Neutral Citation Number: [2022] EWHC 3009 (Ch)

Case No: BR-2019-001363

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES COURT

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

Date: 25/11/2022

Before:

CHIEF INSOLVENCY AND COMPANIES COURT JUDGE BRIGGS

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Between :

MOORGATE INDUSTRIES UK LIMITED	**Applicant**
- and -	
(1) PRAMOD MITTAL (in bankruptcy)	**Respondents**
(2) ALLISTER MANSON AND STEVE PARKER (in their capacity as joint supervisors of an Individual Voluntary Arrangement)	

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JOSEPH CURL KC and GISELLE MCGOWAN (instructed by **CLYDE & CO LLP**) for the **Applicant**
IAN MAYES KC and STEPHEN RYAN (instructed by **COLLYER BRISTOW LLP**) for the **First Respondent**

Hearing dates: 7, 8 November 2022

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Approved Judgment

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CHIEF INSOLVENCY AND COMPANIES COURT JUDGE BRIGGS

Chief ICCJ Briggs:

1. This case before the court concerns a challenge to an individual voluntary arrangement entered after the making of a bankruptcy order.

2. Global Steel Holdings Limited ("GSH") was a company incorporated in the Isle of Man and concerned in the business of steel. It was wound up on 10 May 2018. Pramod Mittal ("PM") was the chairman and one of four directors of GSH. He was also a director of a Global Steel Philippines Inc ("GSP") which owned and operated a steel works in the Philippines. In a written statement to creditors PM stated that the local authority in the Philippines had foreclosed on the assets of GSP in about 2013. In any event GSH and GSP incurred liabilities (the provision of raw materials by way of a purchase agreement) to the State Trading Corporation of India Limited ("STC"). GSH and GSP failed to pay those liabilities.

3. A settlement agreement was reached in respect of the STC liability in November 2011. The agreement was breached. A new agreement was reached in May 2012. By the second agreement PM agreed to provide STC with "additional security" (clause 12 (iv)) in the form of a personal guarantee "guaranteeing STC for payment of entire outstanding" sum.

4. Moorgate Industries UK Limited ("Moorgate") had provided finance to another company within the group of companies associated with PM, Global Ispat Koksna Industrika d.o.o ("GIKI"), a company incorporated in Bosnia-Herzegovina. Ispat Steel Holdings Limited ("Ispat") is a Mauritan company that claimed to be a creditor of PM and is the purported assignor of the debt to a Mr Agarwal. Moorgate required a personal guarantee to be provided for it "to continue to do business with (Ispat)".

5. GSH was wholly owned by Direct Investments Limited ("DIL"). DIL is a company incorporated in the British Virgin Islands ("BVI") and wholly owned by Prasan PTC Limited ("Prasan") which is a private trust company also incorporated in the BVI.

6. Ispat failed in its obligations. As a result, Moorgate took action against GSH pursuing payment under the guarantee in the commercial court in August 2013. Ispat commenced arbitration proceedings under a request for Arbitration dated 4 November 2013. Ispat contended that it was not liable to Moorgate for any debt and issued a crossclaim for approximately US$300m.

7. Following the activity in the commercial court and the request for Arbitration GSH provided a guarantee to secure the debts of GIKI. The guarantee was given on 13 July 2016.

8. Subsequently PM provided an undertaking agreeing to be bound by and not challenge any finding of law or fact by the Tribunal under the Arbitration. He agreed, by the undertaking, that he would be liable to pay any award (the "Award") made within 21 days of it becoming enforceable. Once the undertaking was given, a stay of proceedings in the commercial court was granted, pending the outcome of the Arbitration.

9. The Arbitration tribunal rejected the crossclaim and made an award against GIKI on 31 July 2017 to pay Moorgate the sum of £124,875,724.91, plus costs of £2,160,147.20 and interest from 14 August 2017 at a rate of 5.19%

10. PM became liable to pay the Award by reason of the undertaking.

11. On 19 January 2018 judgment was entered against GSH and PM. On 10 May 2018 the Manx Court appointed provisional liquidators in respect of GSH. PM and DIL jointly made an application to the Manx Court in June of that year to rescind the order appointing the provisional liquidators. The application was made on the basis that GSH was solvent. The application was unsuccessful. PM and DIL had failed to disclose to the Manx Court any debt due to STC. His Honour Deemster Corlett said that this failure was an "extraordinary omission" which presented "a false picture" to the court.

12. The provisional liquidation was terminated upon the appointment of liquidators in October 2018 when Mr Wilson, Mr Adrian Allen and Mr Mitchell of RSM Restructuring Advisory LLP were appointed. The statement of affairs of GSH was signed by Mr Das, who was one of the four appointed directors and a director of DIL.

13. In or around December 2018, applications were made to the Manx Court for a Committee of Inspection to be formed for GSH. DIL applied to be a member of the Committee. The Court found that PM controlled DIL and refused the application on the basis of a potential conflict of interest. Criticisms were levelled at PM and Mr Das for failure to disclose information and deliver up books and records. The Deemster commented "it seems on the evidence before me that [DIL] is beneficially owned by Mr Mittal. He is the driving force behind that company." It is said that this comment needs to be read in context of the overall proceeding and in particular the issue of a conflict.

14. Moorgate served a statutory demand on 30 October 2019 seeking payment of the sum due under the Award. The demand was not paid and there was no application to set it aside. After 21 days from service of the demand Moorgate issued a petition for the bankruptcy of PM on the basis that the sum of £139,786,656.43 plus interest was due and owing.

15. The petition was opposed on many grounds set out in a document titled "Debtors Notice of Opposition to Petition". The document was produced and signed by solicitors acting on behalf of PM. Several weak arguments were advanced but relevant to this matter, under a heading "Mr Mittal's Claim in GSHL's Liquidation" it was said:

> "GSHL's liability to STC under the STC Settlement Agreements of circa US$347.74 million was discharged by paying circa US$ 372.51 million (US$ 347.74 plus interest)... In the premises, the discharge of GSHL's liability to STC has discharged the STC Claim in GSHL's liquidation, with the result that Mr Mittal is entitled to be subrogated to the rights of STC in respect of the STC Claim to the extent of circa US$315.41 million… On 14 May 2019, MannBenham Advocates Limited ("MannBenham"), acting on behalf of Mr

> Mittal in respect of the liquidation of GSHL in the Isle of Man, wrote a letter (pages 88 to 89) to the Joint Liquidators of GSHL in which the discharge of GSHL's liability to STC is set out and Mr Mittal's right to be subrogated to the rights of STC in respect of the STC Claim is asserted (the letter mistakenly referred to the figure of US$ 311.58 million as having been discharged by Mr Mittal instead of the correct figure, US$ 315.41 million)… On 23 December 2019, MannBenham lodged Mr Mittal's proof of debt for US$ 315.41 million and his witness statement in support with the Joint Liquidators… Pursuant to the STC Claim, Mr Mittal expects to receive a substantial sum from the liquidation of GSHL…Mr Mittal expects that the debt can be discharged within a reasonable period of time."

16. PM maintained his subrogation claim with the liquidators of GSH through his solicitors MannBenham.

17. The proof of debt submitted stated GSH is: "indebted to for (sic) the sum of US$372,514,602 out of which USD315,404,602 paid by me and my behalf (sic)" The proof of debt submitted by PM was questioned by the liquidators. On 19 February 2020 MannBenham wrote in response that they had been instructed that the debt owed to STC had been settled and that: "out of the amount US$372,514,601.71 the amount paid by Mr Pramod Mittal and/or on his behalf was US$315,404,602". The letter ended: "we trust that this clarifies matters and will now enable the Joint Liquidators to accept the proof of debt filed on behalf of Mr Pramod Mittal".

18. In a witness statement signed with a statement of truth in the bankruptcy proceedings PM explained [11-15] that MannBenham had provided further evidence to the joint liquidators in support of his claim for subrogation. He states [13] that he made clear to the joint liquidators that he would apply to court if he had to "to ensure recognition of my claim."

19. An application was subsequently made and listed. PM provided a witness statement signed with a statement of truth in support:

> "*my application by which I claim is an declaratory* and consequential relief *to give effect to my having been subrogated by operation of law* to the position of [STC]." (sic) (emphasis supplied)

20. In his statement (dated 23 October 2019) he explained [13]:

> "GSHL is an investment holding company incorporated in Isle of Man. The sole shareholder of GSHL is Direct Investments Ltd which is incorporated in the British Virgin Islands *and which is beneficially owned via a Trust and controlled by the Mittal Family"* (emphasis supplied)

21. He asserts his subrogation claim in the following way:

> "[42] By reason of *my having discharged personally* the entirety of the liabilities of GSHL to STCI, as a guarantor for those liabilities under the Personal Guarantee, as specifically recorded in the order of the Supreme Court of India dated 12 March 2019 and the subsequent order on 22 August 2019, I consider *I am entitled to stand in the shoes of STCI* and to assume all rights and claims in the liquidation to which STCI would have been entitled but for the discharge of the liabilities of GSHL to it. (emphasis supplied)
>
> [43] I consider my position is very well established under English and Manx law; that is, a surety or guarantor who has guaranteed the repayment of a debt owed by a debtor (GSHL) to a creditor (STCI), will, in the event that he repays the debt, be entitled to be subrogated to the creditor's rights against the debtor."

22. PM sets out the payments breaking them down and says they were made: "by me or on my behalf". These associated payments are separate from "third party payments" scheduled. The associated payments are said to have been made by DIL, Ispat, Global Coke & Energy FZE ("Global Coke"), Mohan Lal Mittal and Divyesh Mittal. The grouping is interesting in that it provides evidence of how PM viewed his relationship with DIL. He concludes [61]:

> "I have therefore discharged, as surety, the entirety of the indebtedness."

23. PM was adjudged bankrupt prior to the hearing. The application has yet to be resolved. It is not doubted that any right to subrogation will have vested in the trustee-in-bankruptcy.

24. The opposed bankruptcy hearing was set down for determination on 18 May 2020 and heard by ICC Judge Burton. Following a reserved judgment PM was adjudged bankrupt on 19 June 2020 at 9:55am.

25. Within days of the bankruptcy order Moorgate, who had been deprived of the sum due under the Award for two and a half years by this stage, wrote to the Official Receiver attaching proofs of debt and seeking the appointment of Nicholas Wood, Michael Leeds and Kevin Hellard of Grant Thornton UK LLP as joint trustees in bankruptcy. Moorgate informed the Official Receiver that PM had evaded service of the bankruptcy petition (he refused to accept personal service when at court) and failed to cooperate with the liquidators of GSH. Moorgate understood that he had assets in multiple jurisdictions including the British Virgin Islands, Dubai, Nigeria and India which would make the bankruptcy complex.

26. In the meantime, Clarke Willmott solicitors, acting for creditors of PM provided the Official Receiver with a spreadsheet that included claims in the bankruptcy for Mohan Lal Mittal, Ispat, Waltace Limited ("Waltace"), DIL, Interworld Steel Industries Ptd ("Interworld"), Global Coke and Securex Holdings Ltd ("Securex"). I shall refer to these and their assigns as the "supporting creditors". Of most relevance is the claim made by DIL of US$21.13 million.

27. The Mittal family nominated Paul Allen of FRP Advisory. The family claimed to be creditors in the sum of US$214 million. On 29 June 2020 the Official Receiver made the decision to appoint Mr Allen on the basis of a claim made by Mohan Lal Mittal (the father of PM) for US$210,350,000 (£168,496,559).

28. The Official Receiver made the appointment as the sum claimed by Mohan Lal Mittal represented 54.7% of approved claims.

29. PM made an application for permission to appeal the bankruptcy order on 9 July 2020 and lodged evidence. PM maintained his position that he was entitled to be subrogated to the sums used to repay the STC debt based on his assertion that the moneys used to pay STC were his monies or paid on his behalf. He maintained his argument for subrogation even after he had instructed insolvency practitioners to put a proposal to creditors for the purpose of approving an individual voluntary arrangement ("IVA"). It was not until the application for permission to appeal came before the court on 17 December 2020 that the appeal was abandoned.

30. On 2 September 2020 Clarke Willmott provided Mr Allen with an undated schedule of six creditor claims. The schedule includes the same claims as had been provided to the OR, but with a new column showing the addition of compound interest at 4% a month. Debts of US$61,611,133 increased to US$2,681,482,825. Loan agreements were attached.

31. The loan agreement relied upon by DIL is dated 3 January 2006. It is an altogether unusual document. The recital states that DIL "wishes to make a loan" to PM and GSH in a "specific sum" of US$70,000,000 with repayment to be made "upon notice". The loan is expressed as being unsecured giving the borrowers entitlement to draw the sum loaned in one or more instalments.

32. The oddity is that the loan agreement is specific in terms of its use:

> "[It] shall use the Loan to repay the Debt towards State Trading Corporation of India (STC) and Stemcore UK Ltd."

33. It presupposes an existing debt to those specific entities. The debt owed by PM to STC had not arisen at the time of the loan agreement, nor was it going to arise for many years.

34. The purchase and sale agreement between STC and Global Steelworks International Inc and GSH is dated 2005. STC obtained judgment against GSH and a settlement agreement was entered in 2011. At this time PM had no personal liability. It was not until 17 May 2012 that PM entered into a settlement agreement with STC that included the provision of a personal guarantee under which he would be personally liable as surety for the STC debt.

35. It is highly unlikely that PM or DIL anticipated that judgment would be obtained and a settlement agreement negotiated so far in advance of the loan agreement being entered. To bolster this, four years after the loan agreement was entered (2010), GSH posted strong accounts with no signs of an inability to pay debts as they fell due. It counted among its creditors an outstanding loan due from the Prasan Trust of

US$22,272,665. The accounts expressly state that GSH had no contingencies or commitments.

36. Similarly, the personal guarantee given by PM to Moorgate (formally Stemcore) is dated 24 January 2006, after the date of the loan agreement.

37. The loan agreement is also curious in that it includes a 4% per month compound interest provision. It is unusual since the loan was not expressed to be a bridging loan where such clauses are more common (it is an open-ended loan agreement). The evidence of PM is that he expected his family to meet the demands made under the guarantees.

38. Lastly there is an absence of documentation to support the loans made. Two matters are certain. First, PM did not draw down US$70,000,000 on 3 January 2006. This is axiomatic as no debt was owing to STC or Moorgate. Secondly there is evidence of transfers made by DIL to STC and Moorgate. The two are not necessarily connected. The payments made to STC, for example, are said to have been made at the direction of PM. That is not a request for a draw down. It may provide evidence of his control over the assets of DIL.

39. I note that in the course of a two-day hearing I was not taken to any document that purported to be a "notice, request" made by PM to DIL for a draw down as anticipated by clause 1 of the loan agreement and required by clause 9.

40. In or around mid-September 2020 PM approached Opus Restructuring LLP ("Opus") to assist with putting a proposal to creditors to approve an IVA. The IVA proposal provided for a payment of approximately £4.68m to be made by PM's son, Divyesh Mittal, as a contribution. In his witness statement Mr Manson of Opus describes the care taken in his capacity as joint nominee to ensure that the contribution was not the money of PM, how he investigated the liabilities of PM and reached the conclusion that PM had few assets, did not own or control DIL nor was he a beneficiary of the Prasan trust.

41. On 2 October 2020 a notice was sent to creditors by the joint nominees convening a virtual meeting to be held on 21 October 2020. The notice attached a proxy, proof of debt forms, a statement of affairs, a list of creditor claims and a copy of the proposal, among other documents. By the proposal PM informed creditors that:

> "As I was unable to satisfy the liability to STC, the sum owing under my personal guarantee was paid using funds that I borrowed from various parties pursuant to loan agreements. Although I no longer have any personal liability to STC, the parties from whom I borrowed money have claims against me in respect of the loan payments they made to me directly (so I could pay STC) and the payments they made to STC on my behalf."

42. PM states that "for legal reasons" he is not permitted to have contact with GIKI or its management. The liabilities he lists include a debt of over £1bn owed to DIL. When that debt is added to other creditor liabilities, the sums owing to unsecured creditors is £2,549,368,737.

43. PM explained that he has lived in the UK since 1998 and that he has quoted and unquoted shares in a number of companies located in India and Nigeria. He informed creditors that any sums owed by GSH "cannot be recovered…nor can it be considered an asset in my estate." His assets estimated to be available to unsecured creditors were calculated at £116,669.

44. He did not include the claim for subrogation made in the liquidation of GSH. This is curious for three reasons. First, the subrogation claim was used as a basis to argue that the debt owed to Moorgate could be paid within a reasonable period. Secondly, he had attested to the claim and entered a proof of debt in the liquidation. Thirdly, proceedings had been issued for a declaration as to entitlement. Those proceedings are in his name and as I have mentioned, remain outstanding.

45. Mr Wilson (the joint liquidator of GSH) also finds the inconsistency curious. In his witness statement he observes [41]:

> "it appears that the [PM] was prepared to seek subrogation to the STCI Debt in his own name and issue proceedings to have the Subrogation Claim determined (notwithstanding that, even on his own case, many of the debts were not actually paid by him directly). However, once he was made bankrupt (and so, clearly, the benefit of the Subrogation Claim would flow to his bankruptcy estate rather than to him personally), parties connected to him (including his father, Mr Mittal Snr, and connected companies) have independently sought to be subrogated to the STCI Debt based on the same set of circumstances by way of the Initial PoDs."

46. Mr Manson has not found any of these inconsistencies difficult to reconcile. In his statement, made for the purpose of assisting the court and "to show the detailed investigations we conducted" he states [61 and 134] that there had been some confusion about "technical terminology" and that confusion is consistent with "the language barriers I had myself experienced with Mr Mittal." When considering an issue of the connection between PM and DIL he opined [146] that there was no "definitive evidence" of an association and similarly no such evidence that PM was a beneficiary of the Prasan Trust.

The Prasan Trust and DIL

47. In the Eastern Caribbean Supreme Court Territory of the Virgin Islands, Adderley J, Ag heard an application made by Prasan (as trustee of the Prasan Trust) seeking to set aside a statutory demand served on Prasan by GSH and made on 16 April 2019. PM provided evidence recorded at paragraph [22] of the judgment:

> "The evidence is that the companies have historically had a close relationship, sharing directors, and Mr Mittal is a beneficiary under the trust which is the ultimate shareholder of the Respondent, and Mr Mittal is a beneficiary of the trust and the Chairman of the Respondent."

48. The Prasan Trust benefited from a settlement provided by the settlor, Mohan Lal Mittal. Recital B to the Settlement Deed provides:

> "It is the express intention of the Original Settlor that insofar and so long as a private trust company is appointed trustee of this Trust the terms shall so far as possible not permit such trustee to be paid remuneration where the trustee is in relation to this Trust conducting unremunerated trust business."

49. An associated person is defined as a person within the terms of paragraph 2 of Part 1 to the BVI Financial Services (Exemptions) Regulations 2007. The beneficiaries are named. These are members of the Mittal family, including Divyesh Mittal who volunteered to provide money to creditors of the IVA. The class of beneficiaries does not include PM. PM is included in the "Family Class". The appointed trustees have the power to add any person in the Family Class as a beneficiary and to shorten the trust period including to terminate the trust.

50. The Protector of the Prasan Trust is named as PM. The settlement provides him with extraordinary powers that go beyond what is required to ensure the orderly administration of the trust. The Protector is provided with what may be described as indirect powers. The trustees cannot exercise certain powers or exercise discretion without the consent of the Protector. The Protector has a power to shorten the Trust Period. In theory the Trust Period could be shortened to such an extent that it would end in the immediate future.

51. Other specific powers subject to the control of the Protector include:

i) Powers over income.

ii) Powers over capital.

iii) A power to add a beneficiary or exclude an existing beneficiary.

iv) A power to dispose, charge, mortgage or otherwise encumber the securities of a company that comprises the trust fund (DIL).

v) A power to appoint or remove directors of any company the securities of which are comprised in the trust fund (DIL).

vi) Exercise a power in relation to any matters arising under or in connection with the trust "notwithstanding that the Protector is directly or indirectly interested" in the matter and without accounting for any resultant profit. These include powers to invest and lend to any beneficiary as defined.

52. The Protector is not to be liable for his acts or omissions. The trust properly construed provides a power to act for his own benefit since a trustee can be removed if that trustee does not do as he directs. It can be inferred from the powers provided to the Protector that the settler wished to involve PM in the management of the trust and for PM to benefit from the trust if he chose to do so. Prasan (as trustee of the Prasan Trust) is the sole shareholder of DIL which in turn is the sole shareholder of GSH.

Through this route PM had considerable influence and power to exercise over GSH prior to liquidation and continues to have such power in respect of DIL.

The IVA challenge

53. By an application (the "Application") dated 13 November 2020, amended by order of Deputy ICC Judge Agnello QC on 25 June 2021, the IVA approved at the meeting of creditors on 26 October 2020, is challenged. The Application seeks revocation on the basis of material irregularity alternatively on the basis that the creditors acted in bad faith. The Application is supported by a witness statement sworn by Jade Moore ("JM"), a director of Moorgate.

54. The focus of the attack at the hearing concerned the claim submitted by DIL in the sum of £972,005,205.46 and the claim made by Interworld in the sum of £13,186,444.20. If Moorgate is successful in respect of the attack on DIL and Interworld there will be insufficient votes to carry the proposal made for the IVA.

55. The statement details the bankruptcy proceedings and highlights the increase of the debts submitted at the impugned meeting of creditors:

> "The Nominees' explanation for the value of the creditors in their report on the IVA was that the Bankrupt had purportedly entered into loan agreements with a number of third parties, which were purportedly entitled to compound interest at 4% per month (i.e. almost 50% per annum and compounding). No explanation was provided by Clarke Willmott LLP …as to why all the supposedly third party independent companies had identical rates of interest when those claims were submitted in the bankruptcy estate. CW are a firm of solicitors who act for certain Mittal family members and Ispat Steel Holdings Limited ("ISHL"), Securex Holdings Ltd ("Securex"), Waltace Ltd ("Waltace"), DIL, Global Coke & Energy FZE ("Global Coke") and Interworld Steel Industries Pte Ltd ("Interworld")."

56. JM says that the representations made by PM or on his behalf in the IVA contradict earlier representations made in the bankruptcy as the same debts had increased well beyond the level submitted to the Official Receiver just a few months earlier.

57. The first meeting of creditors convened to vote on the proposals was adjourned to 26 October 2020. This provided JM with the opportunity to ask the solicitors acting for the nominees to provide the proofs of debt submitted. Following an inspection, it was noticed that several companies identified by Moorgate had been struck from the register (but had been identified as creditors in the proposals). The following debts are said to have been assigned long ago:

    i) the claim by Global Coke (valued at £54,832,038.37) had been assigned to Smijithlal Sathyanandan (an authorised signatory of Global Coke, itself owned by GSH and in turn DIL);

    ii) the claim by Interworld (valued at £13,186,444.20) had been assigned to Rupam Poddar (a director of Interworld- owned by a Mittal owned company);

iii) A claim by Ispat (valued at £533,697.791.65) had been assigned to Pankaj Agarwal (also a director of Securex with members of the Mittal family);

iv) the claim by Securex (valued at £47,074,157.79) had been assigned to Rajib Das (a director of GSH with PM); and

v) a claim by Waltace (valued at £54,832,038.37) had been assigned to Arvind Kumar Sinha (also a director of Interworld).

58. The first point made by Moorgate is that the purported assignments are to individuals that are affiliated with PM, due to their positions in companies that are connected with PM. Moorgate found the assignments incredulous and on 25 October 2020 asked Edwin & Co LLP for PM to provide the metadata to demonstrate that (i) the loan documents and (ii) the assignments were genuine. The purported creditors have failed to produce the metadata. The metadata has never been provided.

59. JM states that the failure to sufficiently respond to questions from the nominees, the inconsistency of PM's financial position in the bankruptcy and IVA, the late production and reliance of the assignment of debts after Moorgate had pointed out that the relevant company submitting proofs of debt in the bankruptcy of PM or in the liquidation of GSH, had been struck-off, and the connection between DIL (the largest creditor in the IVA), the Prasan Trust and PM, led to this challenge.

60. I have set out a summary only of the witness statements. Moorgate have produced 4 statements in support of the application, PM a single statement, the joint liquidators of GSH and the joint supervisors of the IVA have also submitted witness statements. It would be disproportionate to repeat them all here.

61. PM argued that statements of case were appropriate. Neither party has raised the issue of statements of case during the case management hearings. Any criticism made during the hearing that the first statement of JM failed to set out the case against PM is without merit since the summary I have provided is the basis of the arguments before the court.

Legal Principle

Jurisdiction

62. As Moorgate submitted, an IVA binds the creditors, whether or not they vote in favour or are aware of the decision procedure approving the proposals. An IVA is agreed by the requisite number of creditors who, *inter se* owe each other a duty of good faith.

63. By section 262(1) of the Insolvency Act 1986, a debtor or creditor, the Official Receiver or Trustee in Bankruptcy may challenge the approval of a proposal. The section provides:

> "Subject to this section, an application to the court may be made, by any of the persons specified below, on one or both of the following grounds, namely-

> (a) that a voluntary arrangement approved by a decision of the debtor's creditors pursuant to section 257 unfairly prejudices the interests of a creditor of the debtor;
>
> (b) that there has been some material irregularity in relation to a creditors' decision procedure instigated under that section."

64. Rule 15.35 of the Insolvency Rules 2016 (the "Rules") provides that where there is a material irregularity or unfair prejudice the court may vary, reverse or declare invalid the decision and it may order another decision procedure to be initiated or make such other order as it thinks just. The general rule is that the chairman should not be made personally liable for costs, but the court retains a discretion to do so if the circumstances warrant such an order: R*e a Debtor (No 222) of 1990) ex p Bank of Ireland (No 2)* [1993] BCLC 233; *Tradition UK v Ahmed* [2009] BPIR 626.

65. In respect of ground (a) Moorgate must show that they have suffered prejudice in their capacity as creditor. Ground (b) is fact specific dependent upon on whether there was a material irregularity in the procedure by which the proposal was approved. The good faith principle also falls within ground (b) so creditors are under an obligation to act according to the interests of their class and not for some illicit, collateral benefit: *National Westminster Bank plc v Kapoor and Tang* [2011] EWHC 255 (Ch).

66. In *Gertner v CFL Finance Ltd and another* [2018] EWCA Civ 1781, a settlement agreement entered with the largest and most influential creditor and a third party was not of itself materially irregular, but its non-disclosure at the creditors' meeting (in breach of the duty owed to other creditors) rendered their vote non-admissible.

The task of the court

67. The High Court has stated on numerous occasions that if a competing creditor challenges the acceptance of another creditor's proof, that other creditor will need to substantiate their claim: *Elser v Sands* [2022] EWHC 32 (Ch), [76]-[77]; and Re *Farrar Construction Ltd (in CVA)*; *Levi Solicitors LLP v Wilson* [2022] EWHC 24 (Ch), [19]-[20].

68. It follows that where the appeal is a challenge to the decision as to the existence of a debt, the court's task is to determine whether a debt is proven on the balance of probabilities: *Re McNally* [2013] EWHC 1685 (Ch).

69. In *Re A Company (No 004539 of 1993)* [1995] 1 BCLC 459 Blackburn J made the following useful observation [466]:

> "In my view, the task of the court, on an appeal under r 4.70(4) of the Insolvency Rules 1986, is simply to examine the evidence placed before it on the matter and come to a conclusion whether, on balance, the claim against the company is established and, if so, in what amount. I would only add that, in considering the matter, the court is not confined to the evidence that was before the chairman at the time that he made his decision but is entitled to consider

> whatever admissible evidence on the issue the parties to the appeal choose to place before the court."

70. A practical example of the principle can be seen from the case of *Tradition (UK) Ltd v Ahmed* [2009] BPIR 626:

> "Secondly, the claims of the third to eighth respondents are all based on alleged loans. They say that they lent money to the Debtor either to finance his spread betting activities or to fund his general living expenses and those loans have not been repaid. The court's task is therefore to determine whether on the balance of probabilities such loans were in fact made."

71. The relevance of this legal principle is that PM argued that the case must fail since the creditors who have had their votes challenged were not joined to the proceedings. The question is one of procedural fairness and common sense. If the burden lies with a creditor, that challenged creditor should have an opportunity to discharge the burden. The logic is unimpeachable.

72. In this case the issue was raised before Insolvency and Companies Court Judge Burton. Judge Burton, alive to the issue, made an order on 7 December 2020 that the creditors whose debts were challenged, and "any other interested party" could file and serve evidence. No evidence was filed by any challenged creditor. The challenged creditors were represented by solicitors at the time and were served with, and acknowledged, the Application. Other than Moorgate no creditor provided evidence or was represented at the hearing. When the matter next came back to court before Deputy Insolvency and Companies Court Judge Agnello QC in June 2021 she noted that there has been a failure to provide any evidence regarding the metadata. As the challenged creditors had failed to provide any evidence, she ordered the Joint Supervisors to provide copies of all correspondence between them, PM and the challenged creditors relating to the metadata and earlier versions of the purported loan agreements and assignments that gave rise to the creditor claims by July 2021.

73. Accordingly, the challenged creditors who had been represented and had participated in a dialogue with Moorgate were given an opportunity to provide evidence to discharge the burden of proof and have their evidence tested. No explanation has been offered why the challenged creditors chose not to advance their claims before the court.

74. As no sworn evidence has been provided by the challenged creditors to support their claims, Moorgate decided not to cross-examine.

Assessment of evidence

75. In *Coyne v DRC Distribution Ltd* [2008] EWCA Civ 488, [2008] BCC 612 Rimer LJ explained:

> "The basic principle is that, until there has been such cross-examination, it is ordinarily not possible for the court to disbelieve the word of the witness in his affidavit and it will not do so. This is not an inflexible principle: it may in certain

> circumstances be open to the court to reject an untested piece of such evidence on the basis that it is manifestly incredible, either because it is inherently so or because it is shown to be so by other facts that are admitted or by reliable documents"

76. I was referred to *Kireeva v Bedzhamov* [2022] EWCA Civ 35 where the Court of Appeal considered appeals from decisions of the High Court where Mr Justice Snowden, as he was, recognised a Russian bankruptcy order but declined to grant assistance to the Russian appointed receiver (trustee). Bedzhamov was subject to a judgment in Russia based on a personal guarantee given to a bank that had made a loan to his sister. Bedzhamov claimed the personal guarantee had been forged. A second bank, VPB, obtained another judgment on a claim for unjust enrichment. Bedzhamov said the judgment was obtained by fraud. Bedzhamov was declared bankrupt in July 2018 on a petition of both banks. One ground of appeal was that the Judge had been wrong to reject without cross-examination Bedzhamov's assertions of fraud and forgery. The Court of Appeal applying *Coyne v DRC Distribution Ltd* agreed and remitted the matter back to the High Court for trial. It is of passing interest that on remittal Mrs Justice Falk was not helped by cross-examination. She said:

> "[85] Mr Bedzhamov has not succeeded in persuading me that the Guarantee is vitiated by fraud.
>
> [86] My conclusions are based principally on the available documents, including those from 2007 and 2013, and inherent probabilities. As already indicated, the expert evidence is of limited assistance and there are direct conflicts in the factual witness evidence, conflicts which cannot be fully reconciled."

77. Against this it is said that this case is capable of resolution without cross-examination since (i) the challenged creditors have not produced any evidence and (ii) the evidence provided by PM is either inconsistent or incredible when assessed against all the other evidence.

78. In a different context many cases are resolved without the expense and need of cross-examination. Patten J (as he then was) explained in *Portsmouth v Alldays Franchising Ltd* [2005] BPIR 1394 (Ch) at para12:

> "[t]he mere fact that a party in proceedings not involving oral evidence or cross examination asserts that certain things did or did not occur, is not sufficient in itself to raise a triable issue. That evidence inevitably has to be considered against the background of all the other admissible evidence and material in order to judge whether it is an allegation of any substance. Once the court considers that the evidence is reliable in that sense, and not some attempt to obfuscate the real issues by raising a series of hopeless allegations then it does, of course, become necessary to consider what the legal consequences of it are."

79. In *Re Kerkar* [2021] EWHC 3255 Insolvency and Companies Court Judge Burton found that the evidence in support of an application to set aside a demand was

"inherently implausible".

80. PM accepts that as a matter of principle the analysis of Patten J is correct.

Votes to be discounted

81. There is no argument that the definition of an associate in section 435 of the Insolvency Act 1986 is relevant. I provide the relevant subsections only:

> "(7) A company is an associate of another person if that person has control of it or that person and persons who are his associates together has control of it.
>
> (10) For the purposes of this section a person is to be taken as having control of a company if –
>
> (a) the directors of the company or of another company which has control of it (or any of them) are accustomed to act in accordance with his directions or instructions, or
>
> (b) he is entitled to exercise, or control the exercise of, one third or more of the voting power at any general meeting of the company or of another company which has control of it;
>
> and where two or more persons together satisfy either of the above conditions, they are to be taken as having control of the company."

Discussion

82. As the onus lies with the creditors to prove their debts and no creditor has provided any evidence the court is faced with an unusual situation. On one hand the court could decide that the lack of sworn creditor evidence backed up with documentary evidence is sufficient to find that the burden has not been discharged. On the other hand, the person directly affected by the challenge, PM, has provided sworn evidence that he is a debtor of the creditors who voted in his favour at the meeting of creditors. To disregard the evidence of PM on the basis that it has not come from the creditors is perhaps too legalistic and fails to take account of the evidence provided by the joint supervisors.

83. I am inclined to favour the first view, that the creditors who had voted in favour of the proposal at the meeting of creditors have failed to discharge the burden of proof at a contested hearing in court. This is because firstly, I infer that the lack of engagement by the supporting creditors was calculated and deliberate. The supporting creditors engaged solicitors to act for them at the time of the order made by Judge Burton. The solicitors were engaged in protracted correspondence. The order of Judge Burton permitted them to engage in the court process and provide evidence to support their position. They have provided no explanation as to why they have decided not to provide evidence. Secondly, the only evidence in favour of the challenged creditors is provided by PM who has a vested interest in the outcome. And thirdly, the failure to provide sworn evidence may deprive the court from assessing the evidence filed,

deciding if it is reliable and hinder Moorgate's submissions based on documentary evidence, normally expected to accompany a challenged creditor's sworn evidence. The lack of such evidence is not a mere technicality but a matter of substance.

84. In deference, therefore, to the submissions made and as PM has adopted (in part at least) the position of the creditors and seeks to substantiate their claims, I turn to his submissions.

Evidence of payments made on behalf of PM

85. It is submitted that there is clear evidence that numerous payments were made to STC and Moorgate on behalf of PM. The payments would have had some basis and that basis is the loans made to PM bearing the interest rates as documented.

86. The evidence for the payments is a schedule annexed to Mr Manson's witness statement.

87. The evidence to support the purported debt owed to DIL is: (i) a loan agreement (ii) transfers from a bank account of DIL and (iii) a letter sent to PM from DIL. In relation to the debts purportedly owed to Mr Poddar, Mr Sathyanandan and Mr Agarwal reliance is also made on an assignment made by Interworld (Poddar), Ispat (Agarwal) and an assignment made by Global Coke (Sathyanandan).

88. I shall first consider the Interworld (Poddar) debt as the facts relied upon closely match those in respect the other claims. DIL needs separate consideration. I shall then consider the issue of PM's association with the challenged creditors.

Interworld loan to PM

89. In his evidence Mr Manson refers first to a letter provided by Interworld [para 100] that confirms three payments made to Moorgate in 2012. The letter is dated 12 March 2018, addressed to PM and signed by Mr Poddar.

90. An exhibited statement of account does show that 9 transfers were made in July from a US$ account at the Bank of India (Singapore Branch). The destination of the three purported payments is less clear. The statement of account does not assist with demonstrating that the monies had been transferred pursuant to a loan agreement.

91. In her evidence JM explains the investigations made into the Interworld debt and subsequent assignment of the purported loan to Mr Poddar. Moorgate obtained the financial statements for Interworld for the years 2013-2016. The accounts for the year ending 2013 show current assets of US$30,663,263 with "other receivables". This included related party transactions totalling US$22,218,175.

92. A note is provided under "other receivables". The note states that this asset is unsecured, interest free and repayable on demand. The notes to the accounts do not mention that PM owes some or all of the related party advances. If he did owe Interworld money it would have been recorded as an "other receivable" and the loan would have been interest free.

93. It is said that Interworld lent money to GSH. If that is the case that was also interest free. It is not suggested that any loan to GSH would not fall within related party transactions.

94. The loan agreement relied upon is dated 2 July 2012, days before the transfers made in July from the Singapore branch of the Bank of India. The loan agreement includes a clause to add interest to any loan made. The interest said to have accrued is very important. It is said that if the transfers were made pursuant to the loan agreement the sum lent of US$415,000 is increased by interest of US$16,744,683.

95. In his first witness statement dated 18 January 2021 PM says that it is correct that the assignment between Interworld and Mr Poddar is dated 6 April 2018. He does not give evidence that the advances said to be made on behalf of PM were made pursuant to a loan agreement. The terms of the loan agreement are, as pointed out above, inconsistent with the Interworld accounts.

96. Mr Manson explains [para 90] that PM could not provide "specific information" about Interworld (or the other supporting creditors) and that he needed to communicate direct with Mr Das, Mr Poddar and Mr Sathyanandan. This is evidence that PM was not able to provide evidence in respect of the debts they claimed in the IVA.

97. In October 2020 Clarke Wilmott was asked for minutes recording the commercial rationale for any loan made to PM and any evidence that the money would be repaid. In other words, why was it in the best interests of Interworld to make the loan? Clarke Willmott responded that there were no minutes, no mention was made whether there were any meetings, and no rationale was provided. Mr Poddar responded to an e-mail asking when Interworld was struck off stating that it was in "October 2018 onwards" but that he had "agreed to pay 10% of total recovery to the assigner or assigner shareholder".

98. The evidence considered against the background of all the other admissible evidence and material leads me to conclude that it is inherently implausible that the transfers or advances purportedly made in July 2012 were made pursuant to the 2 July 2012 loan agreement exhibited to Mr Manson's evidence.

99. First, there is no sworn evidence from a director of Interworld that states this to be the case: that the transfers were made pursuant to the loan agreement.

100. Secondly, there is no document to link the 2012 loan agreement with the transfers.

101. Thirdly there is no rationale provided as to why it was in the best interests of Interworld to make such an advance.

102. Fourthly, the interest rate stated in the loan agreement is penal yet there was no repayment date. Interworld would have known that any debt would compound to a size that was unmanageable and unlikely to be repaid within a relatively short period yet no contemporaneous documentary evidence refers to the rate of interest, no updated statements of account were kept or provided to PM and no demand was made.

103. Fifthly, interest was not added to the proof of debt submitted in the bankruptcy. An inconsistency that has never been adequately explained.

104. Sixthly, PM expressly told the Official Receiver on 15 July 2020, supported by a statement of truth, that formal written agreements did not exist in respect of any debts owed to the supporting creditor companies.

105. Seventhly, the Official Receiver received a spreadsheet of creditors by solicitors acting for the supporting creditors in the IVA. The spreadsheet detailed that Interworld was owed £420,000. This is consistent with the transfers made and the accounts of Interworld.

106. Seventhly, the supporting creditors have refused to provide the metadata first requested in March 2021 and again in May 2021 showing the date of the loan.

107. Eighthly, despite mention having been made of sums paid to STC on PM's behalf in the Manx proceeding and the English bankruptcy proceeding, there was no mention of interest on those sums until around the time that the IVA was proposed.

108. Ninthly and related to the Manx proceeding, there was no suggestion from PM that any of the loan agreements relied upon by any of the supporting creditors existed during the Manx proceeding.

109. Tenthly, solicitors acting for PM in the Isle of Man wrote on 14 May 2019 that the liability of GSH had been discharged to the extent of USD311.58 million by PM "personally" or by way of "funds applied at his direction." PM therefore sought subrogation of the debt owed to STC.

110. At first, I was impressed by the thought that PM could discharge the debt and seek subrogation if the money was provided by way of a loan as much as if he had paid it directly from his own resource. On reflection, having in mind the purported assignments and claims made against PM, the obvious course would have been for Interworld to have been subrogated. Interworld would have recourse to the personal guarantees given by GSH and PM. In any event in the absence of evidence from Interworld I read the letter sent on instructions from PM literally. PM paid the debt personally from funds he held and funds he had available to him. There is no contemporaneous document that states that the payments made to STC were made by way of a loan made to PM.

111. Lastly, the accounts of Interworld provide a reliable source of information as they were professionally drawn, are verifiable on a register and pre-date the bankruptcy proceedings. Any loans made did not attract interest.

Interworld assignment of purported debt to Mr Poddar

112. The assignments have been put into question in these proceedings. Mr Manson says that he took legal advice and that on its face the assignment to Mr Poddar of the purported debt owed to Interworld was good.

113. No evidence of a notice of the assignment sent in accordance with the terms of the loan agreement has been drawn to my attention during the hearing, although I have

been informed of a notice by the Joint Supervisors after this judgment was circulated in draft.

114. One curiosity about the assignments is that solicitors (Keystone Law) were instructed to act on behalf of the assignor supporting creditors and did act (assuming due diligence was undertaken) after they had been struck off. In a letter dated 28 January 2020 Keystone Law wrote to the liquidators of GSH informing the joint liquidators that they acted not only for the companies who had submitted proofs of debt in the bankruptcy and the liquidation but for the assignees of the debts owed to those companies (including DIL and Interworld). The letter explained that the proof submitted would be amended and resubmitted.

115. Mr Manson refers to the e-mail I have mentioned above dated 23 October. Reference is made in his statement to an e-mail from Mr Richards of Clarke Willmott. Mr Manson claims to have been satisfied with the answer to a question about the late revelation of the assignment and why Mr Poddar had not submitted the proof of debt (the proof of debt is provided by Interworld) in his capacity as the owner of the debt. The reason given is that it was thought that the original creditor would need to submit the proof.

116. This explanation fails have regard to the terms of the assignment and fails to have regard the legal status of Interworld.

117. Mr Manson puts this down to a misunderstanding due to language. Mr Manson does not give evidence of his qualifications to make such an assessment, does not state why the solicitors acting for the supporting creditors did not ensure original proofs were submitted by the owner of the debt or deal with the basic point that the company could not give instructions to submit a proof of debt once it had been struck off.

118. Moorgate point to the improbability of the assignments being genuine. If the assignment and loan documentation was genuine, it is argued, Interworld (and the other assignors) would receive only a small percentage of the recoveries if the assignor remained solvent and on the register. It is submitted that the assignment terms are incongruous with an aggressive lender seeking a 4% per month return on a loan calculated on a compound basis and 15% on default. And it is submitted that the assignments are a convenient mechanism to circumvent the legal status of the assignor who is no longer on the register. The fact of strike off makes the small percentage of potential recovery remote if not meaningless. The timing of the assignment and the striking off is unexplained.

119. Moorgate submit that the inconsistencies are plain.

120. First, there had been no mention of any assignment until Mr Poddar (and the other assignees) became aware that the relevant companies had all been struck off.

121. Secondly Mr Manson asked Mr Das to explain (in an e-mail dated 24 October 2020) why the last set of accounts for GSH do not include any liabilities for the loans received from the six purported creditors. The explanation given by Mr Das failed to give an answer other than to say that the "respective entities are claiming the portion of their payment which paid on behalf of Mr Mittal only". The answer reveals at least two inconsistencies. First if monies were paid to STC on behalf of GSH and PM as

contended, the liability of GSH would have been in the accounts and it was not. Secondly on 24 October 2020 Mr Das was telling Mr Manson that the claims were not being made on behalf of assignees but on behalf of the "entities".

122. Thirdly, on a related issue Mr Das informed Opus Restructuring on 25 October 2020 that the Interworld loan to GSH appears in the GIKI accounts (a subsidiary of GSH). To avoid double counting the debt was not shown in GSH. That was not true.

123. When these issues are added to a failure to provide the metadata as requested in a letter dated 3 February 2021, chased in March and May, serious doubts exist as to the genuine nature of the documents referred to by Mr Manson.

124. PM argues that the court cannot go behind the witness statements or the signed documents. The difficulty with the first of these arguments is that the only statement to support the claimed debts is from PM and it does not, nor could he on his own account, deal with these arguments. The second argument about going behind signed documents I accept. In the absence of cross-examination, it cannot be said that the loan document and the assignment or any of them are shams. As Neuberger J (as he was) explained in *National Westminster Bank v Jones* [2000] BPIR 1092 [59]:

> "Because a finding of sham carries with it a finding of dishonesty, because innocent third parties may often rely upon the genuineness of a provision or an agreement, and because the court places great weight on the existence and provisions of a formally signed document, there is a strong and natural presumption against holding a provision or a document a sham".

125. The same judge found that once dishonesty had been established in cross-examination a judge was entitled to make a finding of sham in *Vooght v Hoath* BPIR [2002] 1047.

126. However improbable it is not open to this court to make a finding that the assignment was a sham in the absence of a finding of dishonesty, and cross-examination is required to make a finding of dishonesty.

127. The only explanation provided for the assignment is made (as hearsay) by Mr Poddar. That the assignments were made because the creditor company was no longer viable. And the loan was assigned to a person long associated with the company "whom they trust". That provides no explanation. If a company was not viable and was owed considerable sums of money that company could sell the debt or at least demand repayment and seek to enforce. The explanation also begs more questions. Is the trusting person PM? Why was trust required? Why choose someone long associated with the company when the company was not viable? As hearsay I give this explanation little weight.

128. If no notice was provided to PM for the assignment, it is unenforceable (the parties agreed the same law applies).

129. If proper notice in accordance with the purported loan agreement was made, it is open to the court to make an adverse inference taking account of the contemporary documentary evidence and its absence.

130. I infer from the failure to produce the metadata and comply with the court order that the assignment was created or otherwise completed after the date on the document.

131. This adverse inference does not make the assignment a sham. It raises the question of whether Interworld was able to make a valid assignment at the time it did. As there is no evidence from Interworld or Mr Poddar on the issue the burden of proof resting on the shoulders of Mr Poddar has not been discharged.

DIL loan to PM

132. Many of the same arguments I have dealt with under the preceding headings arise in respect of the DIL loan.

133. Among the common features with the challenged creditor claims are:

> i) there is no evidence from DIL or Mr Das in support of the proof made in the IVA;
>
> ii) there is no document linking the payments made by DIL "on behalf of" PM to the purported loan agreement; and
>
> iii) evidence is produced by Mr Manson in respect of the challenged creditor claims.

134. In respect of the evidence of Mr Manson, he makes clear that he is not taking a position in these proceedings. His evidence is only provided to ward off criticism made against him for his alleged failure to investigate the claims made by creditors.

135. As an example, Mr Manson says [154] that "the first payment by DIL under the DIL loan agreement was made to Moorgate on 29 March 2006". Mr Manson does not explain how he reached that conclusion without evidence. He is likely to have looked at the transfer and the date of the loan agreement and assumed that the two were linked. That is not sufficient in a court of law.

136. The evidence of PM in respect of the DIL loan (its full extent) is as follows:

> "It is correct that I owe a substantial debt to [DIL] (see loan agreement dated 3 January 2006)…"

137. There is no evidence of PM providing any notice in writing in accordance with the terms of the loan agreement. There is no notice provided for the purpose of obtaining a draw down. There is no letter, fax, e-mail or record of a phone call produced by DIL in support of any sum of money being advanced as a loan.

138. The purported loan is not recorded in the accounts of GSH despite it being a joint borrower. The debt said to be owed to DIL or Mr Das was not stated in the statement of affairs of GSH notwithstanding that Mr Das was a director.

139. In an e-mail dated 24 October 2020 from Mr Das to Mr Manson he stated:

> "The Six companies which you are referring about who are claiming in IVA are business associates of GSHL since long

> back. They had agreed to pay STC & Stemcore/Moorgate on behalf of GSHL/Mr. Mittal besides their other normal transaction to others Group companies and GSHL"

140. Despite this it took Mr Manson to point out that the last set of accounts for GSH did not include a loan liability. Mr Das sought to explain that the reason for the debt not appearing in the accounts of GSH is that the debt appears in GIKI and the Philippines company. The explanation makes no sense if the debt was a liability of GSH.

141. There is also an inconsistency in the story told by DIL. DIL wrote to GSH on 7 July 2018, after it had been wound up:

> "Please note that the non-refundable loan which has been taken by GSHL as on 10 May 2018 of USD$117.161 Million, for business purposes only and will be converted into equity later stage. (sic)"

142. The letter was signed by Mr Das in his capacity as director. I infer from the third paragraph, the letter was written to support the rescission application made in the winding up proceedings, in the Isle of Man. The message the letter seeks to convey to the court is that GSH was solvent, and the purported loan shown on the balance sheet was not repayable.

143. As this letter was intended to be read by GSH and the court, and represented that money was provided for business purposes and was not expected to be repaid, it has the weight of solemnity.

144. There are inconsistencies between the proofs lodged in the IVA and what was disclosed to the Official Receiver under oath (where there was no mention of the loan agreements and no mention of interest now said to be due at penal rates, although the interest was included in a schedule provided to the trustee in bankruptcy), and the failure to disclose any of the loan agreements in the Manx proceedings.

145. The loan agreements are not consistent with the evidence provided by PM seeking subrogation of the debt owed by GSH to STC "by reason of my having discharged personally the entirety of the liabilities of SGHL to STC, as guarantor of those liabilities under the personal guarantee as specifically recorded in the order of the Supreme Court of India dated 12 March 2013."

146. The use of the phrase "on my behalf" is used frequently when PM discusses the payments made to STC or Moorgate. In a sworn witness statement dated 21 April 2020 supporting an application to adjourn the final hearing of the bankruptcy proceedings PM uses the phrase again [31]: "the receipt of funds by Direct Investments Limited by way of a dividend from Global Nigeria which I am told by its directors it would be willing to pay to Moorgate on my behalf." This makes clear, in my view, that the phrase payments made "on my behalf" is not synonymous with "payments made by way of a loan to me".

147. I find that from the evidence, when considered against the background of all the other admissible evidence, any money advanced by DIL to PM or paid out at his direction or on his behalf was not paid pursuant to the 2006 loan agreement purportedly made

prior to PM having any personal liability or GSH having a liability to Moorgate or STC.

Other claims

148. Two other claims are challenged. First the claim of Pankaj Agarwal as assignee of Ispat and secondly the claim of Smijithlal Satyanandan as assignee of Global Coke. Having in mind the findings I have made in respect of DIL, and the claim made by Mr Poddar there is little to add in respect of these the claim made by Mr Satyanandan that has not been said. In all the circumstances his claim is not made out on the balance of probabilities. For the same reasons I would dismiss the claim made by Mr Agarwal but add that the purported assignment was impossible since Ispat did not exist at the time the purported assignment was made.

149. I find, for the same reasons provided above, that having regard to all the circumstances the claims are not made out on the balance of probabilities.

Associate

150. Moorgate claim PM and DIL are associates of each other. If Moorgate is correct, the voting rights of DIL will be affected.

The law

151. The starting point is the definition given for an associate in section 435 of Insolvency Act 1986. The key to a determination is to investigate the circumstances focussing on control.

152. At the hearing reference was made to two cases. The first is a judgment of Insolvency and Companies Court Judge Prentis who gave judgment in *Re SMU Investments Ltd* [2020] EWHC 875 (Ch). The applicant sought a declaration that various payments made to the respondents constituted preferences. The application asserted that the respondents were associated to the company that had made the payments. If they were not associates the claims would be time-barred. The court had given permission to serve out of the jurisdiction on paper. An application was subsequently made to set the order aside on the basis that the claim had no real prospect of success and there had been a failure to provide full and frank disclosure.

153. The argument advanced was that the evidence demonstrated that the Panamanian company that was served was a trust that acted at the direction and control of one of the respondents for his family and various investments. The judge found that the best evidence produced to support the allegation was two e-mails sent one year apart. This was insufficient when set against a documentary scheme that distanced the respondent from the company's management decisions. The evidence in support of control was thin.

154. The second case, *Granada UK Rental & Retail Ltd v Pensions Regulator* [2019] EWCA Civ 1032, concerned an unsuccessful joint venture, the appointment of administrative receivers and a pension scheme in deficit. One issue for decision was the power to control voting rights which may be helpful in a different case. I discern the following as representing useful guidance for today [126]:

> Parliament did not wish section 435(10) (and thus section 435(7)) to bite only on people or entities who control a company in practical terms. It was evidently Parliament's intention that section 435(7), and the term "associate" more generally, should have a wide meaning…"

The factual arguments

155. Moorgate argue that PM had control of the Prasan Trust and once in control of the Prasan Trust was able to control its interests including DIL. PM argues that Moorgate has not identified any evidence of giving directions or instructions to the directors of DIL or of the directors acting in accordance with any such directions or instructions (let alone being accustomed to doing so).

156. The factors relied upon for demonstrating control are as follows:

i) PM swore an affidavit in the BVI proceedings in support of an application by Prasan PTC Limited (as trustee of the Prasan Trust) to set aside a statutory demand served by the liquidators of GSH. In the affidavit he stated: "I am also one of the beneficiary of the Prasan Trust" (sic).

ii) A demand for US$31m payable under a loan facility agreement whereby GSH lent money to the trust.

iii) Mr Das is a director of Prasan PTC Limited, and swore an affidavit in support of the application in the BVI. His evidence to the court was: "Mr Pramod Mittal is a beneficiary of the Prasan Trust and Chairman…" of GSH.

iv) In its judgment dated 12 June 2019 Adderley J Ag observed: "The evidence is that the companies have historically had a close relationship, sharing directors, and Mr Mittal is a beneficiary under the trust which is the ultimate shareholder of the Respondent, and Mr Mittal is a beneficiary of the trust and the Chairman of the Respondent".

v) In his sworn evidence in response to the bankruptcy petition presented against him PM informed the court that [31]: "Direct Investments Limited is owned by Prasan PTC Limited on behalf of the Mittal family trust and that any dividend paid by Direct Investment Limited to the trust could be made available to me by the trustees if necessary."

vi) At the hearing of the petition Insolvency and Companies Court Judge Burton was informed that monies could "find their way through" the Prasan trust to him.

vii) In the Manx proceedings PM gave sworn evidence that "both DIL (the sole shareholder of GSH) and other companies under my direction have been making payments to STC…" This was followed by a statement that stated that payments had been made "under my instruction".

viii) DIL had informed the court, through its officer and director Mr Das, by a letter dated 10 August 2018, that the payments made to STC: "for and on behalf and at the instruction of [PM]".

ix) In February 2019 Deemster Corlett made the following finding [13]: "It seems on the evidence before me that this company is beneficially owned by [PM]. He is the driving force behind that company. Indeed [PM] and [DIL] have been represented throughout by one advocate, Mr Webb…". It is said that at the very least PM, DIL and the legal team thought their interests were aligned.

157. PM relies on the findings of Mr Manson who said that there was no "definitive evidence" to support a finding that controlled DIL. He is said to have wrongly thought that DIL and PM had not been jointly represented in the Manx proceedings and relied on his interpretation of the terms of the Prasan Trust.

158. PM can make good his argument that he is not currently a named beneficiary. He can do that by reference to the Prasan trust deed. This much is accepted by Moorgate. The fact that he is not a named beneficiary does not, however, affect the issue of control.

159. PM argues that nothing else in the trust deed provides him with control over the trust.

160. It is accepted that PM is the sole appointed protector of the trust but his role is limited to overseeing certain decisions. PM argues that the matter may be tested by asking if the trust would be a wholly artificial construct if he were to be able to control DIL when there are named beneficiaries and trustees who owe duties to those beneficiaries.

161. PM submits that the findings made by Deemster Corlett are to be read in the context of the whole judgment and provide evidence to which little weight may be attributed.

162. I have taken time after the hearing to read the whole judgment given by Deemster Corlett and other documents I was fleetingly referred to during the hearing.

163. Before turning to the trust deed itself, I have scoured the evidence provided by PM in this proceeding to understand what he says about control. He positively asserts that he is not a beneficiary of the Prasan trust and that he "inaccurately described myself as a beneficiary in evidence in the BVI proceedings."

164. He does not directly refer to the issue of control raised by JM in her first witness statement [21].

The Prasan trust deed

165. The trust deed is dated 21 July 2008. Prasan (PTC) Limited is named as the "Original Trustees". The beneficiaries are named and do not include PM.

166. PM is named within the "Family Class".

167. The trustees are given powers to invest, pay or apply all or part of the capital of the trust fund to or for the benefit of all or any one of the beneficiaries. They may shorten the trust period (100 years) by deed to any time after 21 July 2008.

168. The "Protector" has extensive powers. The trustees are only able to exercise certain powers with the prior consent of PM as set out above.

169. In carrying out his duties as Protector, PM is excluded from any liability "howsoever arising" except fraud.

170. He may also exercise his powers where he is directly or indirectly interested in a transaction or the matter in hand "without accounting for any resultant profit".

171. In argument I was taken to *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev* [2017] EWHC 2426 (Ch) for a discussion on the role of protector. The facts briefly stated are that Pugachev established five New Zealand law discretionary trusts. They predominantly held real estate in London, St Barths, Russia, Switzerland, and Massachusetts. The trustees were New Zealand companies that had been incorporated near to the time of the trusts and the trustees were loyal to Pugachev. The beneficiaries were named as the infant children of his relationship with Ms Tolstoy. Pugachev was the trust Protector. The liquidator of a Russian bank started proceedings against the Pugachev in London. The issue was whether the trust could be accessed by a judgment creditor. Of relevance was whether Pugachev sought to hide the assets in the trust:

> "if a person gives away their property to someone else then it is no longer theirs. But that is not what the unscrupulous person in the example wants to do at all. As far as they are concerned the property is theirs. The objective is not to lose control of it, the objective is to hide it and protect it from creditors."

172. This is where the role of protector comes in. In the Pugachev case the settlor and the protector were the same person. That is not the position here. The settlor was able to grant himself wide powers that when analysed gave him control of the discretionary trust.

Control- accustomed to act in accordance with his directions or instructions

173. PM's father settled the Prasan trust. However, the settlement was meagre in comparison to its holdings: US$100. The Prasan Trust refers to companies, land, property and other holdings. It is apparent that the Prasan trust was not about the settled property. The Prasan trust was intended to hold more extensive assets under its umbrella.

174. As Protector PM has no liability unless there is fraud, he has extensive powers and may exercise any power "in connection with the trust" regardless of whether he is directly or indirectly interested. He is not barred from being the sole beneficiary and would be unaccountable for such a decision. Accordingly, like the Pugachev trust PM can exercise the powers selfishly and persuade the trustees to do his bidding for him (if they don't he can replace them without more).

175. The effect of being able to exercise powers selfishly permits PM to control the assets settled. This is apparent from:

    i) the ability of any of the named beneficiaries to receive any distribution or other benefit is in the hands of PM as Protector.

    ii) PM has the power to exclude the named beneficiaries.

iii) The power of appointing new or additional trustees are vested in the Protector.

iv) As Protector PM has the power to remove a trustee.

v) The Protector is the ultimate decision maker to add or exclude a beneficiary or beneficiaries.

vi) PM has the power through his position as Protector to deal with the assets of the Prasan Trust.

176. It follows that control of the Prasan trust is control of its assets and its assets include DIL. With this in mind, the mist clears making it easier to see why PM was able to say that he was a beneficiary in the BVI proceedings even though he is not named in the Prasan trust. Able to persuade the trustees to do the bidding for him he could decide that monies should be used to prop up other entities such as GIKI and then GSH and in turn that required support to PM.

177. Control over the Prasan trust makes his statement in the bankruptcy proceedings easier to understand: "Direct Investments Limited is owned by Prasan PTC Limited on behalf of the Mittal family trust and that any dividend paid by Direct Investment Limited to the trust could be made available to me by the trustees if necessary." PM was able to say that the dividend could be available because the trustees of the Prasan trust were accustomed to act on his instructions.

178. The documents filed at court stating that monies had been paid on the instructions of PM and on his behalf are also easier to understand. These are instances of PM giving instructions upon which the directors of DIL were accustomed to act.

179. The control given to PM of the Prasan trust explains PM's carefully worded witness statement in these proceedings: he is not and has never been a beneficiary. He is a protector and one of a class of potential beneficiaries. He has no right to compel the trustees to make him a beneficiary.

180. This was all said prior to disclosure of the redacted trust deed. It is now clear that compulsion is not a right given to the Protector under the Prasan trust deed but the Protector may persuade the trustees for the reasons set out: it was the same in the Pugachev case.

181. In my judgment PM had control of the Prasan trust and by a combination of instructions said to have been given for payments to STC and Moorgate or payments made on behalf of PM, the claim to subrogation, his evidence provided in various courts and the lack of evidence from PM to negate control, I find, on balance, that the directors of DIL were accustomed to act on the instructions of PM.

182. At the hearing PM did not respond to the construction of the Prasan Trust submitted by Moorgate or make representations in respect of the Pugachev case other than to say as things stand PM is not a beneficiary. I agree with that submission.

Conclusion

183. In my judgment there was a material irregularity at the meeting of creditors convened to consider PM's proposal. The debts claimed by the challenged creditors have not been substantiated at this hearing. The challenged creditors have failed to discharge the burden of proof.

184. It is unnecessary to deal with the issue of good faith and make this already long judgment longer since the application of Moorgate succeeds on the ground that DIL is not a creditor by reason of loans made pursuant to the loan agreement of 2006, and Mr Poddar is not entitled to vote as assignee of the purported Interworld debt. Mr Agarwal is not an assignee of Ispat and cannot vote, nor is Mr Satyanandan entitled to vote having failed to come to court to make out his claim

185. In my judgment PM is an associate of DIL within the meaning of section 435 of the Insolvency Act 1986.

186. Creditors should be warned that if their claimed debts are challenged on an appeal from a nominee they should be joined to the proceedings and take advantage of any order made by the court to permit them to file and serve sworn evidence.

187. In this case the challenged creditors were on notice of the proceedings and chose not to participate in any case management hearing or ask to be joined. This is consistent with their approach when not filing or serving any evidence to support their claims. Where no evidence is filed and served it is open to the court to make adverse inferences.

188. I shall revoke the IVA.

189. I invite the parties to agree an order.