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Case No: HT-2023-000016
Case No: HT-2023-000024

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (KBD)

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

Date: 16/07/2024

Before :

MRS JUSTICE JEFFORD

Between:

HENRY CONSTRUCTION PROJECTS LIMITED

Claimant

-and-

PROMEP LIMITED

Defendant

And Between:

PROMEP LIMITED

Claimant

-and-

HENRY CONSTRUCTION PROJECTS LIMITED

Defendant

- -
- -
- -

Graeme Halkerston and Brenna Conroy (instructed by **Archor LLP**) for the Part 8 Claimant and Part 7 Defendant
Rebecca Stubbs KC and Gideon Shirazi (instructed by **HQ Law Ltd**) for the Part 7 Claimant and Part 8 Defendant

Hearing dates: 16 March 2023; 23 May 2023

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 16th July 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

....

MRS JUSTICE JEFFORD

Mrs Justice Jefford:

1. These proceedings concern Part 7 proceedings in which there is an application for enforcement of an adjudicator's decision by way of summary judgment, in which ProMEP Limited ("ProMep") is the claimant and Henry Construction Projects Limited ("Henry") is the defendant and a corresponding Part 8 claim in which the roles are reversed.

2. ProMep is an M&E contractor and over a period of about 4 years was engaged as a sub-contractor by Henry on a number of projects with a total value of around £68 million.

3. ProMep and Henry entered into a contract incorporating the JCT DBSub/C 2016 form with amendments. Henry engaged ProMep as sub-contractor for the design, supply, installation, testing and commissioning of M&E works in relation to a project at Stanbridge Earls, Stanbridge Lane, Romsey.

4. From early 2021, the relationship between the parties deteriorated and both parties claimed to be entitled to terminate their various contracts. ProMep's position was that Henry repudiated the Stanbridge contract and that, on 20 July 2021, ProMep accepted that repudiation as terminating the contract. Henry disputed that it was in repudiatory breach and that ProMep was entitled to terminate and, therefore, alleged that ProMep was in repudiatory breach.

The Proposal and the CVA

5. By a proposal dated 7 October 2021, the directors of ProMep proposed that it enter a company voluntary arrangement (CVA). The proposal was approved in a slightly modified form and came into effect on 25 October 2021. Christopher Stevens and Philip Harris of FRP Advisory Trading Ltd. ("FRP") were appointed as Supervisors of the CVA.

6. The Proposal stated that it was to be a composition in satisfaction of the Company's debts (clause 1.2) and that the proposals were to be read with Appendices A to F which formed part of the Proposal. Clause 1.5 provided:

   "Standard terms of proposals are attached at ***Appendix E****. These specific proposals are to be read with the standard terms of proposals, which form part of the proposals put to creditors. If there is any conflict between the proposals and the standard terms, these proposals shall prevail.*

7. Section 2 was headed "Circumstances giving rise to the proposed CVA". This section included a brief summary of ProMep's history with Henry and stated that, since 2018, ProMep had entered into a number of projects/ contracts with Henry. Clause 2.7 stated that ProMep had ultimately issued 7 day suspension notices on "all projects" because of non-payment but Henry had still not paid and had instead excluded ProMep from the sites. At paragraph 2.9 the Proposal recited that ProMep had issued 9 claims in adjudication against Henry with a combined value in the region of £1 million and that those claims were based on Henry's failure to pay its Payment Notices. Further details of the adjudications were included in Section 5, the last being commenced in September 2021.

8. Section 3 headed "What is the effect of a CVA?" included:

"3.2 In order for a CVA to become binding on creditors, it must be approved by 75% or more in value of creditors voting on the decision to accept or reject the CVA (in person or by proxy). If the Arrangement is approved, it will bind all creditors whether or not they received notice of the decision procedure and regardless of whether they voted for or against the CVA or did not vote at all. ....

3.3 A CVA will affect all creditors whose claims are not payable as expenses of the CVA. Typically, creditors will be required to write off and/or defer some part of their claim as part of the compromise where the monies received through the CVA are accepted in full and final settlement of the amount outstanding to the creditors. Once the CVA is approved creditors shall not be entitled to take any proceedings against the Company or its assets to enforce its debts."

9. Section 5 was principally concerned with monies due to ProMep:

(i) Clauses 5.1 to 5.15 referred to the 9 adjudications which ProMep had commenced against Henry, summarising the background to the adjudications, setting out the amounts so far won in adjudication (£644,955), and setting out the amount paid (£115,000). Clause 5.7 stated that that amount received had been "ringfenced for the benefit of CVA creditors".

(ii) Clauses 5.12 and 5.13 addressed the prospect of enforcement of the decisions:
"5.12 In a CVA there is a good prospect that the Court would order payment on an enforcement. However, in liquidation or administration there is virtually no possibility of payment as the likely outcome is a stay on payment pending final resolution in litigation.
5.13 For the purposes of the estimated outcome statement realisations in respect of the adjudications in a liquidation scenario have been estimated at 10% of the headline value. It is not considered likely that these claims would be capable of being pursued in liquidation due to protracted litigation and costs."

(iii) Clause 5.15 provided that any adjudication monies received from 1 January 2022 onwards "will be excluded from the CVA". That date was later modified.

(iv) Clauses 5.16 to 5.24 addressed retentions totalling £323,500. It was recorded that £57,000 had been received and was ringfenced for the benefit of CVA creditors. Again it was provided (clause 5.24) that any retention monies received after from 1 January 2022 "will be excluded from the CVA".

(v) Clauses 5.25 to 5.28 dealt with refunds from HMRC and:
"5.26 At present the net realisation to the CVA is estimated to be £217k after set-off and it is intended that this refund is paid directly to the CVA upon receipt.
…
5.28 The HMRC refunds will be available to the CVA irrespective of the time it takes for the funds to be received by the Company and the CVA shall not conclude until the refunds have been collected."

(vi) Clause 5.32 stated that the company intended to seek further work in the future. Then:

"5.33 For the avoidance of doubt, in the event the CVA is still active when the Company undertakes new contracts it is not proposed that any receipts received by the Company from 1 January 2022 onwards will be paid over to the CVA, with the exception of the HMRC refunds detailed in the proposals.

5.34 This is on the basis that any future activity undertaken from that date will be funded separately by the directors.

5.35 The trade-off for creditors is that the ongoing survival of the Company facilitates enforcement of the adjudications and allows it to maintain warranties/relationships with contractors, which is anticipated to maximise retention realisations."

(vii) Clause 5.36 provided that the ring-fenced amounts would be paid over immediately to creditors upon the CVA being accepted by creditors.

(viii) The following clauses were also referred to in argument:

"5.43 It is anticipated that the period of the CVA will be up to 6 months, although may be extended at the discretion of the Joint Supervisors ... in order to facilitate the agreement of creditor claims, distribution of funds to the creditors and the statutory requirements to finalise the CVA.

5.44 Any unexpected windfalls received by or becoming available to the Company during the course of the CVA will be immediately advised by the Supervisors and will be included in the CVA to be available for Arrangement creditors."

10. Section 7 was headed "The duties and responsibilities of the Supervisors:

(i) Under clause 7.1 their role included *"(e) to determine whether any other assets form part of the CVA funds, and if so, arrange for their realisation accordingly"*.

(ii) Clause 7.3 provided *"In the event that any clauses under the CVA appear to be in conflict, unclear or ambiguous, the Supervisors will, at their absolute discretion, be entitled to resolve their priority, interpretation or application, acting in what they believe to be the interests of the creditors."*

11. Section 8 contained the "Statement of Affairs – comparative outcomes":

(i) Clause 8.2 stated that professional valuers had carried out a desktop valuation of the Company's assets "being Computer Equipment and Motor Vehicles".

(ii) Clause 8.3, which is central to the argument before me and before the adjudicator, was in the following terms:

"All of the Company's assets, other than the net proceeds of the HMRC refunds until such time as they are fully received and Retentions and Adjudication Funds received prior to 1 January 2022 which will form the voluntary contributions, are excluded from the Arrangement. The excluded assets will be utilised to deal with the successful implementation of the arrangement and potential future trading of the Company. For the avoidance of doubt this includes but is not limited to:

- *Cash at bank*
- *Chattel assets*
- *Overdrawn directors' loan account*
- *Company Records*
- *Intellectual property rights*

(iii) Clauses 8.4 and 8.5 provided:

*"8.4 **Appendix D** provides a comparison of estimated outcomes between the CVA and the liquidation of the Company. It can be seen that, based on currently available information, a dividend of between 11.7p/£ and 15.4p/£ would be paid to unsecured creditors from the CVA. By contrast, a dividend of up to 4.8 pence in the pound is estimated to be available to unsecured creditors in the event that the Company went into liquidation. This is the result of the likely reduced realisations in respect of the adjudication claims and retentions in the event of a liquidation and the limited value of the chattel assets.*

8.5 The main reason for the anticipated improved dividend in the CVA is that the Company will be better able to deal with the collection of the outstanding retentions and deal with the adjudication process while remaining under the control of the directors with the protection of a CVA, as dealing with the adjudication enforcement action in a liquidation would be considerably more difficult."

12. Clause 9.8 then provided:

*"The Company's creditors are set out in the statement of affairs. All creditors must submit a statement of claim within 28 days of the Supervisors' request. Thereafter the Supervisors shall not be obliged to request, invite or otherwise advertise for the submission of claims. The adjudication of each claim will be in accordance with the standard terms and conditions attached at **Appendix E**."*

13. Appendix C contained the Estimated Statement of Affairs setting out the company's creditors (not including Henry).

14. Appendix D, as referred to in clause 8.4, set out a "Comparison of Estimated Outcomes Between CVA and Liquidation of the Company". In short, under the heading Assets Subject to Floating Charge, there was reference to the adjudications, retentions and so on. There was no reference to any other debts due to or claims by ProMep.

15. Appendix E repeated at paragraph 1 that "in the event of a conflict between the terms of the company's proposals and these standard terms then the terms of the proposals shall be given priority". Material to the arguments before me were the provisions under the heading "Creditors' Claims and the Calculation and Payment of Dividends" which included the following:

"27. The Supervisor will assess and agree the claims of preferential and unsecured creditors based on information in the company's books and records, and the proofs of debt submitted by the preferential and unsecured creditors, together with the advice of the directors as considered appropriate by the Supervisors.

…

29. When assessing and agreeing claims from scheme creditors, the Supervisor will follow those rules of the Insolvency Rules and those sections of the Insolvency Act 1986 that apply to the agreement of creditors' claims by a liquidator. These include debts in

foreign currency, set off and interest accruing after appointment. References to the winding up shall be interpreted as reference to the CVA. Court directions may be sought by the Supervisor if appropriate

30. Subject to the above, dividends shall be calculated on the amount for which that creditor's claim would be accepted to rank for dividend had the company gone into creditors' voluntary liquidation on the Decision date on which the proposals were approved.

31. The Rules relevant to the payment of a dividend to unsecured creditors (Part 14 of the Insolvency Rules) shall apply to the CVA, excluding any Rules relating to the advertisement of a dividend, and dividends to secure creditors. References to the winding up shall be interpreted as references to the CVA."

…"

16. The Insolvency Rules, Part 14 include the following:
"14.25 – (1) This rule applies in a winding up where, before the company goes into liquidation, there have been mutual dealings between the company and a creditor of the company proving or claiming to prove for a debt in the liquidation.

(2) An account must be taken of what is due from the company and the creditor to each other in respect of their mutual dealings and the sums due from the one must be set off against the sums due from the other.

(3) If there is a balance owed to the creditor then only that balance is provable in the winding up.

(4) If there is a balance owed to the Company then that must be paid to the liquidator as part of the assets.

…"

17. By a proof of debt form dated 28 March 2022, Henry proved for 3 debts arising out of projects known as Makerfield, Scaperfield and 2-6 Pelham Terrace. Importantly, there was no mention of Stanbridge. By e-mail dated 13 June 2022, the Supervisors confirmed that that claim "is accepted".

18. On 27 July 2022, the Supervisors gave notice (form CVA4) that the CVA had been successfully completed.

19. On 18 November 2022, ProMep commenced an adjudication and Rowan Planterose was nominated as adjudicator by the RICS. It is relevant to note that Mr Planterose is a highly experienced barrister and solicitor in the field of construction law and that both parties were legally represented in the adjudication.

20. The Referral Notice was dated 23 November 2022. In short summary, ProMep's claim was that Henry was in repudiatory breach of contract, which ProMep had accepted as terminating the contract, and ProMep claimed payment for work done and damages for breach in a total sum of £887,545.80.

21. On 5 December 2022 Henry served its Response. In that Response, Henry expressed itself to be "astounded" that ProMep had commenced this adjudication. One reason given was that it was ProMep that was in repudiatory breach and had wrongfully

terminated the contract. Henry advanced a counterclaim for £825,208 in damages. The other reason was the background in which ProMep had owed Henry a significant sum when ProMep entered into a CVA. Henry's claim for £3.457 million had been accepted by the Supervisors but Henry had only been paid £242k. As counsel for ProMep pointed out, Henry did not advance any argument that ProMep's claim in the adjudication had also been settled by the CVA.

22. On 12 December 2022, ProMep served its Reply which did advance the argument that Henry's counterclaim was settled by the CVA. The Reply included the following:

"10. HCPL submitted its proof of debt in the CVA after the CVA had been agreed to by the creditors. HCPL was not involved in that agreement because it did not claim to be a creditor until later. The directors objected to the Supervisors' decision to accept HCPL's claims in full and suggested that the CVA be altered so that those claims would fall outside the CVA. The position between the parties could then be addressed after the CVA. HCPL refused that suggestion and maintained that its claims should be included for dividend. Under the terms of the CVA all claims by HCPL have been compromised in return for this windfall.

…

15. ProMEP does not comment further on the invalidity of HCPL's claims because they have been compromised in the CVA. In considering this point it is important to understand that the CVA is a contractual agreement between ProMEP and all its creditors, the effect of which is entirely dependent on the terms of the CVA. In this regard see *Wright & Anor (Liquidators of SHB Realisations Ltd) v The Prudential Assurance Company Ltd* [2018] EWHC 402 (Ch) (06 March 2018) at the end of paragraph 20 …

16. Promep's claim against HCPL is an asset of the company. Whether any company assets are included in the CVA is a question of construction of the agreement. Clause 8.3 of the CVA provides that only limited assets are included in the CVA as follows:

"*All of the Company's assets, other than the net proceeds of the HMRC refunds until such time as they are fully received and Retentions and Adjudication Funds received prior to 1 January 2022 which will form the voluntary contributions, are excluded from the Arrangement. The excluded assets will be utilised to deal with the successful implementation of the arrangement and potential future trading of the Company. For the avoidance of doubt this includes, but is not limited to:*

- *Cash at bank*
- *Chattel assets*
- *Overdrawn directors' loan account*
- *Company records*
- *Intellectual Property Rights"*

17. The claim against HCPL does not fall into any of these categories and is part of "*all of the Company's assets, other than the …. voluntary contributions*", which are excluded from the arrangement under this clause."

23. On 19 December, Henry served its Rejoinder. Henry contended that ProMep was wrong to say that Henry's claim had been settled in the CVA. That contention appears to have been based simply on the fact that it was not one of the debts for which Henry gave proof of debt in the CVA. On the other hand, Henry now said that it was ProMep's claim that was compromised. In summary, that was said to be because the CVA was intended to function in a manner that mirrored a liquidation where set-off was mandatory so that the creditor ended up with a final position and the creditor could not later be pursued for further monies. Henry included within the documents submitted to the adjudicator an Advice from counsel to that effect. I observe that Henry did not explain how pursuit of its own claim was consistent with the contention that the CVA should end up with a final position.

24. On 21 December 2022, ProMep served its Surrejoinder. The Surrejoinder stated that ProMep had previously received advice from counsel as to the effect of the CVA. Her Chambers had been contacted with a request that she respond to "the Henry Advice" but she was now on maternity leave and unable to respond, as she would have been had the Henry Advice been provided earlier. In the circumstances, ProMep provided a summary of counsel's advice. ProMep said: "For obvious reasons this has not been approved by her. However, it does set out ProMep's understanding of her view on the legal position". The adjudicator was asked to note in particular the summary in paragraphs 8, 9 and 12. That advice was said to be that ProMep's claims against Henry were excluded from the CVA (paragraph 8); that insolvency set-off does not apply (the reference was to paragraph 9 but it appears that it should have been to paragraph 10); and that if Henry's claims are admitted in full (as they were) then they were extinguished (paragraph 12).

25. I do not set out the entirety of the summary but it included the following:

    (i) Under the heading "Overview of Conclusions":

    "(1) It is necessary to ascertain whether Promep's Claims are assets of the CVA. Promep's Claims could either be (1) excluded from the CVA under clause 8.3 of the Proposal or (2) included in the CVA under clause 5.44 of the Proposal. This is a question of construction of the Proposal to be determined by the Supervisor to determine (sic) under clause 7.1(e) of the Proposal.

    (2) If Promep's Claims are excluded from the CVA, they belong to Promep. In this case, admission of Henry's Counterclaims in the CVA would not prevent Promep pursuing Promep's Claims later (and set-off would no longer apply as Henry's Counterclaims will have been settled in the CVA) and insolvency set-off likely does not apply, although this would be a matter for the Supervisor to determine.

    (3) A decision that ProMep's Claims are not CVA assets would be the simplest solution from Promep's perspective. However it should be noted that determination by the Supervisor admitting Henry's Counterlcaims but excluding Promep's Claims may be unacceptable either to Henry (who would be receiving only a dividend in respect of its liability, but still exposed to the full amount of Promep's Claims) to other creditors (who would potentially receive less than they would in a liquidation …..). Either Henry or another creditor might challenge such a decision on this basis."

(ii) Under the heading "Are Promep's Claims against Henry assets of the CVA?":
"5. ProMep's Claims are assets. If the CVA did not exist they would certainly be assets of the Company.

6. Whether any Company assets are included in the CVA is a question of construction of the Proposal (perhaps subject to the Supervisor's discretion under clause 5.44). In this case there are two relevant clauses: cl. 5.44 and cl. 8.3.

[The terms of clause 8.3 were then set out]

8. …. Assuming the Promep Claims existed at the time the Proposal was entered into, they will have been part of "all the Company's assets, other than the …. voluntary contributions" – which are excluded from the arrangement under this clause."

(iii) Under the heading "If ProMep's Claims are excluded from the CVA":
"9. If the Supervisor determines that Promep's Claims are not CVA assets then they are owned legally and beneficially by Promep.

10. Clause 31 of the Standard Terms applies Part 14 of the Insolvency Rules 2016 on the calculation of dividends, Rules 14.24 and 14.25 deal with insolvency set-off – and so these principles are applied to the CVA. Insolvency set-off nets off mutual debts between creditor and insolvent company upon insolvency, with the result that only the balance that is owing to be claimed by way of dividend in the insolvency ….

11. As Henry's Counterclaims are claims against Promep to be settled in the CVA, if Promep's Claims are excluded from the CVA, then it is likely there is no mutuality of debts (a condition for insolvency set-off …..)

12. If this is right, Henry's Counterclaims should be admitted for dividend in full, without set-off. They would thereby be extinguished by the dividend received. Meanwhile Promep's claims would remain alive, and they would not be subject to any defence of set-off because Henry's Counterlcaims would no longer exist to be setoff against them."

26. In the body of the Surrejoinder, ProMep also made submissions on the Henry Advice.

27. On 5 January 2023, the adjudicator gave his decision. He found in ProMep's favour that Henry had repudiated the contract and decided that ProMep was entitled to be paid a total of £90,380.49.

28. Dealing with the arguments in relation to the CVA, the adjudicator set out what he considered to be material terms of the Proposal. He noted that:
"101. A CVA is essentially a contract which binds all creditors whether or not they have participated or indeed agreed to its terms. Its precise terms are therefore of importance to the issue as to what has been included (and settled) and what has not. Interpretation follows normal rules. There is (as Counsel notes), no automatic statutory set off of debts."

29. He then summarised the respective positions of ProMep and Henry, including a summary of the respective advices of counsel and a note from Henry dated 21 December 2022, as follows:

"106. …. HCPL say:

a. IR14.25(2) refers to mutual dealings, not debts. There is a clear requirement to apply insolvency set-off;
b. The question that needs to be asked is: does the definition of assets in the CVA trump the reference to set-off in the conditions?

107. In response ProMEP referred me to HCPL's counsel's Advice. He noted that, unlike in administration or liquidation, there is no automatic statutory set off of debts owed to and by the Company.

108. In my view

a. Paragraph 8.33 (sic) of the Proposal clearly excludes the claims now made from the arrangement;

b. I disagree with Counsel's view as [to] the "old" contracts. As ProMEP say in their Surrejoinder, the list of included assets is confined to "the net proceeds of the HMRC refunds until such time as they are fully received" and Retentions and Adjudication Funds received prior to 1 January 2022.

c. Automatic set-off does not apply to a CVA;

d. The application of set-off would negate the effect of Paragraph 8.33 (sic).

109. It follows that the answer to the question posed in HCPL's note of 21 December 2021: "does the definition of assets in the CVA trump the reference to set-off in the conditions?" is "Yes, it does". ProMEP's claims remain alive."

30. On 19 January 2023, Henry issued a Part 8 claim seeking a final determination of the issue as to whether the CVA settled all claims as between ProMep and Henry. Henry sought declarations (i) both that ProMep's claim in the adjudication was settled by the CVA and that all other claims that ProMep had against Henry, prior to the inception of the CVA, were settled by the CVA and (ii) that Henry's claims against ProMep were not settled by the CVA other than those for which proof of debt was submitted. By the time of the May hearing, Henry had served Particulars of Claim in which they did not pursue (ii).

31. On 26 January 2023, ProMep issued Part 7 proceedings to enforce the adjudicator's decision by summary judgment in the usual way. In short, subject to one matter which I refer to below, Henry's only ground for resisting summary judgment was its contention that the CVA had settled all claims between these two parties.

The procedural issues

32. The usual abridged timetable was ordered in respect of the adjudication enforcement and the matter, therefore, first came before the court on the hearing of the application for summary judgment. At the start of the hearing, Mr Halkerston, for Henry, argued not only that the Part 8 claim should be determined at the same time but also that the Part 8 claim should be determined first because it was procedurally first in time and, more importantly, because if Henry's claim was successful, it would provide a complete defence to the enforcement of the adjudicator's decision.

33. I directed that the Part 7 proceedings, that is the adjudication enforcement, should be heard first and that I should hear first from Mr Shirazi on behalf of ProMep. That reflected the recent decision of the Court of Appeal in *A&V Building Solutions Ltd. v J&B Hopkins Ltd.* [2023] EWCA (Civ) 54. It also reflects the fact that the abridged directions for the hearing of this matter were made because it was an adjudication enforcement and not because of the Part 8 proceedings.

34. It was, further, in my judgment, not appropriate to hear the Part 8 claim at the same time. Decisions of the Technology and Construction Court, which are reflected in the Technology and Construction Court Guide at paragraphs 9.4.4 and 9.4.5, make plain the nature of Part 8 proceedings which the court will hear together with an adjudication enforcement such that the Part 8 proceedings become a defence to enforcement. The complexity of the arguments on the effect of the CVA were such they did not fall within these principles and there was plainly insufficient time to deal properly with all issues. As the hearing proceeded, Mr Halkerston, in fact, made many of the arguments relevant to the Part 8 proceedings but there was insufficient time for any response from Ms Stubbs KC on behalf of ProMep. It also became clear that the nature of the cases had developed and that some limited disclosure might be necessary. The parties undertook to agree directions leading to an further hearing in May.

35. A further procedural issue was raised by an application made by Henry, within the Part 7 adjudication enforcement proceedings, for specific disclosure of all documents containing the advice of ProMep's counsel. The application was made under PD57AD paragraph 17 and/or PD 57AD paragraph 18 and/or Part 31.12 and/or Part 3.1(2)(m). The paragraphs of PD57AD relied upon are concerned with steps the court may take where there has been a failure adequately to comply with an order for Extended Disclosure or to vary an order for Extended Disclosure including by ordering disclosure of specific documents. Neither of those was relevant here. Part 31.12 and Part 3.1(2)(m) might procedurally have been relied upon for the court's power to order specific disclosure but, in the exercise of any discretion, it would have been important to bear in mind that the application was made in the context of enforcement of an adjudicator's decision and against the background that no issue had been raised in the adjudication.

36. The witness statement served in support of the application sought to explain the basis for the application. On 14 February 2023, Henry's solicitors had requested from ProMep's solicitors the full Advice of counsel. ProMep's solicitors declined to provide that advice and continued to do so following further correspondence. Henry's reasoning was based on the premise that the summary of the advice was material to the adjudicator's decision. Henry said that, if the Advice was not disclosed, they would invite the court to draw the inference that the Advice did not support ProMep's position and rely on the circumstances surrounding the Advice as a reason the court should not enforce the decision. If it was disclosed and showed that there had been a deliberate "cut and paste" in the summary, Henry would argue that there had been a deliberate misrepresentation of counsel's advice and that for that reason the decision ought not to be enforced.

37. Before the full Advice was considered, Henry also relied upon an e-mail from Mr Stevens, one of the Supervisors, to Mr Hough, ProMep's solicitor, dated 25 May 2022 which was exhibited to Mr Hough's witness statement dated 10 March 2023. Henry

submitted that the Supervisor noted "that ProMep's counsel had in fact indicated, correctly, there was a right of set-off". The e-mail, in fact, said:
"Finally, my solicitors have advised there is no right of set-off in the CVA process. I take your point that Counsel has suggested otherwise. I do not propose to explore this matter further at this stage unless you feel that it is necessary."

The e-mail, therefore, referred to what Counsel had suggested and not what counsel had advised and, as will be seen, Counsel had indeed raised that suggestion but not concluded that that was right.

38. I also note that the e-mail also said:
"We will not put anything into communications with creditors regarding the fact that any claims against Henry's are not included within the CVA. I think Clause 8.3, as drafted, means any such claims would be excluded in any event."

39. This disclosure application, although not the reasoning behind it, was overtaken by events. On 15 March 2023, ProMep's solicitors, HQ Law, wrote to Henry's solicitors, Archor, referring to another adjudication in respect of "the Optivo dispute" between these parties. The Referral in that adjudication had been served on 15 February and, in preparing the Reply, HQ Law appeared to have realised that the full version of Counsel's Advice had been included in the documents served with the Referral. The court was provided with a copy of the Advice with passages that had not appeared in the summary shown in red and Mr Halkerston made further written submissions in respect of that Advice.

The relevance of Counsel's Advice

40. In addition to the way in which the case was put in the witness statement in support of the disclosure application, Henry put its case on the relevance of this Advice in a number of ways including that there was a material misrepresentation of fact as to the content of counsel's Advice, that the adjudicator relied on that representation, and that that was a ground for not enforcing his decision.

41. In principle, in my judgment, the only basis on which these matters could assist Henry would be if they were sufficient to give rise to an arguable defence that the decision was procured by fraud. Having seen the full Advice, that was indeed the submission that Mr Halkerston made. Having set out the matters omitted in the summary (which are considered further below) and referring again to the e-mail of 25 May 2022, he submitted that these matters clearly met the threshold in *PBS Energo v Bester Generacion* [2020] EWCA Civ 404 at [22(c)] - that *"the evidence on which the adjudicator has relied is shown to be both material and arguably fraudulent"* – for resisting enforcement. As he put it, they showed that a deliberate decision was made to provide select parts of an opinion and present them as counsel's unequivocal opinion when no such opinion had been given.

42. The difficulty with this submission, even if there were some misrepresentation of counsel's Advice, is that counsel's advice is not evidence and, by definition, not evidence relied on by the adjudicator. It is not, of course, suggested that counsel's Advice was fraudulent but rather that ProMep's statement as to what counsel had advised was, or was at least arguably, fraudulent.

43. Although a representation that counsel has given particular advice is, in a literal sense, a representation of fact, for the reasons I explain below, it is more akin to a representation as to the law, and a flawed statement of law made by a party in an adjudication would not be a reason that the decision was unenforceable since the decision on the applicable law would be a matter within the jurisdiction of the adjudicator.

44. I say that this is more akin to a statement of law because it is a common practice to include in submissions in an adjudication an open Advice from counsel. It is a mechanism or technique to put arguments before the adjudicator as if they were submissions from counsel and with the intention and hope that the arguments will carry some weight with the adjudicator as the views of counsel. This was a technique adopted by both parties to this adjudication. Even if ProMep's summary of counsel's Advice was inaccurate and partial, it was made clear that it was ProMep's understanding of the Advice and that was a matter which the adjudicator could take account of in deciding what, if any, reliance to place on the summary. Any adjudicator faced with two conflicting opinions from counsel would be expected to form his own view and reach his own decision on the issue – all the more so when the adjudicator is an experienced lawyer. The nature of the reliance of an adjudicator, or other tribunal, on legal submissions is that they provide the tribunal with an articulation and exposition of the competing legal arguments which the tribunal has to consider. The nature of that reliance is quite different from reliance on a statement of existing fact. It is then difficult to see how the fact that the full Advice was not disclosed could give rise either to the inferences that Henry sought to draw or to an arguable defence that the decision was procured by fraud when all that was before the adjudicator was legal argument.

45. In any case, I do not consider that there was an arguable case that ProMep had fraudulently misrepresented counsel's advice.

46. The full version of counsel's Advice dated 13 May 2022 was, of course, far lengthier than the summary that had been provided. Mr Halkerston carefully pointed out passages that were <u>not</u> included in the summary.

47. In the first part of the Advice, counsel gave an "Overview of Conclusions" some but not all of which was included in the Overview of Conclusions in the summary. A paragraph addressing the position if it was decided that ProMep's claims were included in the CVA was omitted as was the following:

"(6) No matter whether Promep's Claims are included or excluded from the CVA, the Supervisor will need to make a determination on whether insolvency set-off applies to Henry's Claim and where this leave Promep's Claims. This decision should be communicated to creditors.

…

(8) If the Supervisor comes to the view that Promep's Claims are assets of the CVA and that insolvency set-off should apply as between Promep's claims and Henry's Counterclaims (and Henry does not agree that its claims are exceed in value by Promep's Claims) then it is likely the CVA will have to be modified. …."

48. In a section headed "Are ProMep's Claim against Henry assets of the CVA", the passages I have referred to above in the summary appeared, thus replicating the Advice,

but in the full Advice they were followed by paragraphs that set out the contrary argument:

"11. However this interpretation is called into question by the fact they were not identified in ProMep's statement of affairs at Appendix C of the Proposal (although I am told the Supervisor as been notified of their existence subsequently).

12. It is uncertain whether an asset which was not identified in the Proposal can have formed part of "all the Company's assets" in the meaning of the Proposals, since a reasonable reader would assume those assets to have been identified.

13. Further, clause 5.44 of the Proposal provides:

"Any unexpected windfalls received by or becoming available to the Company during the course of the CVA will be immediately advised to the Supervisor and will be included in the CVA to be available for Arrangement creditors.

14. Arguably, Promep's Claims are "windfalls" which are to be included in the CVA."

49. Counsel said that the definition of windfall assets had also to be considered and, summarising, that it appeared to provide for the Supervisor to decide whether something was a windfall asset and to give a discretion as to whether or not it should be included in the CVA. She contemplated three different conclusions the Supervisor could reach, namely:

"(1) That Promep's claims are part of the company's assets excluded from the CVA by paragraph 8.3.

(2) That Promep's claims are windfall assets included in the CVA under clause 5.44; or

(3) That Promep's Claims could be treated as windfall assets under clause 5.44, save that the Supervisor does not consider this appropriate under a discretion granted to him under clause 5.44, so that they are excluded from the CVA."

50. A section headed "If ProMep's Claims are excluded from the CVA" was also partly replicated in the summary. The summary omitted the passages that considered the "available argument" that the insolvency set-off applied.

51. The section headed "If ProMep's Claims are included in the CVA" did not appear in the summary at all. Counsel noted that rules 14.24 and 14.25 were applied by paragraph 31 of the standard terms, commenting that "It would have been possible to limit the effect of insolvency set-off in the Proposals by express words but there are not such words." Counsel said again that it would be for the Supervisor to make a determination on admission of Henry's counterclaims for proof. She concluded this section:

"The Supervisor would be in difficulty if he determined that Promep's Claims are assets of the CVA and that therefore mandatory set-off between those and Henry's Counterclaims had occurred because the value of Promep's Claims is uncertain."

52. Counsel then considered "possible solutions" the starting point for which was that the Supervisor would first have to determine whether the Promep Claims were or were not CVA assets.

53. Mr Halkerston submitted that the Surrejoinder was misleading – and misleading as a matter of fact as to what counsel had advised - because it represented to the adjudicator that counsel had positively advised both that ProMep's claims were excluded from the CVA and that insolvency set-off did not apply. In fact, it was submitted, she had given

no definitive opinion, had said that the Supervisor should be asked to determine whether the claims were excluded, and had considered the position on insolvency set-off both if the claims were excluded and if they were included. ProMep had presented its submission and summary as its understanding of counsel's view on the legal position but, not least because she had expressed no concluded opinion, ProMep could not reasonably have believed that counsel's opinion was as it was presented to the adjudicator.

54. Whatever was said in the Surrejoinder as a matter of submission, the summary clearly contemplated that the ProMep claims might or might not be within the CVA and stated more than once that it was for the Supervisor to determine whether the ProMep claims were or were not included in the CVA. That point was made again in the section headed "Are Promep's Claims against Henry assets of the CVA?". Therefore, whatever ProMep said its understanding of Counsel's advice was, what she had, in fact, said was before the adjudicator.

55. It is right that the summary then only reproduced the paragraphs that supported the view that the claims were not assets of the CVA and omitted the paragraphs that called that interpretation into question. To that extent, it presented a partial view of counsel's Advice but it did so in circumstances where the possibility of a different answer had been set out and clause 5.44 was expressly referred to.

56. The balance of the summary was all expressed on a conditional basis – that is, addressing the position <u>if</u> the claims were excluded and/or the Supervisor so determined. The summary omitted the paragraph setting out the contrary available argument but counsel did not express any opinion preferring that view. Similarly by omitting the section "If Promep's Claims are included in the CVA", the summary did not demonstrate that counsel had addressed this scenario further but again she had not preferred this view and she had concluded with a difficulty that it presented.

57. The summary itself made clear that Counsel contemplated differing views as to whether the ProMep claims were included in or excluded from the CVA. Her approach was to set out one view and then the contrary arguments or difficulties with that view. ProMep's expressed understanding was that her view was that the ProMep claims were not included, even though she set out the contrary arguments and said the matter needed to be determined by the Supervisor. It goes too far to seek to infer from the omission of those qualifications that ProMep's statement of its understanding was fraudulent. That is particularly so when this is not a matter of factual evidence but rather of Counsel's advice being deployed to make a submission of law in the manner that I have described above.

58. Yet further, it has been well established, since the decision of Akenhead J in *SG South Ltd. v Kingshead Cirencester LLP* [2009] EWHC 2645 (TCC) (as cited, for example, in *PBS Energo v Bester Generacion* [2020] EWCA Civ 404) that the there is a distinction to be made between fraudulent behaviour, acts or omissions "which were or could have been raised as a defence in the adjudication" and those which could not reasonably have been raised but emerge afterwards:

"In the former case, if the behaviour, acts or omissions are in effect adjudicated upon, the decision without more is enforceable. In the latter case, it is possible that it can be raised but generally not in the former." (At [20])

59. In the present case, the scope of what was being presented to the adjudicator – a summary of advice which counsel had not herself approved – was clear and Henry could have, but did not, raise an issue as to whether the summary was misleading in the adjudication. Henry did not, of course, have the complete Advice but, in submissions on the enforcement proceedings, Henry went so far as to say that if counsel had advised that insolvency set-off did not apply that advice was "extraordinary and it [was] almost unthinkable that specialist counsel would have provided advice in those terms". That was a position that Henry could have taken in the adjudication inferring that ProMep must have misrepresented counsel's advice. The position seems to me to fall within Akenhead J's former category and, even if there were any fraud argument to be advanced, it was, in effect, adjudicated upon.

The enforcement proceedings

60. Leaving the Part 8 proceedings to one side, in my judgment, Henry has no defence to enforcement of the adjudicator's decision.

61. It is well-established that the court will enforce the decision of an adjudicator made within his jurisdiction subject to limited exceptions.

62. As I have said, one line of defence was that ProMep had procured the decision in its favour by fraud, being the misrepresentation of its understanding of counsel's opinion, supported by an inaccurate or partial summary. For the reasons given above, I do not consider that it is arguable that ProMep acted fraudulently but I also do not consider that, if there was any misrepresentation either of counsel's advice or ProMep's understanding of that advice, it could be considered material. At the risk of repetition, presenting an adjudicator with advice from counsel is a technique commonly adopted to persuade but no more than that. Giving a summary of advice rather than providing the full Advice is a variation of the technique. In all these circumstances, the adjudicator is simply being presented with a legal argument and has to reach his own decision on the law. That is what happened in this case. I do not go so far as to completely exclude the possibility that there may be circumstances in which a legal opinion is so badly misrepresented to an adjudicator that it is capable of amounting to fraud but such circumstances are extremely difficult to envision.

63. Henry's further submission amounted to an argument that the position on enforcement should be different where the issue concerned an insolvency set-off and relied on the decision in *John Doyle Construction Ltd. v Erith Contractors Ltd.* [2021] EWCA Civ 1452. In that case, John Doyle had an adjudicator's decision in its favour on its final account but, being in liquidation, the issue that arose was whether it was entitled to summary judgment irrespective of the potential set-off of cross claims in the liquidation. The short answer was that it was not. Henry submitted that, even if the court could not determine the Part 8 claim at the same time as the enforcement proceedings, it should nonetheless not grant summary judgment because, so long as Henry's position was arguable, it might be the case that the insolvency set-off applied and the position would be the same as or analogous too that in *John Doyle*.

64. There is, however, a distinction between a liquidation in which the application of rule 14.25 is mandatory and a CVA in which it is not. In *John Doyle*, Coulson LJ said at [98]:
"… I do not consider that the provisional finding of an adjudicator, even on a single final account dispute where no other significant non-contractual or contractual claims arise, can be treated as if it were a final determination of the net balance, in circumstances where the other party maintains its set-off and cross-claim. It is not a question of security; it is a question of the insolvent company's cause of action being for the net balance only. It is not a matter of discretion because it is impossible to waive or disapply the Insolvency Rules. As my Lord, Lord Justice Lewison put it during argument, insolvency set-off must apply to adjudication; it is not somehow an exception. To find otherwise would give rise to incoherence."

65. In this case, the issue that was properly before the adjudicator was whether the insolvency set-off applied at all which was a question of the construction of the CVA which had already concluded. The adjudicator decided that the insolvency set-off did not apply. To enforce the decision in those circumstances does not disapply mandatory rules or give rise to incoherence. Henry's argument is a variation on the theme that the adjudicator was arguably wrong and that, therefore, his decision ought not to be enforced and does not provide a reason to refuse enforcement.

66. Having said that, because the Part 8 proceedings were heard before any decision on the enforcement, it is appropriate to take account of my decision on those proceedings.

The CVA

67. Although they were helpfully made, I do not propose to set out in this judgment the submissions that were made to me as to the general nature and process of a CVA which forms the backdrop to the parties' respective submissions.

68. One matter that was common ground between the parties was that a CVA takes contractual effect "by statutory hypothesis" (*Johnson v Davies* [1999] Ch 117; *IR Commissioners v Adam & Partners Ltd.* [2000] BCC 513 at [18]).

69. It was also common ground that the contract is to be construed in accordance with normal contractual principles and there was no dispute about those principles. Ms Stubbs KC cited, in particular, *Arnold v Britton* [2015] AC 1619 at [15] per Lord Neuberger:

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

at the time the document was executed; and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions."

70. ProMep's position can be summarised as follows, starting with the statutory provisions that have the effect that CVA binds all creditors whether or not they were aware of the CVA or participated in and agreed to the arrangement (Insolvency Act 1986, section 4A, 5(2)).

71. There is no automatic set-off within a CVA, in contrast to a liquidation or administration. The default position is that the insolvency set-off does not apply but it may be provided for by the terms of the CVA.

72. In the present case, there was such provision in Appendix E but it was not relevant to the claim made in the present adjudication or in other adjudications that ProMep has pursued against Henry. Clause 8.3 expressly provided that all assets, other than those identified in the clause, were excluded from the CVA such that they fell outside the scope of the CVA. The concluding wording of clause 8.3 was inclusionary not exclusionary. It follows that any further claims that ProMep might have against Henry were excluded from the CVA in the sense that they were not subject to the operation of the CVA and irrelevant in terms of the operation of the insolvency rules.

73. If there was a conflict between (i) the terms of the CVA which effected this position and (ii) paragraph 29 of the standard terms in Appendix E, in that that paragraph incorporated the Insolvency Rules and the automatic set-off, the answer was to be found in the application of the provisions as to precedence of clauses which gave precedence to the clear words of clause 8.3. However, ProMep's primary position was that there was no such conflict.

74. On ProMep's case this construction of clause 8.3 gives effect to the commercial purpose of the CVA. The purpose of the CVA was to perform a "hard reset" on ProMep at a point where it had liquidity issues. For that reason, all its debts were to be dealt with in the CVA and a defined fund was identified to settle those debts. The benefit to creditors was that they would have the benefit of receiving some monies in respect of their debts reasonably promptly. The benefit to ProMep was that it would give the company a future.

75. Potential claims arising out of the termination of contracts with Henry were too complex and speculative to be taken account of in the CVA but it made commercial sense that ProMep might be able to pursue those claims in the future.

76. ProMep advanced a number of alternative arguments including (i) that it could be inferred that the supervisors had resolved this issue of construction in favour of ProMep's construction as they were entitled to do under clause 7.3 and (ii) that there was no mutuality of debts. A further argument that Henry was estopped from arguing the contrary because of the common understanding of all those involved in the CVA was not in the event pursued.

77. Henry's case can be summarised as follows. The CVA was a composition of the debts of ProMep, that is, it was intended to operate as a full and final settlement of all amounts due to the creditors of the company. It is common for CVA proposals to incorporate the Insolvency Rules 2016 so adopting the legal procedures and effects of the Rules, typically as they apply to a company voluntary liquidation. In this case, the proof of debt process for the CVA expressly incorporated the Insolvency Rules applicable to proof of debts in a voluntary liquidation. That procedure automatically applied the insolvency set-off process in rule 14.25.

78. The assets identified as being available to fund the dividend payable on the CVA are only relevant to the calculation of the dividend payable to creditors. They are irrelevant to the points above.

79. The set-off operates on a mandatory basis and is "self-executing" as a matter of law, so that even if no proof of debt is submitted, the claims and cross-claims are determined conclusively in the process and cease to exist as choses in action from the date of approval of the CVA (see *Stein v Blake* [1996] 1 AC 243 at 255). Henry referred to the summary of the operation of the set-off given by Lord Briggs in *Bresco Electrical Services v Michael J Lonsdale (Electrical) Ltd.* [2020] UKSC 25 at [29]-[30] as follows:

"[29] The legal and equitable rules for asserting set-off as a defence to the company's claim by no means encompass every type of cross-claim, in relation to current, contingent and future liabilities. But the statutory regime for set-off in insolvency, now to be found in IR 14.25, operates upon an altogether more comprehensive and rigorous basis. First, it applies to every type of pre-liquidation mutual dealing, and also to secured, contingent and future debts: see IR 14.25(1), (2), (6) and (7). Secondly, whereas legal or equitable set-off is essentially optional, taking effect only if the cross-claim is pleaded as a defence to the claim, insolvency set-off is mandatory, and takes effect upon the commencement of the insolvency (the 'cut-off date'). It is said to be self-executing, and for some purposes the original cross-claims are replaced by a single claim for the balance: see IR 14.25(3) and (4). Thus the separate cross-claims may no longer be assigned after the cut-off date: see Stein v Blake [1995] 2 All ER 961, [1996] AC 243. But the separate claims may survive for other purposes: see Wight v Eckhardt Marine GmbH [2003] UKPC 37, (2003) 62 WIR 42, [2004] 1 AC 147 (paras [26]–[27]) per Lord Hoffmann. One example is the balance of contingent or prospective claims under IR 14.25(5). Within the liquidation, a net balance owing to the creditor must be pursued by proof of debt in the ordinary way. The liquidator is entitled to be paid the full amount of any net balance owing by the creditor, and may exercise any available remedies for its quantification and recovery, including litigation, arbitration or ADR: see IR 14.25(4) and (5).

[30] The identification of the net balance is to be ascertained by the taking of an account: see IR 14.25(2). If there is no dispute as to the existence and amount of the claims and cross-claims this is in practice a matter of simple arithmetic, the net balance being the difference between the aggregate of the claims and the aggregate of the cross-claims. But if any of the claims and cross-claims are in dispute, then those disputes will need first to be resolved, by reference to the individual merits of each, before the arithmetic resumes: see again Stein v Blake [1995] 2 All ER 961 at 967–968, [1996] AC 243 at 255 per Lord Hoffmann."

80. Mr Halkerston also relied heavily on the Australian case of *Gye v McIntyre* [1991] HCA 60. That case concerned a bankruptcy and like provisions as to set-off. The court identified the issue as whether a sum owed in damages by the appellants, Gye and Perkes, to the respondent, McIntyre, by reason of a judgment given before the composition could be set-off (under section 86 of the Bankruptcy Act 1966) against an amount owed in damages by McIntyre to Perkes and Gye by reason of a judgment obtained after the date of the composition but where the proceedings were pending at the time. The court concluded that, for there to be mutual debts, the respective claims did not have to be vested, liquidated or enforceable at the decisive date, being the special resolution accepting the composition. It was not necessary that the contingent claims against McIntyre had not passed to the trustee in bankruptcy under the composition. The insolvency set-off in section 86 still applied. Mr Halkerston submitted that there was a close analogy to the present case – the future claims against Henry did not form part of the funds available for distribution and did not pass to the Supervisors but, because clause 9.8 provided that creditors clams would be adjudicated upon according to the standard terms, they were nonetheless properly subject to the insolvency set-off.

81. Without seeking to do any disservice to counsel's lengthy submissions, there are the following strands to Henry's case:

(i) Appendix F sets out the meaning of terms used in the proposals, unless the context otherwise demands. These include the definitions:
    (a) Distribution: "Any payment of Distribution Funds to Scheme Creditors by way of a dividend to reduce the Creditors' Claims."
    (b) Distribution Funds: "Those funds held by the Supervisor in respect of the Company in accordance with the Proposals that are available for distribution to Scheme creditors."

(ii) Paragraph 59 of the standard terms in Appendix E gives the order in which the distribution funds are to be distributed.

(iii) The exclusion in clause 8.3 means only that the excluded assets are not to be included in the distribution funds and are not available to satisfy ProMep's debts. It does not have the effect of excluding any assets from the effect of the CVA or excluding assets generally from that effect (see above). Further, in support of this proposition, Henry relies on the context provided by clause 8, that is that it is a "Statement of Affairs – comparative outcomes" which is focussed on explaining to creditors the assets which are to be utilised for the payment of dividends to the creditors. Henry also points to the use of the same phrase "excluded from the CVA" in clauses 5.15 and 5.24 where, it is submitted, it has the same meaning and effect.

(iv) The effect of the CVA includes the operation of Rule 14.25 so that any debts owed to ProMep from Henry must have been set-off against Henry's claims against ProMep such that they are compromised by the CVA. That would have been the case even if Henry had submitted no proof of debt in the CVA. That is the clear meaning of paragraphs 29 and 31 of the standard terms in Appendix E which provide that Part 14 of the Insolvency Rules shall apply to the payment of a dividend in the CVA as if it were a creditors' voluntary liquidation.

(v) There are no express provisions of the Proposal that are in conflict with these standard terms and the provisions as to precedence are irrelevant. For the reasons above, clause 8.3 does not exclude any debts owed by Henry from the operation of the CVA but only from the distribution funds

82. Henry argues that ProMep's literal interpretation of clause 8.3 renders clause 9.8 and the standard terms in Appendix E functionally meaningless since it means that there is no set-off to be adjudicated upon.

83. Henry submits that its construction is also consistent with commercial reality – it would, it is submitted, be absurd if the effect of the CVA was to compromise all of Henry's claims against ProMep but preserve any claims the other way. Objectively, the parties cannot have intended the outcome to be that creditors received only a few pence in the pound when ProMep had assets in the form of claims potentially worth millions. That outcome would further be inconsistent with the Insolvency Rules Part 2 (which are concerned with a CVA). In accordance with rule 2.3(1) the Proposal must list the company's assets and their values (sub-paragraph (a)) and which assets are to be "excluded from the CVA". Rule 2.6 provides for the statement of affairs to list the company's assets and estimated values. ProMep did not list any debt or damages due from Henry as an asset. On the contrary, the Proposal in clause 2.7 referred to the suspension notices being issued on "all projects" and either expressly or impliedly stated that all claims were the subject of the existing adjudications.

84. Accordingly, the result of the CVA is that any claims as between Henry and ProMep were replaced by a single net sum due to Henry, neither party has challenged that, and they are both bound by it.

Discussion

85. There is a clear attraction in Henry's argument. Construing clause 8.3 as meaning that all assets (other than those specified) are excluded from the funds available for distribution has the effect that any (unidentified) assets that ProMep may have, including any claims against its creditors, are to be taken into account in adjudicating upon the creditors' claims. That gives a substantive purpose to paragraphs 29 to 31 of the standard terms.

86. That construction is also consistent with the provisions of the Proposal that compare the outcomes of the CVA and a liquidation (in which all claims and cross-claims would be the subject of the mandatory set-off). In both columns of the comparison there is no reference to any assets other than ones that are expressly addressed in the Proposal and the Statement of Affairs (whether they form part of the distribution fund or are "excluded from the CVA" by clause 8.3).

87. Mr Halkerston emphasised the importance of the company's obligations to fully disclose its assets in the Proposal and Statement of Affairs so that all creditors were on an equal footing with the same information as to the company's financial position.

88. Rule 2.3(1) provides that the Proposal must set out, so far as is known to the proposer, the company's assets with an estimate of their respective values (sub-paragraph (a)) and

which assets are to be excluded from the CVA (sub-paragraph (c)). Sub-paragraph (x) requires the proposer to set out: *"any other matters that the proposer considers appropriate to enable members and creditors to reach an informed decision on the proposal."*

89. In *Lazari Properties 2 Ltd. v New Look Retailers Ltd* [2012] EWHC 1209 (Ch), Zacaroli confirmed that the duty to treat creditors equally applied to CVAs and, in respect of disclosure, said this:

"299. The contents of a proposal for a CVA are prescribed by rule 2.3(1) IR 2016. Among other things, it must state the nature and amount of the company's liabilities, how they will be met, modified, postponed or otherwise dealt with by means of the CVA. The overarching obligation of disclosure is reflected in the last item in the list set out at rule 2.3: (x) any other matter that the proposer considers appropriate to enable members and creditors to reach an informed decision on the proposal. …….

300. Unsurprisingly, since CVAs and scheme of arrangements share in common the fact that creditors are invited to vote upon a compromise or arrangements affecting their rights, this overarching obligation is materially the same as that which exists in the scheme jurisdiction. In In re Indah Kiat International Finance Co BV [2016] BCC 418 for example, Snowden J said, at para 41: "it is well established that the scheme company has a duty to place before members or creditors sufficient information for them to make a reasonable judgment as to whether the scheme is in their commercial interest or not."

90. There is obviously force, therefore, in Henry's argument that the assets disclosed in the Proposal, and indeed the subject of the comparison of outcomes, ought to have included any potential claims against Henry. There was no mention of them and that would seen to be a significant failure of disclosure. That factored into Henry's case on the construction of clause 8.3 on the basis that "all of the company's assets" (other than those specified) could only refer to disclosed assets which were "excluded from the CVA" and not available for distribution. Any other undisclosed assets would be subject to the automatic set-off in consequence of the adjudication of the creditors claims or even if no claims were submitted.

91. It is obviously a concern that the Proposal made no reference to any potential future claims (and I return to this point below) and it creates, as I have indicated, an attraction in Henry's argument. Despite that attraction, it seems to me that Henry's position cannot be right.

92. The first and primary difficulty, however, with Henry's position is that it requires clause 8.3 to be construed as defining the distribution funds when clause 8.3 does not do so. Clause 5 sets out what monies will form the distribution fund. Clause 8.3 says that all assets (other than those that have already been referred to in clause 5) are "excluded from the Arrangement". That is expressly on the basis that the excluded assets will be utilised to implement the arrangement and fund future trading. These assets include but are not limited to identified assets.

93. Henry's principal argument on construction is that "excluded from the Arrangement" means only excluded from the distribution fund and therefore not available for payment of the dividend. That is not consistent with the intention that the assets excluded from the arrangement will be available to implement the arrangement and, perhaps more

importantly, fund the future of the company. Henry points to the same wording in clauses 5.15 and 5.24. However, the intention of these clauses, in my view, is that if monies were received from the adjudications that had already taken place or were pending, but received after a specified date, they would not only be unavailable for the dividend but would also be retained to the benefit of ProMep. If Henry's construction were right, any such monies (due from Henry to ProMep), even though excluded from the distribution funds, would still be subject to the set-off. The wording of clauses 5.15 and 5.24 fits with ProMep's construction of clause 8.3 but, in my view, not with Henry's.

94. The modified proposal removed the time limit and provided that the supervisors should review the adjudication and retention realisations on or before 31 March 2022 and inform the creditors whether a further extension was required to allow those realisations. That modification does not indicate a change of intention as to dealing with the proceeds of the adjudications. I note that the "Notice of termination or full implementation of the voluntary arrangement" (CVA4) set out the realisation from the adjudications which was ultimately less than the figure in the statement of affairs.

95. Henry also relies on the contention that ProMep's construction of clause 8.3 renders the provision for insolvency set-off pointless and, therefore, does not give effect to clause 9.8. Again there is force in this argument but less force than there might be because the provisions in Appendix E are standard terms and not the bespoke terms of the Proposal. The fact that there may not be circumstances in which the insolvency set-off operates should not force a construction of other clauses that does not accord with their express provisions. The authorities to which I was referred, including those above, similarly address a common, and it may be said standard position but not the particular terms of this Proposal. *Gye v McIntyre* is a case about bankruptcy and the operation of the statutory set-off in bankruptcy. There was no contractual exclusion of any assets from the operation of the bankruptcy.

96. Mr Halkerston also cited *Re Sigma Finance Corporation* [2009] UKSC 2 in this context. In that case, the issue was, in summary, whether the concluding words of a clause, clause 7.6, providing for the discharge of short term liabilities, gave priority to such liabilities during the realisation period. As a matter of construction, it was held that the clause did not have that effect because that would have changed the clear structure of the financial relationship. By analogy, it is submitted that, in this case, to give clause 8.3 the effect for which ProMep contends would change the clear structure of the CVA in which all mutual dealings were to be taken into account in the operation of clause 9.8. That, however, involves the assumption that the clear basic scheme of the CVA was one in which all debts and liabilities would be adjudicated upon under clause 9.8 applying the insolvency set-off. Having regard to clause 8.3, Henry cannot make that assumption.

97. Henry also contends, as I have indicated, that ProMep's position lacks commercial sense and/or would not be how a reasonable person with the relevant background knowledge would construe the Proposal. I repeat what I have said in respect of ProMep's submission as to commercial purpose and I cannot conclude that this lacks commercial sense or does so to the extent that the court should depart from the normal meaning of the words used in clause 8.3.

98. As a matter of construction, therefore, I prefer ProMep's construction and I do not make the declarations sought by Henry. It follows that there is no reason not to enforce the adjudicator's decision.

The factual evidence

99. Because of the course that these hearings took, there was, in the event, a body of factual evidence as to ProMep's and the Supervisors' knowledge and intentions in respect of any claims by ProMep against Henry that were not already the subject of adjudications at the time of the Proposal.

100. The evidence of Mr Hough, of HQ Law, in his witness statement dated 10 May 2023,was that he was asked by the Supervisors to comment on the "smash and grab" adjudications, that is those brought on the absence of notices. On 2 September 2021, he attended a meeting with Mr Stevens, Mr Baluchi and Ms MacNamara of FRP for that purpose. At the meeting, the "smash and grab" adjudications and enforcement were discussed. Mr Hough also discussed the difficulties of bringing any further claims because ProMep would have to establish that they had been entitled to terminate and would face a claim from Henry that ProMep had wrongfully terminated. His evidence was that it was agreed, which I take to mean that there was a common understanding, that ProMep would not be in a position to make any further claims against Henry while it was in a CVA. Mr Hough pointed to an e-mail from Mr Baluchi following the meeting in which Mr Baluchi asked for "clarity on how legals are being funded in the event that resolution of adjudications goes beyond enforcement" as referring to discussions about further claims, although to my mind it seems more obviously to refer to the disputes that were already the subject of the adjudications.

101. Mr Hough said that he understood that, in answer to a query from creditors, Ms MacNamara passed a scheduled to creditors showing outstanding balances of over £12 million due to ProMep and he exhibited a copy of the schedule. Ms Stubbs recognised that she could not submit that this schedule had been sent to all creditors but it had certainly been sent to some. The schedule showed (in red) outstanding balances on a list of projects. This column was followed by a column headed "Reason for non-adjudication". The reasons included "Payless Notice", "Adjudication Won" and "Payless Notice & offset accepted by adjudicator". The last column in the schedule gave figures for "Adjudication Win" totalling £683,371.41.

102. Mr Hough was then asked to attend the creditors' meeting on 25 October 2021. His evidence was that at the meeting he was specifically asked by creditors whether ProMep would be making any further claims against Henry. His written evidence as to his response included the following:

> "As for further claims against Henry, I explained that ProMep believed Henry was at fault and had breached the sub-contracts. Arguments about the termination were difficult and could not be pursued in the CVA. There was no money to pursue any claims, which would require further investigation and considerable resources and time. With both sides arguing termination, it was not possible to predict what might happen. There was a risk that Henry could win on termination and that that would be a huge liability for ProMep, as Henry was claiming.

…. The proposal being made to the creditors was that the proceeds from the Smash and Grab adjudications were included in the fund for creditors. That was the certified payments. All assets other than those that could reasonably be expected to be recovered in the CVA were excluded.

The Creditors listened to my summary of the position and I don't recall any further questions being asked of me. After some discussion the proposal was voted on and accepted."

103. Mr Hough also addressed an exchange of e-mails in May 2022 during the course of the CVA. On 18 May 2022, Mr Hough wrote to Mr Stevens:

"I have now received counsel's advice in relation to not compromising possible claims against Henry if their claim in the CVA is accepted and a dividend paid.

Counsel has advised that claims against Henry are not assets of the CVA by operation of clause 8.3, which excludes them because they are not in the list of included assets.

….

However, counsel has advised that you should make it clear to the creditors that there are no assets under the CVA that can be applied by way of insolvency set-off against Henry's claims so that there is an opportunity for the creditors to object, should they wish to do so …."

104. Mr Hough then suggested some wording to make that clear. The e-mail dated 25 May 2022, set out above, was Mr Stevens' response. Mr Hough's suggestion was not accepted but Mr Stevens stated his view that clause 8.3 achieved the same effect and recounted solicitors' advice that the insolvency set-off did not then apply.

105. In the context of these proceedings, FRP did not make any witness statement. FRP (Mr Stevens) wrote to HQ Law on 28 April 2023 to provide their input and stated that they considered that, as it provided their factual account as officers of the court, their letter should be disclosed to Henry, as indeed it was. At paragraph 7, Mr Stevens said:
"On 22 October 2021, in response to some questions raised by creditors on the draft Proposals, Mr Clarke [director or ProMep] provided a schedule of outstanding balances that they considered to be owing by HCPL to ProMEP under various projects (the Schedule). The Schedule is appended to this letter. It was considered by the directors of ProMEP that the amounts listed in the far right hand column of the Schedule (under "Adjudication Win") could be recovered quickly through adjudication processes and so these were included as assets in the CVA, with all adjudication funds received (subject to receipt by a cut off date) being ringfenced for the benefit of the CVA creditors. A full list of adjudication claims included as assets in the CVA are detailed at clause 5.5 of the CVA Proposals (CVA Adjudication Claims). FRP were not aware of any other claims initiated by ProMEP against HCPL and the directors of ProMEP did not inform FRP of any other such claims. The directors had indicated that any other claims that ProMEP might have against HCPL were highly speculative and that ProMEP would consider whether or not to make any claims at a future date at the Company's cost."

106. Henry's position was that any evidence of fact served in the Part 8 proceedings was irrelevant to the issue of construction and ProMep's case in no sense depended on this evidence. I have reached my conclusion as to the construction of the Proposal without reference to this evidence but I refer to it for two reasons.

107. Firstly, it clearly shows that ProMep and FRP were aware that there might be further claims against Henry in the future. Subjectively, they had no intention that these should be compromised by the operation of the insolvency set-off in the CVA and that was the subjective intention of excluding all other assets from the CVA. That that view was held by the Supervisors is an indication that it was not a commercially unrealistic position in the CVA.

108. Secondly, and more importantly, the provision of the Schedule to the creditors itself demonstrates that (at least some of) the creditors were made aware that the sums which ProMep said were outstanding on various projects were significantly greater than the amounts which it anticipated recovering as a result of the adjudications which had been pursued or were on foot. This supports Mr Hough's evidence as what he said at the creditors' meeting. Objectively, the schedule alone would mean that creditors knew that they were being offered the monies likely to be received quickly and easily even though there were further claims that might be made by ProMep. Those creditors who attended the meeting had that further explained to them. It is improbable that the reasonable creditor with that knowledge would consider the intended effect of the CVA to be that ProMep was foregoing all of those potential claims. Rather it would seem that the purpose of the CVA was to protect ProMep from its creditors by distributing to its creditors the funds that could readily be realised and enabling ProMep to continue trading and possibly pursue further claims, if the funds were available to pursue the claims and if the risk was considered worth taking.

109. Ms Stubbs also submitted for a further reason on the facts that the evidence demonstrated why a CVA of this nature was not as commercially improbable as Henry sought to suggest:

(i) Henry was not listed as a creditor in the Proposal in the circumstances that Henry had failed to make payments due to ProMep; Henry had, in ProMep's view, wrongfully terminated the contracts; and Henry had made no claims against ProMep.

(ii) Henry nonetheless put in three claims in the CVA. In March 2022, the quantity surveyors, Leslie Keats, engaged to advise FRP, recommended that these claims be rejected principally because Henry had repudiated the contracts. They also noted that Henry had not, in any case, substantiated any additional costs claimed.

(iii) In April 2022, Addleshaw Goddard gave advice to FRP in respect of Henry's claims and the issue of repudiation generally. Addleshaw Goddard were not satisfied that ProMep had lawfully terminated the contracts but did not reach a firm conclusion.

(iv) In their letter dated 28 April 2023, FRP explained the approach they had then taken:

"15. AG suggested however that certain quantum elements of the HCPL Claim could be interrogated further and challenged if necessary. The Supervisors investigated this with the assistance of Leslie Keats, a quantity

surveyor firm, and attempted to reach an agreement with HCPL to accept the HCPL Claim into the CVA at a reduced quantum. However, ultimately these negotiations were unsuccessful and HCPL insisted that the HCPL Claim be admitted in full into the CVA.

16. Representatives of the key creditors of the CVA were informed of these developments and that, in the circumstances, the Supervisors' view was that the most appropriate course of action was acceptance of the HCPL Claim in full. The rationale for this view was that, in the light of the advice obtained from AG …, the Supervisors formed the view that if they were to reject or partially reject the HCPL Claim there would be a risk of challenge to this by HCPL, which could result in a lengthy and costly court process requiring the expenditure of funds that would otherwise be available for distribution to creditors of ProMEP pursuant to the CVA."

110. Ms Stubbs, therefore, submitted that Henry's claims were dealt with in the CVA, and at full value, as a matter of expediency and there was no lack of commercial sense in ProMep's claims surviving. Whilst this factual background does support ProMep's position and subjective intentions, it in no sense involves matters that were known to the creditors generally and it is not, in my view, factual evidence that should be taken into account in construing the terms of the CVA.

111. For completeness, I would also add that, as a result of the directions given in the Part 8 proceedings, the parties' positions were pleaded out in the manner of Part 7 proceedings. In its Defence, ProMep referred to the Supervisors' report filed on 7 October 2021 and averred that in that report the Supervisors informed creditors of the prospect that ProMep would, in the future, engage in further litigation against Henry, the proceedings of which would not be caught as assets within the CVA. Henry denied that the report had been provided to creditors. I cannot, in any case, see any basis on which the report could be construed as saying what is alleged by ProMep. The closest is a passage in section 2 which states that "the Company is not currently in a position to fund further litigation" and that is given as a reason for the proposal that the contributions from adjudications and retentions are to be time limited.

112. The evidence of fact was also relied on for ProMep's alternative case that the Supervisors had (i) exercised their discretion under clause 7.3 of the CVA to determine that there was an apparent conflict between clause 8.3 and paragraphs 29 – 31 of the standard terms and/or an ambiguity in and/or lack of clarity in the interplay between these provisions and clauses 8.3; (ii) that on or about 13 June 2022 when they adjudicated upon Henry's proof of debt they did so without assessing ProMep's claims, without applying insolvency set-off and with the intention that there would be no impact on ProMep's claims; and (iii) that in doing so they concluded, again in the exercise of their discretion under rule 7.3, that IR rule 14.25 did not apply. ProMep relied on the e-mail dated 25 May 2022.

113. This alternative case does not arise but, if it did, I would not have determined this issue in ProMep's favour. The e-mail of 25 May 2022 expressed a view on the meaning of clause 8.3 and consistent solicitors' advice on the operation of the set-off. It did not identify a conflict or ambiguity; it did not purport to resolve anything; and, as Henry pointed out, the Supervisors did not report any exercise of discretion.

114. ProMep submitted that objectively there was an exercise of discretion in that e-mail. FRP were aware that ProMep had substantial claims against Henry (in particular from the schedule) only a small proportion of which were the subject of the "smash and grab" adjudications. It is inherently unlikely that in the period of the CVA, the Supervisors had assessed and adjudicated upon all those claims and they did not claim to have done so. It follows that they must objectively have determined any conflict between clause 8.3 and the standard terms in favour, so to speak, of clause 8.3 even if, subjectively, that was because Mr Stevens did not consider there was a conflict. That submission does not hold water. An exercise of discretion necessarily involves a recognition that there is an issue to be decided and a decision on the issue, exercising the relevant discretion. That was not what the 25 May e-mail said or implied.

115. FRP's letter of 28 April 2023 stated expressly that they did not agree with the relevant paragraphs of ProMep's Defence as to the exercise of their discretion. That letter prompted a letter from Henry's solicitors, Archor, to FRP posing various questions. Amongst other things, Archor said:

> "It is our understanding from the documents we have seen that the Supervisors did not seek to exercise a discretion pursuant to clause 7.3 of the CVA. The summary in your letter of the response to HCPL's claim and proof of debt is consistent with that understanding. ProMep has provided no evidence that supports its allegation that the Supervisors considered they were exercising such a discretion. The evidence simply indicates that the Supervisors applied the CVA according to their understanding of the effect of its terms.
>
> If a discretion was exercised by the Supervisors, they were obliged to notify creditors at the next available opportunity in accordance with SIP, paragraph 18(e). ….
>
> Can you please confirm:
>
> *(a)* No notification of the exercise of discretion was given to creditors.
> *(b)* In the course of the CVA the Supervisors did not consider they exercised any discretion pursuant to clause 7.3."

116. A response to that letter was sent by Addleshaw Goddard (on 15 May 2023) on behalf of the (Former) Supervisors. The letter confirmed that the Supervisors did not consider that they exercised any discretion pursuant to clause 7.3 and that, accordingly, no notification had been given to creditors.

117. I note that the letter also stated that, during the time when Henry's claim was considered by the Supervisors, ProMep did not inform the Supervisors of "any ongoing litigation or other claims between them". I do not regard that as contradicting the evidence given to the effect that the Supervisors were made aware that ProMep might bring claims against Henry in the future as it seems to me to refer to litigation underway or claims being pursued at the time.

Lack of mutuality

118. ProMep advanced a further and alternative argument that, even if the insolvency set-off applied, there was no mutuality of dealings which require both parties to owe each other debts in the same right. That absence of mutuality arose, it was said, from the fact that

Henry's claims against ProMep fell to be dealt with in the CVA while ProMep's claims against Henry fell to be dealt with outside the CVA. That does not seem to me to assist ProMep's case because it is simply another aspect of the issue of construction of clause 8.3.

119. It was also submitted that there can be no set-off between different contracts. For that argument, ProMep relied on the provisions of section 110(1A) of the Housing Grants Construction and Regeneration Act 1996 which, in effect, provides that an adequate payment mechanism cannot be one that makes payment conditional on performance of obligations under another contract. ProMep then submitted that the effect was that sums due on different projects lacked mutuality. I cannot see that that contention could be right as it would take construction contracts to which the 1996 Act applied outside the operation of rule 14.25 and that is clearly not the case.

Conclusions

120. Accordingly, and having considered the Part 8 claim, I would not grant the declarations sought by Henry and there is no other reason not to grant summary judgment in respect of the adjudicator's decision.

121. I am aware that on 8 June 2023, very shortly after the conclusion of these hearings, Henry entered into administration. It will be a matter for further argument what consequences flow from that.