Neutral Citation Number: **[2020] EWHC 2740 (Ch)**

Case Number **CR-2017-003729**

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (Ch D)
IN THE MATTER OF PARAGON OFFSHORE PLC (IN LIQUIDATION)
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

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

Date: 19 October 2020

Before :

DEPUTY INSOLVENCY AND COMPANIES COURT JUDGE AGNELLO QC

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B E T W E E N :

(1) NICHOLAS GUY EDWARDS
(2) DAVID PHILIP SODEN
(3) NEVILLE BARRY KAHN

(the Former Administrators of Paragon Offshore plc (in liquidation))

Applicants

And

MICHAEL R. HAMMERSLEY

Respondent

Mr Mark Arnold QC (instructed by Weil Gotshal & Manges (London) LLP) for the Applicants
Mr Michael Hammersley, acting in person

Hearing date: 7 August 2020

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JUDGMENT

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 19 October 2020 at 2 pm.

Introduction

1. On 23 April 2020, 11 May 2020 and 22 May 2020, I heard the application for discharge issued by the Applicants, being the Former Administrators of the above named company. The Respondent to that application was Mr Hammersley. He was joined to the discharge application because he wished to oppose the application of the Former Administrators seeking their discharge. Mr Hammersley objected to the discharge on a number of grounds. On 20 July 2020, judgment was handed down remotely with no attendance. Prior to the judgment being handed down, it was circulated in the usual way and the parties were invited to submit written submissions relating to the issue as to costs. After the draft judgment had been circulated, Mr Hammersley issued an application pursuant to Insolvency Rule 12.59 for the court to review, rescind and/or vary the draft judgment and/or permission to appeal. This application was before me when I dealt with the issue as to costs. It is this application to review, rescind and/or vary the actual order which forms the subject matter of this judgment. No point was taken that essentially the application was made on the basis of a draft judgment rather than an actual order. Mr Mark Arnold QC, who appeared on behalf of the Former Administrators sensibly took no point on this defect of the application. Likewise, I have treated this application as being one made in relation to the order I made on 20 July 2020. Hereinafter, I will refer to this application as the review application.

2. In my order dated 20 July 2020, I directed that the Former Administrators do have their discharge as from 4 pm on 3 August 2020 and that Mr Hammersley do pay the costs of the Former Administrators as from 12 March 2020 to be the subject of a detailed assessment if not agreed. I also handed down on the same date, 20 July 2020, a short judgment relating to the issue on costs which I had determined on the basis of the helpful written submissions from both parties. I also ordered the sum of £116,008.14 plus VAT of £23,201.63 to be paid, on account of costs, by Mr Hammersley by 4 pm on 3 August 2020. Although the review application was before me when I considered the issue of costs, there was at that stage no proposed grounds of appeal or material

upon which I could determine the permission to appeal referred to in the review application. I made this point in the costs judgment and did not deal accordingly with an application for permission to appeal. Despite what is set out in the judgment dated 20 July 2020 relating to costs and which dealt with the inability of me to deal with any proposed application seeking permission to appeal, no further steps were taken by Mr Hammersley in relation to an application for permission to appeal the 20 July 2020 order.

3. Some of the time before me on 7 August 2020 was occupied with whether Mr Hammersley could as at that date, make an application for permission to appeal. After reviewing the relevant provisions in the CPR, I concluded essentially that as at 7 August 2020, Mr Hammersley was out of time to make such an application before me and accordingly such an application would need to be made to an appellate judge. I have no jurisdiction to extend time or hear the application for permission to appeal. I understand that Mr Hammersley has now made the appropriate application to the Appellate Judge.

4. Turning back to the background to the hearing on 7 August 2020, on 28 July 2020, Mr Hammersley issued an application seeking a stay of the 20 July 2020 order (the stay application) and also a wasted costs application, being an application pursuant to Rule 12.59 of the Insolvency Rules seeking a variation of the costs order made on 20 July 2020 and to replace it with a wasted costs order against the Former Administrators (hereinafter referred to as the wasted costs application).

5. On 31 July 2020, after considering the review application, I directed that it be listed before me for directions on 7 August 2020. Having considered the stay application of Mr Hammersley, the submissions of the Former Administrators dated 31 July 2020 and Mr Hammersley's reply submissions dated 31 July 2020, I directed that the date for the payment of the costs on account by Mr Hamersley be varied to 4 pm on 7 August 2020 but that the date for the discharge of the Former Administrators remain as in my order dated 20 July 2020. Pursuant to my directions, the Former Administrators thereafter confirmed that they did not oppose the short extension I had made to the date for payment of the costs order. However, it seemed to me that the stay application issued by Mr Hammersley contained no real justification for why the Former Administrators could not be discharged on the date set out in the 20 July 2020 order. Any potential

appeal or review from the order of 20 July 2020 did not itself mean that the discharge date should await the outcome of either of those processes. The Former Administrators are experienced licenced insolvency practitioners who are officers of the court. There is no reason to consider, on the evidence before me, that any stay of their discharge as the Former Administrators is necessary. Accordingly, I did not accede to any stay application in relation to the date of discharge for the Former Administrators set out in my order dated 20 July 2020. I did vary the date for the costs order as set out above.

6. On 5 August 2020, after correspondence between the parties, the Former Administrators issued an application seeking a dismissal or a stay of the review application and the wasted costs application, or alternatively that those applications be stayed unless and until Mr Hammersley made payment of account of the outstanding sum owing in costs. I will deal with the Former Administrators' stay application after I have dealt with the dismissal application. In relation to the stay application, during the hearing, Mr Hammersley wanted to raise the issue of his inability to pay the costs order with the consequence of any stay having the effect of stifling his review and wasted costs applications. I therefore directed that Mr Hammersley should file any evidence in support of that submission (there being none before me) and also gave directions for a reply from the Former Administrators to such evidence.

7. On 5 August 2020, Mr Hammersley also issued an application pursuant to rule 14.11 of the Insolvency Rules seeking to appeal the proof of the 'Loan Note Instrument' dated 18 July 2017. This application was foreshadowed in his opposition to the discharge application. However, although I did consider its contents as part of Mr Hammersley's submissions, I do not deal with it in this judgment. The Former Administrators have not had an opportunity to consider it and reply to it.

The applications dealt with in this judgment

8. In summary this judgment deals with:-

(1) the Former Administrators' dismissal application in relation to the review and wasted costs applications;

(2) the Former Administrators' stay application relating to the review and wasted costs application;

(3) any necessary directions in relation to the review as a result of the determinations made on (1) and (2) above; and
(4) remaining issues relating to the limited stay of the costs order I made on 7 August 2020.

The rule 12.59 application – general legal principles

9. This rule provides as follows, 'Every Court having jurisdiction for the purposes of parts 1 to 7 of the Act and the corresponding parts of these Rules may review, rescind or vary any order made by it in exercise of that jurisdiction'. This 'review' jurisdiction has been the subject of numerous cases. In particular, whilst a very wide discretion exists, case law had set out principles relating to the exercise of this discretion under the insolvency jurisdiction. In the recent case of *Discovery (Northampton) Ltd v Debenhams Retail Ltd [2020] EWHC 260,* Sir Alastair Norris, siting as a High Court Judge, summarised the principles applicable to the exercise of this jurisdiction. The review application in that case sought a review of the declaration made by the Judge that the CVA, which had been approved by the creditors in relation Debenhams, was valid. Between the handing down of the judgment and the review application, another judgment which dealt with the ability of CVAs and/or schemes of arrangement to alter the rights of landlord as landlords rather than as creditors had been handed down. In determining that review application, the learned Judge summarised the principles relating to the exercise of rule 12.59 application as follows (paragraph 11):-

> 'In my view the principles material to an application to the judge who made the original order are these:-
>
> a) The rule (like its predecessor) confers a discretion expressed in completely general terms: *Re Calmex (1988) 4 BCC 761 at 762 col. 2.*
>
> b) The application of IR12.59 is informed by the principles upon which section 375 IA1986 is applied. Both extend over a wide field and the factors relevant to the exercise of the discretion will vary according to the character of the order sought to be rescinded or varied: *Re a Debtor [1993]1 WLR 314 at 318E* and 320B.
>
> c) In the nature of things the power will not be routinely or frequently exercised, but only with caution and in "special" or "exceptional" circumstances: *Fitch v Official Receiver [1996] 1 WLR 242 at 249A*.

d) The exercise of the power should be confined to cases in which there has been some change in circumstances since the original decision was made (including, perhaps, the consideration of material not previously before the Court): *Mond v Hammond Suddards [2000] Ch 40 at 49E-F*.

e) The jurisdiction to review is not intended to enable the unsuccessful party to have a second attempt to convince the Court of its case: *Re 38 Building Ltd [2000] BCC 422 at 425H*. '

10. I would add to this that the jurisdiction is separate and distinct from the appellate jurisdiction. As in this case, applications can be made to review an order as well as seeking to appeal the same. Mr Hammersley also seeks permission to appeal, although that application will need to be made to the appellate judge. The review jurisdiction is not a substitute or a replacement or indeed an alternative to the appellate jurisdiction which exists, subject to permission being granted, in relation to orders made by Insolvency and Companies Court Judges. The review jurisdiction is clearly distinct and not to be used in cases where what is in reality being sought, is the exercise of an appellate jurisdiction. It is, as the summary sets out above, a jurisdiction which is to be used sparingly, restricted to 'special' or 'exceptional' circumstances in existence.

11. Furthermore, as is succinctly set out by the learned Judge, in the *Debenhams* case, the jurisdiction does not allow for a re run of the case itself even in cases where fresh material is put forward or further arguments. At paragraph 13(c) the learned Judge stated,

'The review jurisdiction does not exist to enable a party either to re-run arguments that were unsuccessful at the original hearing or to advance, for the first time, arguments that were either overlooked or were not thought to have a sufficient prospect of success to be run at the original hearing. Mr Bayfield QC drew attention to a phrase used by Laddie J in *Papanicola v Humphreys [2005] EWHC 335 (Ch)* where (at [34]) he suggested that the equivalent of the IR12.59 jurisdiction might be exercised if there was "some substantial new material or argument which justifies the Court changing its mind". The *obiter* observation that "a new argument" would suffice does not stand in the mainstream of the decisions. Although the review jurisdiction is unique to insolvency, hearings in insolvency matters share with general civil litigation the principle memorably summarised by Lewison LJ: they are not dress rehearsals but the first and only night of the show.'

The review application of Mr Hammersley

12. Before setting out in summary the grounds of Mr Hammersley's review application, it is useful to briefly summarise the grounds of objection which were considered by me and dismissed in my judgment dated 20 July 2020. Reference needs to be made to my judgment dated 20 July 2020 for my fuller consideration and determination of the objections raised. The purpose of summarising them here is so as to be able to consider the points raised by Mr Arnold in his dismissal application on behalf of the Former Administrators. Do the grounds raised by Mr Hammersley essentially fall under the category of being an attempt to re run the same arguments, albeit with some further documents, all of which were in existence at the dates of the previous hearings?

Summary of relevant facts and grounds

13. Paragon Offshore Plc ('Paragon') is the head of a corporate group which was placed into administration by order of this court on 23 May 2017. Prior to the administration order being made, Paragon had sought and obtained Chapter 11 protection at the US Bankruptcy Court in Delaware. The Fifth Plan was filed with the US Bankruptcy Court on 2 May 2017. That Plan did not envisage any distribution to shareholders. According to the evidence filed before the US Bankruptcy Judge, Judge Sontchi, Paragon was heavily insolvent. This was the determination made by Judge Sontchi. The evidence as to the insolvency of Paragon was also before me.

14. The terms of the Fifth Plan necessitated, as part of complex, but not unusual debt for equity swap, the creation of a Newco (Reorganised Paragon) which would hold Paragon's interest in, among other companies, the Prospector Group, being Prospector Offshore Drilling SA and its operating subsidiaries. The Fifth Plan also included a rationalisation of intercompany liabilities, allowing for their reduction. These reduced claims would be transferred to Reorganised Paragon by means of a Loan Note Instrument. The terms of the Fifth Plan were before Mrs Justice Rose, as she then was, on 23 May 2017. The Judge considered the application as well as the written representations made by Mr Hammersley objecting to the administration order being made. The administration order was made on that date and there has been no appeal from that order. In order for the Court to be able to make an administration order, it

needs to be satisfied that the company is insolvent and unable to pay its debts (see paragraph 11 (a) of Schedule B1 of the Insolvency Act 1986). I have dealt in some detail in my judgment with the evidence which exists of the liabilities of Paragon, the documents relied upon establishing those liabilities and the terms of the Fifth Plan. As I stated in my judgment, the learned Judge who made the administration order was satisfied that Paragon was insolvent. As there has been no appeal from the administration order, as I stated in my judgment, I am not entitled to go behind that order. That remains the position and is, in my judgment, a compelling reason to dismiss the review application.

15. Despite my finding that the issue of insolvency had been effectively dealt with by the making of the administration order on 23 May 2017, in my judgment of 20 July 2020, I did consider the evidence which had been presented before the Judge at the hearing on 23 May 2017. This evidence was also before Judge Sontchi in the US Bankruptcy proceedings who was also satisfied that Paragon was insolvent. Mr Hammersley participated in those hearings and I have quoted passages in my judgment demonstrating the rejection by Judge Sontchi of the submission made by Mr Hammersley that effectively Paragon was solvent. This is the reason that the Judge refused to appoint an equity committee. The evidence before me also clearly established that the Prospector Group was a subsidiary of Paragon. This meant, as again is set out in my judgment, that this Paragon asset was available for realisation for the benefit of its creditors by reason of the insolvency of Paragon. The terms of the Fifth Plan set out that Paragon's interest in the Prospector Group would be transferred to Reorganised Paragon. This was part of the debt for equity swap.

16. As set out and explained in the evidence before me at the earlier hearings, the shares in the Prospector Group had been pledged. Certain of the rigs operated by the Prospector subsidiaries were leased pursuant to sale and leaseback agreements. The necessary consents of the pledgee and lessors had not been obtained by the time of the proposed UK Sale, so a modified Fifth Plan was thereafter presented to Judge Sontchi at a hearing on 17 July 2017. The modifications enabled a management agreement to be entered into which would enable Reorganised Paragon to manage the Prospector assets and enjoy the same economic benefits it would otherwise have enjoyed if the transfer of the Prospector Group shares had taken place. The UK Sale was effected but

excluding the Prospector Group. Paragon and its Prospector subsidiaries thereafter sought fresh Chapter 11 protection as against the threat of pledgee/lessor enforcement. Prospector had not been a party to the first Chapter 11 proceedings. This new Chapter 11 proceeding went before Judge Sontchi on 3 November 2017. Mr Hammersley again objected and sought the appointment of an equity committee in these proceedings. He also filed a motion to revoke the order authorising the modification of the Fifth Plan. The Judge dismissed all his objections. Thereafter, a settlement agreement was entered into between the pledgee/lessor who thereby consented to the transfer of the Prospector shares. This settlement agreement was approved by Judge Sontchi on 5 March 2018 and the second Chapter 11 proceedings were then dismissed.

17. Thereafter, the Prospector transfer to Reorganised Paragon was effected by the Former Administrators on 26 March 2018. The consideration for this transfer, as was envisaged in the Fifth Plan, was the release of US$191 million of the unsecured debt owed by Paragon to Reorganised Paragon. This was part of the Fifth Plan and was dealt with in its terms as well as being reflected in the UK Implementation Agreement. In their final progress report dated 15 May 2019, the Former Administrators gave notice of the move of Paragon from administration to creditors voluntary liquidation. The Former Administrators became the joint liquidators. The application before me dated 27 February 2020 applied for their discharge as Administrators pursuant to paragraph 98(2)(c) of Schedule B1 of the Insolvency Act 1986. I granted the discharge after considering and dismissing the grounds raised by Mr Hammersley in opposition to the discharge application. I refer to the judgment dated 20 July 2020 for the definitions of the various loan documents and other terms set out above and below in so far as necessary.

18. The grounds raised by Mr Hammersley to the discharge application are summarised as follows,

(1) Paragon was not insolvent as at the date that the administration order was made on 23 May 2017;

(2) that Paragon had US $810 million in cash and it was not liable for the debts of the Restricted Subsidiaries;

(3) that no honest director would abuse insolvency proceedings of another sovereign state to prevent shareholders from exercising their rights or conclude that distributing US$600-700 million in cash was in the best interests of Paragon parent;

(4) the exclusive jurisdiction clause in favour of this Court shows that the post confirmation proceedings initiated by Mr Soden (one of the Former Administrators) in the United States are invalid;

(5) the validity of the Loan Note instrument (rule 14.11 type application) ;

(6) The Noble claims;

(7) the alleged fraudulent conduct allegations

These grounds were dealt with by me in my judgment dated 20 July 2020 in some detail and reference needs to be made to that judgment in relation thereto. In particular, I do not propose to set out herein the descriptions and definitions of the various loan, security and other documentation. Their descriptions and definitions are set out in my judgment dated 20 July 2020.

19. In the review application, Mr Hammersley relies on the following as being grounds for the review:-

(1) that the creditors did not have a claim against Paragon or all its assets. He relies upon the fact that the Guaranty and Collateral Agreement conferred security over certain of its assets but not all of them. In particular Mr Hammersley relies on that agreement not extending to Paragon's own equity or to its Prospector subsidiaries. Mr Hammersley also argues that Paragon had no personal liability to creditors under the Term Loan Agreement, the Revolving Credit Agreement or the Guaranty and Collateral Agreement;

(2) Under section 114(d) of the US Bankruptcy Code, Paragon was discharged from its intercompany liabilities, being the claims underlying the Loan Note Instrument. This argument is despite, as I considered in my judgment, the express terms of the Fifth Plan, as confirmed by the US Bankruptcy Court which clearly stipulate that the intercompany liabilities are unimpaired by the Fifth Plan. The Plan states that the intercompany debts would be paid, adjusted, continued, settled, reinstated, discharged, eliminated or otherwise managed such that the intercompany debt outstanding as at the effective date would be an amount owed to Reorganised Paragon. (see paragraphs 16 and 25 of my judgment dated 20 July 2020);

(3) Mr Hammersley asserts that there is fresh evidence now before me establishing that his claim as against the Former Administrators ought to he tried. Mr Hammersley asserts that Reorganised Paragon has been forced to accept that his claims are valid and this could have a material effect on its operations.

The dismissal application

20. Although this application was not issued until 5 August 2020, it had been canvassed in correspondence from Messrs Weil, Gotshal & Manches (London) LLP, solicitors acting on behalf of the Former Administrators. In a letter dated 31 July 2020, Mr Hammersley was invited to accept that there was no merit in his applications (being the review and wasted costs applications) and to agree to withdraw them. The letter stated that unless Mr Hammersley withdrew the applications by 4 pm on 5 August 2020, the Former Administrators would apply before me on 7 August 2020 for orders dismissing the review and the wasted costs applications. In relation to the applications, the letter asserted that the review application did not meet the test applied in relation to applications for review as it was essentially an attempt to re run the original arguments which had been put forward by Mr Hammersley. The letter also stated that as an alternative, an application would be made seeking a stay of the applications pursuant to CPR 3.1(2)(f) until the costs order of 20 July 2020 was complied with. As Mr Hammersley did not withdraw the applications, the notice of application seeking dismissal or a stay was issued by the Former Administrators and is before me.

21. Before me, Mr Hammersley did not seek an adjournment on the basis that he needed further time to deal with the dismissal application. I asked him that question during the hearing. He did say that he had expected to deal with directions relating to the review and the wasted costs application before me. He filed his skeleton argument and invited me to give directions. His skeleton argument submits that this is a matter appropriate for a review application. He submits that the grounds of the review application need to be dealt with and therefore it is not appropriate to dismiss the application without it being heard substantially. I will deal with his submissions once I have set out the grounds relied upon by the Former Administrators.

22. Mr Arnold invites me to dismiss the review application on the basis that the grounds raised by Mr Hammersley are essentially his attempt to re run arguments which

were before me and failed. He submits that the application demonstrates no change of circumstance and is an attempt to re run the issues before me. It is clear that I have the jurisdiction to dismiss the review application rather than allowing it to progress and to give directions. This is clear as well from the judgment in *Debenhams* where the Judge also considered and dismissed the review application made in that case in a summary procedure rather than at a full hearing.

23. I will consider each ground below in order to assess whether it is capable of meeting the principles set down relating to the review jurisdiction. I will also consider Mr Hammersley's submissions.

(1) The creditors did not have a claim as against Paragon or its assets.

24. Essentially this ground of Mr Hammersley relies upon him arguing that Paragon was not liable to creditors under the relevant loan documentation which was in evidence before me, namely the Term Loan Agreement, the Revolving Credit Agreement or the Guaranty and Collateral Agreement. Mr Hammersley also asserted that under the terms of the Guaranty and Collateral Agreement, the security granted under that agreement did not extend to Paragon's own equity or to its Prospector subsidiaries.

25. As submitted by Mr Arnold, the first ground of Mr Hammersley's review application is essentially a solvency argument. In particular, Mr Hammersley criticises the judgment for failing to deal with what he considers are important arguments he raised relating to the Prospector Group not being the subject of certain security documentation. Mr Arnold submits that the arguments raised by Mr Hammersley all really relate to the issue of insolvency and this was dealt with in my judgment in paragraphs 11-17 and 34-42.

26. Mr Hammersley submits that I cannot know whether the review application has a reasonable prospect of success until I consider the arguments and evidence contained therein. In my judgment this approach by Mr Hammersley effectively ignores the exceptional basis of the review application. It is not to be used to re run arguments which were already made before. In considering the review application before me, I have considered its contents and grounds carefully. I have considered whether what is raised by Mr Hammersley constitutes a change of circumstances. Has something

changed since the date of the original hearing so that it is appropriate for me to exercise this exceptional jurisdiction?

27. In my judgment, these arguments of Mr Hammersley were all before me at the earlier hearings. As I set out in my judgment dated 20 July 2020, I determined that based on the evidence before me, it was clear that Paragon was insolvent. I considered that there had been no appeal from the order of Mrs Justice Rose on 23 May 2017. I went on, in any event, to consider the evidence of insolvency which was before her. I also considered the judgments of Judge Sontchi dealing with the issue of insolvency. The insolvency of Paragon was before Judge Sontchi on several occasions. In his submissions, Mr Hammersley argued that I did not deal with his point in relation to the Prospector Group being, he submits not subject to the Guaranty and Term Loan Agreement. However as explained by both Judge Sontchi in his judgment and also as accepted and dealt with by me in my judgment, the key issue is that of insolvency. Having considered carefully the evidence before Mrs Justice Rose on 23 May 2017, having also considered the judgments of Judge Sontchi and also having considered the points made by Mr Hammersley (which included the one he seeks to make now), I determined that the evidence demonstrated that Paragon was insolvent as at the date it entered administration. The effect of this is that all of the company's assets are available to meet the claims of creditors of Paragon.

28. Accordingly, even if Mr Hammersley successfully argues that the Prospector Group is not subject to certain security documentation, the Prospector Group is a wholly owned subsidiary of Paragon. It is an asset belonging to Paragon and therefore it was part of the assets available for distribution to the creditors. In my judgment Mr Hammersley is merely seeking to re run the insolvency argument. His emphasis in relation to the Prospector Group is merely part of the insolvency argument which I heard and which I held against him. In my judgment Mr Arnold is correct in his submission that Mr Hammersley is seeking to re run arguments. Mr Hammersley has presented no change in circumstances and none is identified in his evidence relating to this point. The court does not review its orders merely because the applicant seeks to run the same arguments but perhaps presented in what it perceives will be a more attractive manner. In so far as Mr Hammersley seeks to persuade me that I failed to deal with his point and that his arguments are such that I misdirected myself in holding that

Paragon was insolvent, this is an appellate point. Mr Hammersley's real point here, would be an appeal point. As the passage I have quoted above from *Debenhams* makes clear, the review jurisdiction is not an appellate jurisdiction and should not be used to seek to re run arguments.

(2) The discharge of the intercompany liabilities

29. Mr Hammersley's second argument relates to the intercompany liabilities. As my brief summary set out above, in my judgment dated 20 July 2020, I held that these intercompany liabilities were not discharged under the terms of the Fifth Plan. Before me, Mr Hammersley sought to argue that I was effectively incorrect in this determination. In his review application evidence, he referred to section 1141(d) of the US Bankruptcy Code, asserting that pursuant to that provision, Paragon was discharged from its intercompany liabilities, being the claims underlying the Loan Note Instrument. Mr Arnold submitted that despite the extensive reference by Mr Hammersley (as well as reliance on this provision), the opening words of this section are as follows, 'except as otherwise provided in this subsection in the plan, or in the order confirming the plan, the confirmation of a plan-…'

30. In my judgment, this ground of Mr Hammersley is another attempt to re run an argument before me. The reference to section 1141(d), to section 1141(d)(1)(A) and to various US authorities does not in my judgment entitle Mr Hammersley to 'have another go' at running his arguments before me. I specifically dealt with these issues at paragraphs 51 and 52 of my judgment dated 20 July 2020. Mr Hammersley does not really explain why the materials he now seeks to rely upon to re run his argument were not before me at the hearings. The materials date, as submitted by Mr Arnold, from the confirmation hearings in the US in June 2017. Mr Hammersley seeks to rely upon further provisions of the US Bankruptcy Code and documents which were before the US Court. At no stage did Mr Hammersley seek and obtain permission to rely upon expert evidence. There was no expert evidence provided in relation to US Bankruptcy law. I did however consider the provisions which he sought to rely upon before me during the hearings on 23 April, 11 and 22 May 2020. I noted that despite having the documents and provisions being relied upon now before me by Mr Hammersley, Judge Sontchi approved the Fifth Plan. This clearly states, as I have set out above and in my judgment dated 20 July 2020, that the intercompany liabilities are not discharged.

31. Mr Arnold submits that the materials which Mr Hammersley now seeks to rely upon are not evidence which actually assists his arguments. Mr Hammersley seeks to argue, as part of his review application, that the intercompany liabilities were discharged. His reliance now for this is Section 1141(d). The Memorandum of Law (being the Memorandum of Law in Support of Confirmation of Fifth Joint Chapter 11 Plan of Paragon Offshore PLC and its Affiliated Debtors dated 5 June 2017) exhibited to Mr Hammersley's application contains legal submission relating to section 1141(d)(3), but it does not actually assert that the position relating to the intercompany liabilities under the Fifth Plan is that these were discharged or that they stand discharged by reason of section 1141(d). In fact, as pointed out by Mr Arnold, the Memorandum makes a specific reference to the proposed treatment of claims as set out in clause 4 of the Fifth Plan and notes that the intercompany claims were unimpaired.

32. The other document now relied upon in relation to the alleged discharge of the intercompany liabilities relates, as does the Memorandum of Law referred to above, to the applicability of section 1141(d)(3) to liquidating debtors. This document, called the Osmun document (being the Declaration of Thomas B Osmun in support of Confirmation of the Fifth Joint Chapter 11 Plan of Paragon Offshore PLC and its Affiliated Debtors dated 5 June 2017) is also a document which was already in existence at the time of the hearings before me. It raises the same point as the Memorandum of Law, namely the objection raised by the US Trustee by reference to section 1143(d)(3). This document is also not dealing expressly with the intercompany claims. Upon considering its contents, this document also states on a number of occasions, that the intercompany claims are to be unimpaired.

33. In my judgment, these materials and the arguments of Mr Hammersley do not justify a review of the discharge order which I made. In my judgment, the material which Mr Hammersley now seeks to rely upon does not constitute a change of circumstance such that the exceptional jurisdiction is capable of being exercised. As set out above, the documents do not actually support the argument of Mr Hammersley as both refer to the non-impairment of the intercompany claims in the Fifth Plan. Ultimately, this remains the same argument which was before me at the hearings, namely that Mr Hammersley argues that the entirety of the intercompany liabilities

were discharged. Mr Hammersley is really seeking to argue that I was incorrect in my conclusion relating to the intercompany liabilities. That is an appeal point and the new material does not appear to me to detract from this being an attempt by Mr Hammersley to re run his argument in this respect. As Mr Arnold submits and I agree, the new materials take this argument no further. Again, I dismiss this ground. It does not fall under the exceptional jurisdiction.

(3) Fresh evidence that demonstrates that Mr Hammersley's claim against the Former Administrators ought to be tried.

34. Mr Hammersley relies upon a document, being a filing at the US Securities and Exchange Commission, Form 20-F. This document refers to the Former Administrators needing to call upon a litigation fund to finance legal costs in relation to the challenge which had been made to the discharge application. The document goes on to make the point that in the event that the Former Administrators present a claim under the indemnities in existence, the business and financial condition of the company could be adversely affected. Mr Arnold submits that this document cannot be read as constituting any acceptance that Mr Hammersley has a claim in relation to the shares, or indeed that he has any valid claim in relation the Prospector Group. I agree. Although this document was not before me at the hearings in April and May 2020, it does not, in my judgment, set out any admission that Mr Hammersley's claim is accepted. It does not in my judgment provide any support to Mr Hammersley's argument that his clam ought to be tried. Before me in April and May 2020, there was no evidence of any misfeasance claim against the Former Administrators. No such claim had been issued as against the Former Administrators and indeed the discharge of the Former Administrators does not prevent the issue of such a claim, if one exists and has merit. The difference is that any such claimant would require permission of the Court to bring such a claim pursuant to paragraph 75 of Schedule B1 of the Insolvency Act 1986. I covered this in my judgment dated 20 July 2020. Although Mr Hammersley argues that he has a claim as against the Former Administrators, no such claim has actually been issued, or even set out in draft with the necessary particulars for it to be capable of assessment. Mr Hammersley seeks to argue as part of his review application that he has now fresh evidence in support of his 'claim'. In my judgment, Mr Hammersley is again attempting to re run his arguments before me on this ground. There is no evidence of a change in circumstances

and this document does not provide, for the reasons set out above, any evidence of any change in circumstances. The document merely indicates a potential claim under indemnities which is a long way from any admission relating to a claim being made by Mr Hammersley. There is no justification for exercising the exceptional jurisdiction of rule 12.59.

35. It remains the case that the determination by me relating to the significant insolvency position of Paragon defeats in my judgment attempts by Mr Hammersley to assert that a claim relating to the Prospector Group is valid or should be tried. I have dealt with this in my judgment. Mr Hammersley also seeks to rely on this evidence in relation to a valuation issue. Mr Hammersley alleged before me during the hearings on 23 April, 11 and 22 May 2020, that there was a transfer of cash out of Paragon. He attempts to re run this argument as part of his review application relying on his further evidence set out above. Again, this is an attempt to re-run arguments which failed before me at the hearings. I dealt with the valuation issues raised by Mr Hammersley in paragraphs 30, 38, 41-42, 43-45 of my judgment. Mr Hammersley raised in his arguments before me at the original hearing the issue of what he considered was a missing sum of $810 million (or a reduced sum between $600-700 million). The issue of there being more sums available in Paragon had also been raised before Judge Sontchi and dismissed. However, ultimately, this issue is linked to the insolvency point which Mr Hammersley raises as his first ground in his review application. In my judgment, this is another attempt by Mr Hammersley to seek to re run his valuation argument. The document relied upon now by Mr Hammersley does not, for the reasons set out above, demonstrate any admission as to any liability for a claim brought or made by Mr Hammersley. As such there is no change of circumstances in relation to these arguments. As with the other grounds raised by Mr Hammersley, I am satisfied that this ground of the review application should be dismissed. Accordingly, I dismiss the review application on the grounds set out above in my analysis of the grounds raised therein.

The wasted costs application

36. The wasted costs application is also pursuant to rule 12.59. It seeks a review and a variation of the costs order made against Mr Hammersley by my order dated 20 July 2020. The application also seeks a wasted costs order against the Former

Administrators. Mr Hammersley seeks to rely upon the same documents which he relied upon in relation to his review application which I have dealt with above and determined stands to be dismissed. Before making the costs order, I considered the written submissions made by the parties. I also delivered a judgment relating to the issue as to costs. The costs order made was in the exercise of my discretion. Mr Hammersley relies upon documents and grounds relating to his review application in support of a different costs order than the one I made. The same points which I have made above in relation to the review application are in my judgment equally applicable here. Mr Hammersley is in my judgment attempting to re run his arguments as to why the costs order I made should be varied and/or changed. His reliance upon two further documents do not in my judgment allow him to re run the arguments. There is no change in circumstance and this application relating to costs order does not fall within the exceptional jurisdiction of rule 12.59. As I have already set out above, the review jurisdiction is not to be confused with the appellate jurisdiction. As I have determined that Mr Hammersley's review application stands to be dismissed, then in my judgment his wasted costs application is also to be dismissed.

The alternative stay application sought by the Former Administrators

37. As I have determined that the review application and the wasted costs application stand to be dismissed, I turn to the alternative stay application. This claim was raised as an alternative by the Former Administrators to the dismissal application which has succeeded. However, this alternative application sought an order pursuant to CPR 3.1(2)(f) as applied by rule 12.1 of the Insolvency Rules, seeking that the review application, the wasted costs application, 'and any other application as may be issued by the Respondent in relation to the Former Administrators and/or Company be stayed unless and until the Respondent makes payment on account of costs of the Former Administrators...'

38. The stay application, which is raised by way of an alternative to the dismissal application, is to an extent wider than the ambit of the dismissal application. An order under this alternative relief would cover the rule 14.11 application as well as any potential misfeasance claim or any other application which is referred to by Mr Hammersley in his written submissions dated 21 August 2020.

39. I did consider the further evidence submitted by Mr Hammersley, being a witness statement dated 21 August 2020 as well as his further written submissions. In reply, the Former Administrators filed submissions relating to the further evidence and submissions which had been filed by Mr Hammersley on 21 August 2020.

40. The relevant authorities in this area consist of the Supreme Court case of *Goldtrail Travel Ltd (in Liquidation) v Onur Air Tasimacilik AS [2017] UKSC 57* and the Court of Appeal case of *In Gama Aviation (UK) Ltd v Taleveras Petroleum Trading DMCC [2019] EWCA Civ 119*. The factors which are to be considered by the Court are (1) that the underlying claim subject to the stifling has a real prospect of success, (2) that it would not be possible for the party to comply with an order for payment into court or the provisions of equivalent security, (3) that there are not any funds which can be advanced by a closely associated person; (4) that the evidence of means adduced shows the party cannot pay, and(5) that the party has acted in good faith.

41. Clearly the underlying claim of the review and wasted costs applications have no prospects because they stand to be dismissed. Currently in so far as the underlying claim is said to be the rule 14.11 claim or an alleged misfeasance claim, then these were not before me. The rule 14.11 claim was issued shortly before the hearing on 7 August 2020. In his latest submission, Mr Hammersley refers to an amended application which is also not before me. In relation to an alleged misfeasance claim, as I stated in my judgment dated 20 July 2020, no alleged misfeasance claim has been issued to date. This statement should not be taken as expressing any opinion of the merits or otherwise of any misfeasance claim, or indeed be taken as any sort of invitation for any such misfeasance claim to be issued. In so far as the Former Administrators have now been discharged any such misfeasance claim would require permission of the Court to be issued.

42. As the stay application is raised as an alternative to the dismissal application, I will make no order in relation to the same. I will however adjourn this part of the application generally, giving the Former Administrators permission to restore the same at a later date.

The limited stay on the costs order of 20 July 2020

43. At the end of the hearing before me on 7 August 2020, I determined to extend the stay relating to the payment due by Mr Hammersley of the costs on account. As varied, these costs fell due to be paid by 4 pm on 7 August 2020. I considered that the stay should remain in place until I was in a position to deliver this judgment. As I have determined to dismiss both the review application and the wasted costs application of Mr Hammersley, the limited stay granted on 7 August 2020 will not continue beyond the date to be fixed for the hand down of this judgment.

Dated