profitability of the Lenders, making no further contribution to the compensation fund out of future profits or disposal proceeds earned or obtained by the solvent businesses). Mr Isaacs QC responds by saying that it is well-established that the task of the Court is to examine the scheme which is actually presented and not to indulge in a speculation about whether there is some better scheme that might be proposed. But that is of course an answer but not, I feel, necessarily a complete answer.

45. The court may well be concerned, particularly in the context of arrangements which arise not out of negotiation but out of unilateral action on behalf of a scheme company, that there are broader questions of fairness to be considered. It may not be enough simply to say that the court is only concerned with the scheme before it. It may be that the scheme before it, even if approved at a scheme meeting, contains such an element of unfairness that the court might be reluctant in its unfettered discretion to approve it. The Court, for example, will have to be satisfied that the scheme is one which an intelligent and honest class member, acting according to his or her interests as such, could reasonably approve: a test that is not satisfied simply because the requisite statutory majority has been obtained.

46. This is not the occasion to carry that debate any further; and indeed at the sanction hearing it may prove a sterile debate, or one which is not properly founded in principle. But it is, I think at this stage, worth drawing to the attention of those promoting the scheme, that one obvious absence from it is a future contribution from shareholders to the redress fund, constituted for the benefit of the redress creditors who alone bear the burden of maintaining the solvency of the Lenders.

47. But as all accept, this does not prevent the convening of a single scheme meeting and I shall order the convening of such in the form set out in the draft order which I have considered with counsel and approve.