Case No: BR-2017-001014

Neutral Citation Number: **[2022] EWHC 32 (Ch)**

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

Date: 22/12/2021

Before:

CHIEF INSOLVENCY AND COMPANIES COURT JUDGE

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Between:

MARCO MAXIMILIAN ELSER	**Applicant**
- and -	
(1) MARK SANDS **(as chairman of the meeting of creditors/joint nominee/joint supervisor of the voluntary arrangement in respect of Rory McCarthy)** **(2) SEAN BUCKNALL** **(as joint nominee/joint supervisor of the voluntary arrangement in respect of Rory McCarthy)**	**Respondents**
(3) RORY MCCARTHY	
(4) JAMIE BOND	
(5) CHRIS JONNS	
(6) OBN INVESTMENTS LTD	
(7) MAXINE REID-ROBERTS (as joint supervisor of the voluntary arrangement of the Third Respondent)	

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Mr T Robinson (instructed by **Isadore Goldman**) for the **Applicant**

Mr John Briggs (instructed by **Irwin Mitchell**) for the **First, Second and Seventh Respondents**

Mr McCarthy and Mr Bond acting in person

Hearing dates: 18, 20, 21 October 2021 and 16 December 2021

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Approved Judgment

COVID-19: This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII and other websites. The date and time for hand-down is deemed to be 16:00 hrs on 10 January 2022

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Chief ICC Judge Briggs:

Introduction

1. This is the trial of an application to set aside a chairman's decision to allow three creditors to vote at a meeting held for the purpose of approving a voluntary arrangement for Rory McCarthy on 3 December 2018 ("December 18 Meeting").

2. At the time of the December 18 Meeting Mr McCarthy was an undischarged bankrupt.

3. He was adjudged bankrupt on 13 March 2018 following a failed attempt to obtain an adjournment and an interim order to put proposals to creditors. Mr Ian Robert of Moore Kingston Smith was appointed trustee in bankruptcy on 23 March 2018 ("TIB"). The failed attempt to obtain an interim order is of minor relevance but the proposal drafted for the purpose of securing an adjournment has featured in this challenge. The proposal was drafted by John Paylor of Guardian Business Recovery, who has not given evidence and is not a party to these proceedings.

Mr McCarthy

4. Mr McCarthy worked as an investment banker from 1984 to 1992. Using the knowledge and skills he had obtained he established a conglomerate that included four joint ventures with the Virgin Group and was a financial backer of the Wagamama restaurant group in which he held a sizeable interest. He explains: "unfortunately I sold my shares too early, [and] prior to the sale of the business for £250 million." Regardless of his expressed view he was fortunate enough to be involved in the successful enterprise, receive considerable financial reward on the sale of his shareholding and, according to his own evidence, the success assisted

in strengthening his reputation in venture capital. Indeed, no other enterprise has born such fruit for him since. He tried to replicate the success he found in the restaurant business and opened a sushi restaurant in Chelsea known as "the Kiru". He says:

> "Trading was slow to start with and from commencement of the project we suffered delays including numerous building and redesign issues costing around £3.2million. However, sales eventually optimised in the region of £120,000 per month. Despite high turnover, the initial costs budget was exceeded and the business began making a loss each month. I injected further capital into the business totalling £5million, by selling or borrowing against my own assets, which included the re-mortgaging of land owned by me (later sold by LPA receivers due to default), entering into lease agreements on my possessions, cashing in my pension policy and seeking outside investment. Matters took a turn for the worse when in August 2017 the entire kitchen team walked out to join a rival restaurant, leading to the immediate closure of the restaurant. The company ultimately reopened under license as Chelsea Sushi company, however the decision was taken in December 2018, to close for good."

5. None of this evidence is challenged. At the December 18 Meeting Mr McCarthy was expressly asked about the debt arising from the Chelsea Sushi company, who was running the restaurant and the purchase of debt. The evidence given by Mr McCarthy at the meeting is not easy to follow. I discern the following from a transcript of the December 18 Meeting:

   5.1. Mr McCarthy lent money to a limited company.

   5.2. The limited company traded as Kiru but has become known as theChelsea Sushi company in these proceedings;

   5.3. The Chelsea Sushi company held a lease of the premises from which it traded from a higher-ranking leaseholder or direct from the freeholder;

5.4. The company the senior leaseholder or freeholder entered administration;

5.5. Mr McCarthy borrowed £750,000 from John Paul Dejoria for the purpose of purchasing a debt owed by the Chelsea Sushi company to the leaseholder/freeholder in administration;

5.6. No record of the loan has been produced in these proceedings but that is not surprising since it is not a loan that has been challenged;

5.7. Prior to insolvency the debt had a value of £2.1m;

5.8. In addition to being the lender of £750,000 Mr Dejoria was an original investor in the Chelsea Sushi company. He was interested in obtaining a return;

5.9. To this end he purchased the leaseholder company out of administration and was to take a 50% interest in the restaurant business.

6. The above description of a business that was important to Mr McCarthy is not untypical of his general business affairs. It was not straight forward. When the affairs are not straight forward there is a greater need to keep records. The lack of records has made explaining and demonstrating the truth of the explanations to a third party such as his trustee in bankruptcy and the Applicant, a difficult task. The lack of record has therefore made the task of the Chairman, Mr Sands, difficult and helps explain why he took considerable time to produce proposals for creditors.

7. Creditors took the opportunity to ask questions of Mr McCarthy at the December 18 Meeting. I am not convinced that they were better informed having heard the responses.

8. The affairs of the Chelsea Sushi company also gives an example of Mr McCarthy's modus operandi. Detail is not a strong characteristic of Mr McCarthy. Neither is keeping a paper trail or any clear record. Given his background it is somewhat surprising that very few of his dealings with investors or lenders were reduced to writing.

9. In my judgment Mr McCarthy is endowed with charm and tenacity. There is little doubt that those who had business dealings with him did so based on trust he engendered in them. Although he has been subjected to many criticisms for failing to keep records, he does not face allegations of dishonesty in these proceedings.

10. The ability to raise large sums of money without records or proper records immediately strikes the lawyer or professional as suspicious. Nevertheless, borrowing without written record is not unheard of or even, anecdotally, uncommon. I shall have the characteristics I mention in mind when determining the appeal against the admission and/or quantum of the three proofs of debt.

11. Mr McCarthy has tried other ventures. This resulted in an increase debt to investors/lenders. He explains (para [11] of his statement):

> "In 2015 I began working on a project acquiring properties in St Lucia by purchasing the distressed secured debt of First Caribbean International Bank (Caribbean) Limited ('FCIB') with a face value in the sum of $45million. FCIB was seeking offers in the region of $15million and I put down a deposit of $500,000 to secure the purchase. FCIB required me to complete by November 2017 failing which I would forfeit my deposit. I looked to banks to fund the balance but they were not

> forthcoming in providing a loan so I started approaching high net worth individuals and private equity funds."

12. It appears to be a common feature of Mr McCathy's evidence that he uses personal pronouns inappropriately or wrongly presents a matter using the first hand. To develop the land in St Lucia, a company known as ROK Capital Partners Ltd was incorporated. A third-party lender, Mr Kendrick and the lender's family trust were issued shares. The agreement was that Mr McCarthy would receive a 40.5% shareholding once the lender had been repaid and a salary after "significant" property sales had been made. Mr Kendrick was not the investor in the St Lucia project.

13. The TIB of Mr McCarthy's estate says of the development:

> "The Development is worth in the region of $45 million, thus, after the initial investment is repaid, the Debtor's share equates to $17 million/c.£13.3 million. However, this amount may be subject to change as the terms of repayment for the initial investment and exact valuation of the Development are not yet clear."

14. To date the lender has not been repaid its investment and significant sales of properties have not been made.

15. Mr McCarthy brokered a deal to acquire a decommissioned crude oil refinery in Switzerland owned by the Libyan Sovereign Wealth Fund. A deposit or investment was made of €2 million paid by a group of Russian investors. Mr McCarthy was to receive a cut of the sale proceeds which was anticipated to be in the region of €18 million. I understand from the evidence given by Mr McCarthy that the sale of the refinery was frustrated due to political reasons. The sale required the approval of the Libyan government but the approval was not forthcoming. The TIB understands that the Russian investors received the return

of their funds used to pay for the deposit. Mr McCarthy, not untypically for an entrepreneur, an optimist, remains hopeful of success.

Insolvency

16. Mr McCarthy first faced a petition for his bankruptcy in 2015 based upon an unpaid loan and interest. The petitioner was a company. Mr Elser was either acting as agent of the company or otherwise had a power of attorney. There was a dispute as to the identity of the parties to the loan. There was no written loan agreement. The matter was decided by Registrar Jones (as he was) who noted that none of the documentation that may have evidenced the loan was of assistance. It mostly comprised of correspondence. The Judge said:

> "The law is plain. A contract can be entered into by an agent as though principal when acting for an undisclosed principal and the undisclosed principal can sue on the contract. There is no reason why that could not have occurred here but the question is whether it did. That is a matter of disputed fact and I conclude from all the matters set out above that there are sufficient prospects of success for Mr McCarthy's dispute. If Mr Elser intended to lend and did lend the money himself, the Petitioner cannot sue for repayment."

17. Subsequently Mr Elser as petitioner, presented a petition for the bankruptcy of Mr McCarthy on 5 September 2017. The debt relied upon by Mr Elser was the same as the debt relied on for the earlier petition. It was based on a loan of €285,000 for the purchase of a piece of land that lay adjacent to his home in Bordon. In fact two loans were made. The first was made on 15 July 2008. A second loan was made in September 2008 for USD $350,000. At the time of presentation of the petition the debt had increased to £403,104.73 due to an accumulation of interest at a rate of 12% calculated from 5 August 2008. The stated debt included a part repayment of €51,897:00. The petition was not immediately served. A process server attended

Elystan Street in Chelsea where the Chelsea Sushi company operated but it was closed with a note on the door to state that it was under refurbishment. The first hearing of the petition was fixed for 23 October 2017. Mr McCarthy did not deny that a loan had been made and did not deny the principal sum, although there is correspondence between Mr McCarthy and Mr Elser where Mr McCarthy asks to be reminded about the sums due (an admission of a debt).

18. On 18 September 2013, Mr McCarthy wrote to Mr Elser setting out the proposed terms of an agreement governing a series of trades to be conducted in distressed bonds of Bangkok Land PCL, a company incorporated in Thailand. Their purpose was to generate profits with which he could repay part of the outstanding loan balances. Seven such trades took place in September and October 2013.

19. This led to an argument that the loan had been repaid via a corporate vehicle known as AviCorp or, it was argued, an account should be made and set off against the petition debt in respect of the sums paid to AviCorp and Mr Elser direct.

20. In support of his argument Mr McCarthy exhibited an e-mail from Ms Giarcomel of AdviCorp dated 29 October 2013 that was said to "confirm that your entire debt (capital included interests) with Marco has been settled…". Marco is the first name of Mr Elser. The exhibit to his witness statement provided evidence of sums being paid to Mr Elser from Bangkok Land. Mr McCarthy stated that his "refusal to pay the Petitioning Creditor does not stem from any impecuniosity. Rather … he disputes his liability for the sums sought." To pay the debt he relied upon the acquisition and development of land at St Lucia anticipating that he would receive sums in excess of $750,000 within a few months.

21. Mr Elser agreed that the September loan had been repaid in full, and that two other repayments in respect of the first loan had been made. The first hearing of the petition was adjourned to 12 December 2017. The second hearing was adjourned to 27 February 2018 for further evidence. It was at this time that John Paylor of Guardian Business Recovery drafted a proposal for an IVA (the "Paylor proposal") and an interim order. I am told that the Paylor proposal was drafted in a hurry due to the pressure of the bankruptcy proceedings. I have no reason to believe that this was not the case. It is said that because it was drafted in a hurry, mistakes were made. In any event the application for an interim order was dismissed by Deputy ICC Judge Middleton on 13 March 2018 and the bankruptcy order was made.

22. In his first report to creditors, the TIB informed creditors that Mr McCarthy initially cooperated by attending his offices for an interview:

> "I was aware that prior to bankruptcy, the Debtor instructed John Paylor of Guardian Business Recovery to act as his Individual Voluntary Arrangement ("IVA") Nominee. At the bankruptcy hearing on 13 March 2018, an Interim Order Application was submitted to the Court accompanied by a proposal for the IVA. However, this was dismissed by the Court and the Debtor was subsequently declared bankrupt. During his interview the Debtor affirmed his intention to propose a further IVA to his creditors and annul his bankruptcy if successful."

23. Mr McCarthy agreed to an income payments agreement that would help toward the discharge of his debts while the proposal for a voluntary arrangement progressed. He failed to keep up with the payments, making two payments only.

24. In the meantime, Mr McCarthy engaged Mr Sands of Quantuma to prepare proposals and act as nominee. The TIB explains that he was contacted by Mr Sands who confirmed that he had been appointed nominee. In the three months

that followed Mr Sands and the TIB "opened extensive lines of communication" regarding the progress of the proposal and the TIB "sought regular updates and raised various queries regarding the draft IVA proposals provided to me." It appears that Mr McCarthy became less cooperative with the TIB during this period, although it is not clear from this distance in time what the TIB was seeking to achieve other than obtain income payments and ascertain details of assets and liabilities.

25. The TIB received 17 claims totalling £2,380,765.80. He contrasts that figure with a figure of £9,209,521.55 in Mr McCarthy's statement of affairs prepared for the proposal put to creditors in December 2018.

26. The TIB provides an update to his first report in a report to the court dated 4 June 2021. He explains that his investigations were curtailed by reason of the intervention of the voluntary arrangement. Nevertheless, he thought not improperly, that a review of the documentation and a report of further enquiries may assist the court. He reviewed bank statements of Mr McCarthy between 2016 and 2018; files and correspondence; made inquiries of "certain individuals" including the "Debtor and his business partner Ms Georgia Lee". Mr McCarthy has explained that Ms Lee is also his life-partner (he has at times referred to her as "my wife") and they have a child.

27. Mr Kendrick who was also concerned in the Chelsea Sushi restaurant, confirmed that the agreement to invest in the St Lucia project was made orally and not reduced to writing. This is no surprise given Mr McCarthy's history of raising money without written agreements. The TIB reports that Mr McCarthy had not, at the date of the report, paid the principal funder fee for the St Lucia project. That requires a payment of USD$10m. This leads the TIB to conclude that the St Lucia

project is unlikely to provide a return unless he can find another lender orinvestor. In cross examination Mr McCarthy said he was actively negotiating with a wealthy individual for this purpose.

28. Of greater gravity the TIB has discovered that the deposit paid by Mr McCarthy of USD$500,000 was repaid on 18 September 2017 (after the presentation of the bankruptcy petition but before the involvement of Mr Sands and the TIB). Mr Sands was not made aware of the repayment on 18 September 2017. An analysis of bank statements demonstrates that Mr McCarthy used some of the deposit for his own purposes, such as paying school fees for his youngest daughter. Whatever the money was in fact used for it was not disclosed to the TIB or Mr Sands.

29. The TIB reports on inconsistencies in respect of the purchase of the lease for the Chelsea Sushi company. The IVA proposal states that Mr McCarthy purchased the security held by Lorencap Investments Limited over the assets of the Chelsea Sushi company, including the lease of 2 Elystan Street, funded by a sale of his shares, and a further new trading company. In correspondence to the Supervisor, Mr Sands, he characterised the loan as having been made to the Chelsea Sushi company but guaranteed by him against his interest in the St Lucia Development. The TIB has been informed by Mr Kendrick that Mr McCarthy in fact used money he lent for the purpose of taking an assignment of a secured charge from Lorencap Investments.

30. The TIB also reports on further investigations made in respect of the proof of debt lodged by Mr Brennan. The report helpfully raises an issue about the declaration made in the proposal, that the information contained in the proposal is true to the

best of his knowledge, information and belief. It was on this basis that the Applicant sought to amend the Application Notice dated 2 January 2019 (the "Application") on the first day of trial. I refused permission on the ground that the Applicant had not provided sufficient warning to Mr McCarthy before evidence had closed, of the new allegation. The report of the TIB had been provided to him without any explanation as to the purpose for which it was intended to be used. Mr McCarthy was not provided any or any reasonable opportunity to respond to the proposed new allegation of breach of good faith.

The Appeal made pursuant to Rule 15.35 Insolvency Rules England and Wales 2016

31. The decision of Mr Sands as chairman of the December 2018 Meeting is subject to an appeal to the court pursuant to Rule 15.35 of the Insolvency Rules 2016 (the "Rules"). The Rule provides that where there is a material irregularity or unfair prejudice the court may vary, reverse or declare invalid the decision and it may order another decision procedure to be initiated or make such other order as it thinks just. The general rule is that the chairman should not be made personally liable for costs, but the court retains a discretion to do so if the circumstances warrant such an order: R*e a Debtor (No 222) of 1990) ex p Bank of Ireland (No 2)* [1993] BCLC 233; *Tradition UK v Ahmed* [2009] BPIR 626. On the first day of trial Mr Robinson for the Applicant made clear that costs were sought against Mr Sands personally. This position was revised during the course of the trial and by letter dated 19 November 2021 Mr Sands was informed that the Applicant Mr Elser, was no longer pursuing a personal costs order.

32. The factual basis for the material irregularity is described as: “the Chairman's decision to admit the following claims for voting purposes: Mr Jamie Bond (£4,152,569) and Mr Chris Jonns (£2,343,750) and OBN Investments Ltd (£3,000,000).”

33. Directions were given for the cross examination of witnesses and the matter was first listed to be heard as a trial of the issues in October 2020. Due to illness, it was adjourned, unusually, twice.

34. There have been developments since the December 18 Meeting. It is relevant to mention four. First, additional Respondents have been added to the Application. Secondly, Maxine Reid Roberts, replaced Mark Sands as Joint Supervisor of the IVA on 23 September 2021. There is no dispute that she should be added as a party. I gave permission on the first day of trial. Thirdly, Mr McCarthy has failed to comply with the terms of the IVA. No payments had been paid to Mr Sands as Supervisor since the December 2018 Meeting. That led to Notice of Breach being issued. Mr McCarthy was given until 4 September 2021 to remedy the breach and give a full explanation of the breach. Lastly, the breach was not remedied within the time provided and a decision procedure has been instigated with a meeting convened for 11 November 2021 to consider the consequences of the failure to remedy. One such consequence is termination of the IVA.

35. The court has been informed of the following events in the period between the close of evidence and final submissions:

    35.1. At a meeting on 11 November a proposed variation was agreed to provide Mr McCarthy 12 days to make his first payment, as he said this would give him “sufficient time” to make the payment;

35.2. That variation was approved due to the support of the impugned claims made by Mr Bond and Mr Jonns;

35.3. The Chairperson agreed to accept an increased claim made by Mr Bond. In his evidence given in October 2021 he calculated his proof of debt as £2,842,062.16 but at the 11 November meeting he was admitted to vote for £7,844,134.73;

35.4. Mr Jonns did not attend the meeting but submitted a proof of debt through Ms Lee at 1am on the day of the meeting. His proof of debt was revised down from the previous proof to £2,147,400 (it was previously £2,343,750);

35.5. Mr Bond and Mr Jonns' claims together now amount to over 75% of all creditors claiming in the IVA, and 92% of creditors supporting the variation.

35.6. Mr McCarthy did not make the payment within the extended date of 23 November 2021 or at all;

35.7. The Supervisor has given Mr McCarthy a further 30 days to make the payment (until 24 December 2021).

36. A solicitor acting for the Applicant, Mr Head of Forsters LLP, has produced 7 witness statements in connection with the challenge to the IVA. The first statement is in support of the appeal. He explains that Mr Elser served a statutory demand on Mr McCarthy on 20 July 2017 in respect of a loan advanced in July and August 2008 for the purpose of purchasing land near Mr McCarthy's home in Hampshire. The loan had been made by Carlisle Investments Inc (a BVI

company) and the debt assigned to Mr Elser. The demand was not met within the relevant time, and a petition to bankrupt Mr McCarthy was presented on 22 August 2017 in the sum of £403,104.73.

37. He draws upon the material presented to the court in respect of the bankruptcy proceedings and the proposals drafted by the nominee Mr Paylor, to be put to creditors in March 2018 for a voluntary arrangement. He states that there are "material discrepancies" in respect of the assets and liabilities information provided in the bankruptcy proceedings and the Paylor proposal, and "significant differences" between the Paylor proposal and the proposal produced by Mr Sands for a meeting in October 2018, modified and adjourned for the purpose of voting at the December 18 Meeting.

38. Although the Application challenges Mr Sands' decisions to allow three creditors (I shall refer to these collectively as the "Disputed Creditors") to vote in the amount of their clams it is accepted that if any one of the three claims are successfully challenged, the IVA would not have obtained the necessary 75% creditor support. The Disputed Creditors are:

    38.1. £4,152,569 in favour of the fourth Respondent, Mr Bond;

    38.2. £2,343,750 in favour of the fifth Respondent, Mr Jonns;

    38.3. £3,000,000 in favour of the sixth Respondent, OBN Investments Ltd.

39. In his supporting evidence Mr Head says that the first two are "implausible on their face" and the third requires investigation. Mr Head explains that between the October proposal and the December 18 Meeting the debts said to be due to Mr Jonns and Mr Bond had increased without proper explanation. The OBN

Investments debt appeared to be an amalgam of debts owed to Mr Kaye and Mr Sherwen and increased again without explanation.

40. Mr Head refers to answers provided at the December 18 Meeting to support the argument that Mr McCarthy has misled creditors:

> "Although it apparently now turns out that the entirety of these Disputed Debts totalling over £6.5 million were incurred before Mr McCarthy gave a statement of his assets and liabilities in April 2016 (where they are not mentioned at all and his net asset position is stated as £4.6 million), Mr McCarthy's explanation for not including them is variously: "That was an omission on my part" or: "I have no answer to that", "I took my eye off the ball", "someone else was leading that application", "I should have paid more attention", "I am not saying I forgot, I am saying it was omitted"…His omission that he is the beneficial owner of Wheatley Oast with net equity of around £500,00 even though it does not appear as an asset in either the March or October Proposals"

41. I was taken to the transcript of the December 18 Meeting. The evidence of Mr Head is supported by the transcript but his allegation of deliberately misleading creditors is not so clear cut.

Mr Head

42. In his first witness statement Mr Head says:

> "I accept that it is not the role of Mr Sands, as Chairman, to spend considerable time reviewing the exact status of a debt and, if there is a genuine dispute about a debt, he is entitled to allow it to vote and mark it as objected."

43. He criticises Mr Sands on the basis that he acted as a "rubber stamp" in respect of the Disputed Debts that "do not pass a basic smell test"; failed to provide Mr Head with a "proper explanation, let alone evidence in support, as to what steps [he] took to verify these debts or what documents [he] examined…on the face of it [he] appears to have exercised no judgment at all, independent from what [he was] told

by Mr McCarthy"; that the court should have an opportunity to see "to what extent Mr McCarthy, Mr Bond, Mr Jonns, Mr Sands or Mr Bucknall were or were not parties to misleading and or prejudicing the interests of other creditors"; and Mr Sands failed to heed warnings as to the unreliability of Mr McCarthy;

44. On the other hand, he states:

> "…the information before Mr Sands would have given any reasonably competent insolvency practitioner serious and reasonable doubts as to the fullness or candour of the information provided by Mr McCarthy and the validity of a number of the debts included in the October Proposal." (emphasis supplied)

45. These aggressive criticisms are not justified. There is no evidence that he is anything but a reasonably competent insolvency practitioner. It is also clear that he did have "reasonable doubts" and those "reasonable doubts" are reflected in the decision he made namely, to allow the creditors to vote and mark the admission as objected to. Mr Sands has also shouldered unnecessary and unjustified threats from creditors. As an example, he received the following e-mail from an unhappy creditor: "I am disgusted at what I have seen…I will instruct my uk lawyers to proceed against Mr Sands personally for collaboration and clearly this is a sham. I will also report him and your firm to your governing body as I am treating this as a major case of me being defrauded."

46. None of the documentation I have been taken to, nor the cross examination of Mr Sands has remotely revealed any incompetence or wrongdoing on his behalf. There is no doubt that there was a lot of tension, as is often the case, at the December 18 Meeting which had been fermenting for some time. It is unfortunate that some individuals unleashed their anger on the one individual who had worked to add some order to the affairs of Mr McCarthy.

Mr Sands

47. Mr Sands hardly needs an introduction into this case at this stage. He has been involved in the insolvency profession for more than 30 years, receiving his license to practice as an insolvency practitioner 20 years ago. He takes exception to the language used by Mr Head and provides a witness statement to answer the accusations. He explains that prior to his engagement as nominee he had no previous dealings with Mr McCarthy. He candidly explains that he knew of the earlier proposal to creditors and understood that it was prepared in a hurry under pressure. Nevertheless:

> "I did compare the Failed IVA to the Proposal and identified some differences. The Proposal provides greater detail and is the Proposal that the Nominees' Report and the current IVA relies upon. I cannot vouch for the veracity of the Failed IVA proposal. The explanation of previous discrepancies in statements of his assets and liabilities was explained by RM as stating that he simply did not read the paperwork diligently, signed what was put in front of him, leaving it to others to draft. For this reason I made sure that I went through everything with RM and made sure that he was aware of and agreed with the wording and veracity of the Proposal."

48. His explanation of his actions and duties in respect of drafting and putting forward the proposals is in my view both genuine and reliable. Mr Sands points out, a proposal "is a document that is signed and owned by [the debtor]". He says it is normal practice to rely on the statements provided by a debtor when compiling a proposal. In a case where there are many creditors it would be a long and arduous process if a nominee was obliged to go direct to each creditor and seek clarification and supporting documentation. On the other hand, as I shall go onto analyse, a nominee cannot go about his or her duty in an unquestioning manner.

49. At the heart of the proposal was an increase in assets available to creditors when compared with the alternative of bankruptcy realisations. He instructed a solicitor to attend the December 18 Meeting to assist him to navigate any legal problems that may arise, which he must have anticipated.

50. I now turn to the December 18 Meeting.

The December 18 Meeting

51. At the December 18 Meeting the claims of creditors totalled approximately £13 million. The proposal, when modified, was to give the creditors, over a period of three years, a return of 25pence in £1. The proposal passed with £10,530,976.46 votes in favour (79%) and£2,800,098.66 against.

52. One question that has arisen concerns the nature of the advances made by Mr Bond and Mr Jonns to Mr McCarthy. Mr Robinson argued that some sums may have been investments rather than loans. If they were in truth investments, they are not repayable as loans. The allegation that these debts are implausible or "inherently implausible" is due to the inconsistent nature of the information provided by Mr McCarthy or the Disputed Creditors. In particular:

52.1. Neither debt was mentioned in the Statement of Assets and Liabilities provided to the court on 7 April 2016;

52.2. the March 2018 proposal only mentioned a debt due to Mr Bond. The debt said to be due to him was considerably less than was accepted by Mr Sands at the December 2018 Meeting;

52.3. Mr Bond did contact the TIB but did not submit a proof in the bankruptcy of Mr McCarthy;

52.4. a list of creditors produced to Mr Sands in April 2018 included both Mr Jonns and Mr Bond but the debts were lower than those claimed by December 2018;

52.5. Mr Jonns has taken no part in these proceedings but a proof of debt was submitted in the IVA by Mr McCarthy or Ms Georgia Lee;

52.6. after investigation Mr Sands reduced the debts to £1.589m for Mr Jonns and £2.84m for Mr Bond; and

52.7. the Supervisor's report to court dated 15 June 2021 stated that the supervisor had not received a "revised" proof of debt from Mr Bond.

53. Mr Robinson, acting for Mr Elser usefully summarises by means of a table:

Date and Source	Mr Jonns	Mr Bond
April 2016 Statement of Liabilities	No mention	No mention
Bankruptcy proceedings from March 2018	No mention	No mention
March IVA Proposal	No mention	£2.65m
April 2018 list to Mr Sands	£1m	£2.65m
3 April 2018 interview with Insolvency Examiner	No mention	£2.65m
October Proposal	£2,300,000	£3.2m
3.12.18 meeting	USD3,000,000 (converted as £2,343,750)	£4,152,569
Mr Bond 2nd witness statement	n/a	£3,717,062.16

December 2020 assessment for IVA distribution	£1,589,657	£2,842,062.16
Mr Bond 4th witness statement	n/a	£4,461,925.05
June 2021 assessment for IVA distribution	£1,589,657	£4,152,569

54. In opening Mr Robinson drew the attention of the court to passages within the transcript of the December 18 Meeting that are said to support the case advanced by Mr Elser. Before turning to those passages, it is important to provide some context. The December 18 Meeting was held virtually whereby the creditors, their advisors and Mr McCarthy attended by telephone. Mr Sands said in cross examination that he listened to the tapes prior to coming to court and described it, in what I inferred by his intonation to be an understatement, as a "difficult meeting". The transcript demonstrates that some speakers were talking over others at times, and the line was not always clear resulting in confusion. I now turn to those passages in the transcript.

55. Mr Head said he had "quite a long list of questions" for Mr McCarthy "and you Mr Sands". Mr Sands invited him to "fire away with the first of them and we'll see where we get to". Mr Head turned first to Mr Bond: "What is the nature of the debt"? Mr McCarthy, not having the discipline of detail provided a characteristically discursive answer:

> "I've been in business at various times with Mr Bond, well not at various times, basically consistently for the last 25 years. We've done a number of transactions together including Bangkok land bonds. We have we invested in property together. We've invested in various trading opportunities together. And we will continue to do business together going forward. And that's the situation. The money is owed to him,

> we have supplied Mark Sands with the proof of transfers to my accounts to demonstrate that that money was sent directly to me. And so basically, it's across a whole series of transactions, where we rolled up to pursue various opportunities." (sic)

56. Mr Head asked Mr Sands to provide the detail of the debts or "some ballpark figures some dates". After some interruptions from the TIB and Mr Edward Judge (solicitor assisting Mr Sands) Mr Sands referred to a schedule of payments and responded: "I can see on this schedule although Rory you say matters commence in 2012…is October 2013 some in 2014 and the most recent one in 2015…they vary from the smallest which is sixty-two thousand. The largest [is] one point four million. And the second largest eight hundred thousand…the [largest was transferred on] 7 March 2014."

57. That appeared to satisfy Mr Head who then asked Mr McCarthy why he had not mentioned the debt owed to Mr Bond in his witness statement filed and served in April 2015:

> McCarthy: "That was an omission on my part."
>
> Head: "So are you lying right now or were you lying to the court then?"

58. The tape records laughing. The question must have pleased some of those attending the meeting. Mr McCarthy responded:

> "I have not lied. I have not lied. I'm just telling you. These are the facts. I don't think you need to. This is not a [laughing] matter. That's the first thing, whoever thinks it's hysterical. This is a fact. That money was lent, across the board for a number of deals, including a property deal that went wrong. And that's just a fact."

59. After Mr Sands confirmed that Mr Bond had submitted a proof of debt for the purpose of voting, Mr Head turned to the purported debt owed to Mr Jonns asking

when the £2.3m transfers had been made to Mr McCarthy (I assume distinguishing transfers to a corporate vehicle):

Mr McCarthy: "Yes. I mean it started off with us purchasing a spitfire for restoration and then carried on to an investment in Sierra Leone into the mobile phone business. And that's it basically. There has been no payment."

Mr Head: "And what were the dates of the transfers?"

Mr McCarthy: "I would have to get back to you on that."

Mr Head: "presumably Mr Sands knows the answer to that."

Mr Sands: "Right, so no, on Chris Jonns, I'm afraid at this stage I've not seen any, as much, documentation that I would like to have."

Mr McCarthy: "But we have provided Mr Sands with e-mails confirming the deal. What we're doing. Blah blah blah. And they go back and they go back by the way. I think to 2013 or 2014. Again, that's a debt that's been outstanding for some time."

…Mr Head: "I take it that Mr Jonns isn't voting today."

Mr Sands and Mr Judge: "No. He's voting."

Mr Head: "You have no evidence of a claim and he is still voting?"

Mr McCarthy: "I have supplied Mr Sands with the emails showing the various transactions."

Mr Head: "Well Mr. Sands you have professional obligations are you satisfied from the evidence you've seen that that debt is owing?

Mr Sands: “If I was asked, I think there’s two stages in creditors’ claims there’s whether there’s sufficient evidence to allow a creditor to vote and then sufficient evidence to pay a dividend. We’re not, at this stage, adjudicating on paying the dividend and the proof of debt arrived at short notice and I haven’t had a chance to well I’ve asked for further evidence. I haven’t seen it.”

60. The TIB was in the same position as Mr Sands and had not seen written evidence of the transfers: “I’ve not seen any evidence of this claim at all.” That does not mean that there was no evidence of the debt. Mr McCarthy had provided some limited evidence that the debt existed, and the sum of money owed. The TIB was curious to know why Mr Bond and Mr Jonns had not submitted claims in the bankruptcy. Mr McCarthy responded that he should ask them but offered the following explanation: “they believed that I would have a successful IVA and that they would at least get some money back and that perhaps we will work together going forward on future deals.” Later he informed the meeting the loans were personal to him and that Mr Sands had seen email correspondence “and that dates back to 2013” Mr Sands did not correct him on the latter assertion at the time, but it is now clear that this “was news to me”. Further questioning did not alter the responses given but I refer to one exchange as I was specifically taken to it.

61. Mr McCarthy was asked why he did not disclose Mr Jonns as a creditor in the earlier proposal. Mr McCarthy responded that it was an omission. Mr McCarthy did not, and does not, have trading accounts.

62. Mr McCarthy responded:

> “First of all, as you can imagine, for the last, since twenty twelve or 2013 the reason why the debt is so big is that there have been no profits accumulated. We crashed out on a

> property deal because we were unable to complete. And we lost our deposit. I mean basically we went to Sierra Leone, just before Ebola broke out, in order to pursue a mobile phone business that eventually we had to shelve having invested considerable money there."

63. He was asked why he had not produced bank statements to demonstrate money transfers into his personal account. He said that he had provided evidence of credit transfers, that had been obtained the day before the meeting. There is indeed a chain of e-mails from Mr Jonns where he asks his Bank, (First Bank Client Service Group, New York) to "send me all transfers I made to Rory McCarthy which was a Barclays Bank account in the UK". A response from Morgan Pang of the First Republic Bank timed at 9:50 am on June 16 2015 details three transfers in favour of Mr McCarthy: 1) $620,000 on 22 January 2014 2) There is the possibility of a transfer made on 18 March 2014 for $500,000 3) $1,000,000 on 14 April 2014 and 3) $100,000 on 1 August 2014 4) $50,812 on 14 August 2014 and 5) £125,000 on 9 September 2014. There is no documentary evidence about what these transfers were for, whether they were loans or investments or if they were at any time repaid in part or full. A few years after the transfers Mr McCarthy writes an e-mail dated 4 April 2017 to Mr Jonns:

> "I am writing to confirm that you have very kindly agreed to lend me £100,000 until next Wednesday 12th April 2017. I can also confirm that the total outstanding owed to you from me is US$3.125 million, which will be repaid in the coming weeks from both the oil refinery deal and the Saint Lucia project.
>
> I am so incredibly grateful for your help, patience and trust and I look forward to being able to repay this kindness in many ways."

64. The e-mail dated 4 April 2017 (the "April 17 Mail") to Mr Jonns is curious in a number of ways. First, there has been no explanation why £100,000 was required or why it was required for a week. Secondly, there is a confirmation of the

outstanding sum said to be owed to Mr Jonns which on Mr McCarthy's evidence was "rounded-up". No real explanation has been given for increasing the sum thought to be owed. Thirdly, the addition of the figures above does not make $3.125m. Fourthly, Mr McCarthy purports to keep no written records of money owed to him or owed by him. The confirmation would have been guess-work. Fifthly, he expressly states "total outstanding" is owed by him to Mr Jonns when there is no correspondence from Mr Jonns asking for him to make the confirmation. Sixthly, the "total outstanding" was targeted to be made "in the coming weeks" whereas the loan for $100,000 was due on a specified date. Apart from the different payment dates and the representation that the "total outstanding" it was included in the total outstanding to be paid in the coming weeks. Eighthly, there is no mention of interest. Lastly, if the e-mail is to be read literally, as Mr McCarthy wishes, it was agreed that the "total outstanding" was "to be repaid … from both the oil refinery deal and the Saint Lucia project." If that was the agreement Mr Jonns would not receive payment if these projects failed to produce a return.

65. After receiving the April 17 Mail Mr Sands forwarded it to Mr Judge for his view of the exchange. This was done at 13:17 the day before the December 18 Meeting:

> "Rory has sent me the below- an exchange referring to a debt but not any evidence of the debt. The claim was queried by the solicitor for the petitioning creditor as, I believe, the level of debt had increased…"

Legal analysis

66. The authors of "Insolvency Practitioners Appointment, Duties, Powers and Liability (Elgar) explain the role of a nominee:

> "A nominee is (as the name suggests) an individual who is nominated to act as a supervisor of an IVA. Although the proposal is as a matter of law proposed by the individual who wishes to take advantage of the statutory process, this is something of a legal fiction. In practice, the proposal will usually be drawn up by the same IP who will then act as supervisor in the event that requisite majority of creditors agree to the proposal. The nominee is to ensure that the creditors have the necessary information before them in order to form a view and vote on the proposal…if there are aspects of the information that appear to require an explanation, then it is the IP's duty to ask further questions."

67. The task of the court when considering an appeal is not materially in dispute. explained by Blackburne J said in *Re A Company (No 004539 of 1993)* [1995] 1 BCLC 459, at 466:

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

68. This approach and the decision of Blackburn J was approved by the Master of the Rolls in *Re Mercury Group Ltd* [2010] EWCA Civ 1379; [2011] B.P.I.R. 480. The Master of the Rolls explained that "the judge should not merely review the decision of the chairman which is sought to be impugned: the judge should form his or her own view, based on the evidence and arguments advanced to the court". A fresh decision is envisaged by the Rules. Neuberger MR noted that the analysis provided by Blackburne J had been "applied in a number of subsequent cases concerned with similar provisions of the [Rules]". In that case a creditor, HMRC, appealed the decision of the chairman who had admitted its debt but not in full. Neuberger MR said [45] that the first instance judge appeared to take the correct

approach by proceeding on the basis that the onus was on HMRC (the challenging creditor). Reference was made to the well-known statement of Harman J in *Re a Debtor (No 222 of 1990) ex parte the Bank of Ireland* [1992] BCLC 137:

> "The meeting is not the place to go into lengthy debates as to the exact status of a debt, nor is it time to consider such matters as this court, sitting as the Companies Court, frequently has to consider as such whether a debt is bona fide disputed upon substantial grounds, an issue which leads to a great deal of litigation and frequently takes a day or so to decide. None of that could possibly be a suitable process to be embarked upon at a creditors meeting."

69. In so far as where the burden of proof lay Blackburne J formed the view that the burden lay on a creditor to establish its debt against the debtor, but if the issue on appeal is whether the chairman was wrong, the burden rested on those who assert he was wrong. In this respect this case resembles the task of the court in *Tradition (UK) Ltd v Ahmed* [2009] BPIR 626:

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

70. In *Re Mercury Group Ltd* the Court of Appeal was faced with HMRC providing evidence of the tax owing on the one side and the administrators who had "simply denied liability for all but a small proportion of the claimed tax in the most general terms and failed to put forward any specific evidence or legal arguments as to why the whole or part of the sums claimed were not due." He went on [66]:

> "The administrators could have come up with different facts and different calculations, just as they could have made legal submissions, with a view to persuading the judge that HMRC were at least arguably wrong in their contentions. If that had happened, the judge could have decided the issue before him in

> light of the administrators' arguments, and that could have led to various possible outcomes."

71. As the court is not confined to the evidence that was before Mr Sands, fresh evidence could have been adduced in support of the view that, on balance, the loans made by Disputed Creditors had been made or that the sums due under those loans are equal to the proofs of debt lodged in advance of or at the December 18 Meeting. I put it this way as the burden of proof rests with the creditor. That must be the case as a matter of common sense since new evidence may be admitted as the hearing is *de novo*. It is wrong to view the Application made by Mr Elser as an application to appeal the decision of Mr Sands. The Application asks the court to find a material irregularity and then decide, in its discretion, what directions to give having decided the issues in respect of the impugned claims. Support for this view can be gained not only from a plain reading of the judgment of Blackburne J in *Re A Company* but also *Lynch v Cadwallader* [2021] EWHC 328 (Ch), [2021] BPIR 854, where I said [82]:

> "I have been cited numerous authorities by both parties on the burden of proof. The burden of proof lies with the Bank. In *McCarthy v Tann* [2015] EWHC 2049 (Ch), [2015] BPIR 1224, I found that applications such as these are not appeals proper: it was not for the court to review a decision of the office-holder to decide if the decision was correct, rather the court had to determine, on the evidence before it, whether the claims should be admitted. The burden of proof falls on the creditor to make out their debt on the balance of probabilities."

72. Against this Mr Briggs argues that "that in all cases the onus of proof is on the objector", namely the Applicant. He submits that this can be gleaned from the judgment in *Re A Company* where Blackburne J said [465H] said:

> "It is, I think, established, on the equivalent rule applicable in bankruptcy, that the onus of demonstrating that the chairman's decision was wrong and should be reversed or varied lies on the creditor mounting the appeal and that the decision whether any

> creditor should be admitted to proof for voting purposes under appeal is a provisional one…"

73. In *Tradition (UK) Ltd* the Deputy High Court Judge interpreted this to mean [91]:

> "So the court must decide the issues, to which I have referred in para [86] above, on the balance of probabilities having considered all the evidence adduced by the parties at the hearing of Tradindex's appeal. Moreover, it seems to me to follow that, if I am left in doubt whether the relevant claims are established, I should reject them and allow Tradindex's appeal accordingly. The burden of establishing a claim against any debtor must lie on the creditor alleging it. This is recognised in Blackburne J's formulation ('whether, on balance, the claim against the company is established and, if so, in what amount'). *Although in an earlier passage in the same case he referred to 'the onus of demonstrating that the chairman's decision was wrong' as lying on the appellant, in context this can only mean establishing that the chairman was 'wrong' in the sense that, on mature consideration, the creditor has not established his claim on the balance of probabilities*." (my emphasis).

74. Mr Briggs brings my attention to *HMRC v Maxwell* [2010] EWCA Civ 1379 to support his submission. At paras 42 and 43 the Master of the Rolls said:

> "42. The first question it is convenient to address is the function of the Judge in this case, as a judge hearing an appeal under Rule 2.39(2). As to that there is no dispute between Mr George Bompas QC (who appears with Ms Ruth Jordan for HMRC) and Mr Richard Sheldon QC (who appears with Ms Blair Leahy for the Administrators). They agree that the judge should not merely review the decision of the chairman which is sought to be impugned: the judge should form his or her own view, based on the evidence and arguments advanced in court.
>
> 43. In my opinion, that agreement correctly reflects the law. Rule 2.39(2) refers to an "appeal" as opposed to a "review", which suggests that a fresh decision is envisaged. Further, as the facts of this case show, it would be unsatisfactory and unfair in some circumstances if the judge was confined to reviewing the chairman's decision. The chairman will often be someone who can properly be privy to information and advice provided to the administrators or the company which is information and advice which could, equally properly, be denied to the court. If the court was confined to a reviewing function, it is hard to see how it could be fairly or satisfactorily performed in such circumstances."

75. Mr Briggs says:

> "Clearly, the evidential burden may more readily fall on the debtor/respondent creditor where there is an appeal from the chairman's decision admitting the respondent creditor's debt and the appellant raises some evidence or argument in relation to admission of the debt since the court is concerned to see that the claim against the company/debtor is established.
>
> However, in my submission it is wrong in an appeal against the chairman's decision to admit a debt to place the onus of proving that "the chairman's decision was right" on the creditor whose debt is challenged. This is what Mr Elser's submission based on the Ahmed case boils down to."

76. In my judgment the submission is framed inaccurately and once framed inaccurately the wrong result is reached. As an applicant Mr Elser comes to court asking the court, as he may, to look at the ability of a creditor to vote: does that creditor have a debt? He asks the court to look at all the evidence before it (not necessarily the same evidence as was before the Chairman) to decide the quantum of the debt if there is a debt at all. The task of the court is to assess and reach its own decision independent of a decision made at a creditors' meeting: *Re A Company (No 004539 of 1993)*. The burden of proof in civil disputes lies with the party asserting a proposition, not the party defending or denying it. The person seeking the legal remedy bears the burden or onus of proof. It is the creditor who seeks to exercise an entitlement to vote at the meeting of creditors and the creditor who seeks to demonstrate that he has a right to vote on a challenge under Rule 15.35.

77. If the court finds that the evidential standard has not been met and there was no entitlement for a voting creditor to vote at the meeting the court is able to say that the vote should not have been counted. A consequence of such a finding (dependent upon the count) is that the decision may be rendered invalid. The

terminology used by the Rules is "material irregularity". The court then has a discretion to exercise as to the future conduct of the process.

78. As I have referred to *Tradition (UK) Ltd* it is worth mentioning that much reliance was initially made on the decision to support a claim for costs against Mr Sands. In deference to the parties, I mention it here.

79. The debtor was a businessman who began spread betting activities in 1998. The third, fourth and fifth respondents were the brother, mother and wife of the debtor. The seventh respondent was a family company. The eighth respondent was a company which formerly operated as a clothing wholesaler. M Ltd was a financial spread betting company, trading as Tradindex.com who made the application. The debtor became a client of the applicant in May 2003. He subsequently incurred substantial losses in spread betting activities on his account. By June 2006, the debtor owed the applicant £4.27m. On 18 July 2006, the applicant served a statutory demand on the debtor, which the debtor unsuccessfully applied to set aside. In October 2006, the debtor approached the second respondent, a partner in UHY Hacker Young for advice as to his financial affairs. The possibility of a voluntary arrangement was raised in November 2006, but following a discussion of the company's statement of affairs at a meeting between representatives of the applicant and the debtor, the applicant was not encouraged to support an IVA. On 23 January 2007, it presented a bankruptcy petition. The debtor applied for an interim order pursuant to s 252 IA 1986. The second respondent was named as nominee for the purposes of supervising the implementation of the arrangement. The interim order was granted and the creditors meeting subsequently held. The proposal was approved by a 77.94% majority of creditors.

80. On appeal the applicant submitted: (i) it had been the victim of vote-rigging; (ii) the proposal and statement of affairs contained a number of errors and omissions which amounted to a material irregularity for the purposes of s 262(1)(b) of the 1986 Act, on the basis that if those errors and omissions had been corrected, creditors (or at least some of them) would have voted differently at the creditors' meeting; and (iii) the chairman had failed to meet the standard expected of a reasonably competent insolvency practitioner.

81. It is notable that in this case the Application does not include a claim similar to (iii) above. In this respect the Deputy Judge set out the fullness of the allegations that included [216]:

    81.1. The allegation was, in substance that the summoning of the meeting was premature. The proposal/report should not have confirmed that the debtor had made full disclosure of his affairs and that he was satisfied as to the debtor's statement of his position as to assets and liabilities and which recommended that a meeting of creditors summoned in circumstances where there had been adequate investigation of the debtor's liabilities, particularly the details of the disputed debts, up to that point in time.

    81.2. The chairman ought to have adjourned the meeting before a vote was taken to enable further investigation of the disputed debts.

    81.3. The chairman throughout the proceedings improperly aligned himself with the interests of the debtor.

82. The Judge found (i) that the chairman failed to meet the standards to be expected of a reasonably competent insolvency practitioner in preparing his nominee's

report and conducting the meeting and (ii) there had been a material irregularity as debts could not be justified.

83. I was referred to the Statement of Practice (SIP) 3.1. This provides best practice guidance in respect of the different roles undertaken by an advisor, chairman and supervisor, the need to be transparent and fair in all dealings and act professionally and while retaining objectivity. While of interest, not only is there no allegation that Mr Sands failed to comply with SIP 3.1 or breached the obligation to remain objective and act professionally, but the complaint, buried in the witness statements of Mr Head and to be inferred from the questions he asked at the December 18 Meeting is that he allowed the votes of Mr Jonns and Mr Bond marking them "objected to". That seems to me to be a complaint that had no direction.

84. In these circumstances it was correct for the Applicant to no longer pursue a personal costs order against Mr Sands.

The evidence

Mr Elser/Mr Head

85. Mr Elser has provided no evidence of fact in support of the Application. All statements made for the Applicant are made by Mr Head. It became apparent that Mr Head was unable to provide any evidence of fact that was relevant to the determination of the appeal. His witness statements dealt with issues of procedure assertion or opinion. Mr Briggs, acting for Mr Sands, concluded that no cross examination was necessary since his witness evidence was without value. Mr

Robinson informed the court that he would not be relying on the evidence of Mr Head.

Mr McCarthy

86. Mr McCarthy had submitted a witness statement and gave evidence. He was tested on each of the Disputed Debts with particular focus on the inconsistencies made in various statements of affairs regarding the inclusion and exclusion of debts and the sums that were said to be due: these are said to be the times when hewas required to take care and provide accurate information.

87. It is essential that the court forms a view as to the credibility of the witnesses. Oral evidence is of great importance in this regard. Mr Robinson characterises Mr McCarthy as someone who has managed to avoid addressing creditor claims and has regularly misrepresented his true financial position. Mr Briggs, assisting the court, takes a different view. He submits that Mr McCarthy was honest and helpful, albeit that at times he was vague.

88. Mindful of the pressures of giving evidence Mr McCarthy gave, in my judgment, mostly helpful evidence. He accepted, as he must, that he made serious mistakes. At times he sought to foist the blame onto others, but this should not be mistaken for trying to deceive. Ultimately, he acknowledged that the responsibility for providing accurate information lay on his shoulders. He accepted that the key documents, the March 2018 proposal, the statement of affairs sent to the court during the bankruptcy proceedings, evidence provided to the TIB and information he declared as accurate in the proposals put to creditors at the December 18 Meeting told their own story. A story of misrepresenting the position. That misinformation was, however, not confined to the Disputed Debts. As an example,

the sum of money declared as being owed to the Applicant was incorrect in the Paylor proposal. The explanation for the inaccuracies and failures were, in my judgment, simply explained by Mr McCarthy. He believed that the debt owed to the Applicant was not of great significance when compared with the debt he was carrying. As an entrepreneur he was optimistic that a solution would be found, given time. His focus was less on the insolvency proceedings that deserved his attention, and more on salvaging his failed business ventures and appeasing his long-term business associates. It was easier for Mr McCarthy to look to solutions rather than unpick his past business dealings and provide an accurate account. I infer that it would have been difficult for him to provide accurate information given his own evidence, collaborated by the evidence of Mr Bond, about his own failings in respect of financial bookkeeping.

89. In the course of his evidence, Mr McCarthy explained that he had been unwell in recent years, detail was not his strong point, and that he was motivated to pay his creditors the best he could and retain the family home. In closing he said that bankruptcy was like a fire sale where his home would be sold and a small distribution made to creditors satisfying no one. He wanted the chance to retain his home and pay his creditors. I accept that he has a belief that this is achievable.

90. He expressed regret at not being able to pay his debts. When taken to the Jonns debt declared in the Paylor proposal he accepted without hesitation that he could not defend the position:

> "I let a third-party deal with this proposal-Mr David Simkins-this has been achilleas heal, I have no defence. It has been like a sword of Damocles hanging over me- look it wasn't prepared well and it was rejected-I took my eye off the ball. But this

> failure does not mean that I didn't owe the money to Mr Jonns."

91. He explained that he had only met Mr Jonns four times, he had had a good relationship with him, but the relationship had soured when he failed to make payments. I assume that the failure to make payment was due to the failure to produce a return from oil refinery deal and the Saint Lucia project as set out in the April 17 Mail.

92. Overall, I assess Mr McCarthy's evidence as honestly given but sufficiently vague to lead me to conclude that I should treat some of his evidence with great caution. This is because he cannot be trusted to provide accurate details of his financial position unless supported by documentary evidence. One example of his failure concerns the purported debt owed to Mr Jonns. On his own evidence he chose not to disclose this debt in the Paylor proposal or to the TIB. He did not want Mr Jonns to know of his insolvency or antagonise him. The explanation discloses a willingness to deceive in respect of his financial dealings. Mr Robinson provides a long list of other failures. I select three examples:

    92.1. His statements to the court in 2016 listing his liabilities at £0.8m, omitting reference to a £1.602m debt to OBN and the debt claimed by Mr Bond.

    92.2. Advancing a case of ability to pay debts as they fall due in a 20 November 2017 statement to the court notwithstanding enforcement of security for a debt over his property. It is not clear when Mr McCarthy knew and his present case is that he owed millions of pounds to Mr Bond and Mr Jonns at that time and was being pressed by Mr Jonns for payment; and

92.3. Disclosing alleged debts for the first time in the March IVA proposal while omitting other presently alleged debts, purportedly on the basis that he "can decide who do I put into my IVA".

93. To his credit Mr McCarthy did not shy away from admitting his own shortcomings. He accepted the obvious inconsistencies between the Paylor proposal, the statement of affairs produced for the TIB, and the proposal produced by Mr Sands. I add that Mr McCarthy had the unenviable task of representing himself however, he did so, in my judgment, with eloquence.

Mr Bond

94. Mr Bond has been engaged in these proceedings from the start. He has produced four witness statements signed with a statement of truth and attended trial for cross examination. Like Mr McCarthy, Mr Bond represented himself. In my judgment he gave straight forward and reliable evidence. He was asked about "the way forward" in cross examination. He gave some thought to a question of whether he would vote in favour of a variation of the arrangement at the meeting fixed for 11 November 2021. That is a variation of the time frame in which to make the first substantial payment. Mr Bond responded that he had not made up his mind and would think about what to do having considered these proceedings. He had taken the trouble to read the report provided by the TIB and commented: "The trustee report informs me that [Mr McCarthy] has let me down. Some information was not provided from the beginning or was not as up to date as it should have been." He was referring to the details of the debt owed to him. In the event Mr Bond did vote in favour of an extension of time explaining to the court that an IVA had the best chance of producing a return for creditors.

95. There were several aspects of the evidence given by Mr Bond that were challenged. These break down into two issues: 1) whether the financial relationship between Mr Bond and Mr McCarthy was one of creditor-debtor or investor-consultant; 2) if the former the value of the proof of debt that should be admitted.

96. Mr Bond explained his relationship with Mr McCarthy in the following way:

> "I have known Rory McCarthy for more than 25 years, and in our early days we would often collaborate on putting deals together, although I have never been a director or shareholder or involved in any similar capacity in any company with Rory. Since I became semi-retired, I have regularly kept in touch with Rory, but my involvement with him these days is confined to providing finance for schemes that he is involved with."

97. His evidence about his relationship with Mr McCarthy was not tested save for his current involvement: providing finance for schemes that he is involved with. On the sums lent and reasons why had dealings with Mr McCarthy he said:

> "I appreciate that the money I have loaned to Rory is by any measure a very significant sum. By the time I ceased to be active in deal making myself, I had amassed a considerable amount of capital, and although the debt owed to me by Rory is a very large amount of money, in terms of my overall wealth the loss of this does not have a significant impact on me."

98. And on the first issue his written evidence is:

> "I categorically confirm that all the money shown was provided by me to Rory by way of loan, and it all remains outstanding as at today's date. I would point out that all the payments from me have been made to Rory's personal account."

99. I shall go on to find that in respect of the first issue that the mixed evidence favours a finding that the relationship was and is multi-faceted.

100. The third issue arose during the hearing which concerned a purported debt not included in the proof of debt claimed at the December 18 Meeting. This debt relates to claimed lending made by Mr Bond to Mr McCarthy in respect of a property development known as "Gordon House".

Mr Sands

101. Mr Sands produced one statement of fact. The main thrust of the statement is not to defend the position of Mr McCarthy but to answer a "number of allegations" that "have been made against me and the second Respondent in relation to our position as Nominees and subsequently as Supervisors."

102. In respect of the Jonns purported debt Mr Sands said that he thought the e-mail correspondence between Mr McCarthy and the e-mail chain with the First Republic Bank provided some evidence of the proof of debt. He was challenged about his judgement in deciding whether the email correspondence, and in particular email sent in April 2017, provided sufficient evidence to support Mr McCarthy's position that there was an agreement about the debt and the quantum. Mr Sands had two responses. First, he said that he had taken advice from Mr Judge. Secondly, he explained that although he knew of the dates and figures placed in Paylor proposal he had spent six months and over 200 hours in an attempt to get to the bottom the McCarthy affairs. To this end he knew a) there had been a long-standing relationship with Mr Jonns; b) Mr McCarthy mostly did his business by way of a handshake; c) wealthy individuals trusted him; d) Mr McCarthy was not good with details of debt; and e) email correspondence was reasonable evidence to support a debt. He had consulted with Georgia Lee who

appeared to have a better grip on some of the detail of Mr McCarthy's financial affairs.

103. He accepts that he did not know of the Jonns purported debt until late in the day. He was taken to his letter to Fosters LLP (then acting for Mr Elser) where he stated that all claims of creditors of whom I am aware will be participating in the voting have been (and any additional claims will be) scrutinised to confirm the quantum and validity of the debt."

104. Overall, my assessment is that Mr Sands sought to assist the court the best he could in respect of events that took place nearly three years ago. He gave his evidence truthfully and in a straightforward manner. In my judgment the evidence he gave may be relied upon.

Discussion

105. I shall first discuss whether the Jonns loans can be made out. Secondly, if the loans do exist, I shall consider the quantum of the debt. Thirdly, I shall consider the purported loans made by Mr Bond, dealing first with the relationship and secondly the quantum. Lastly, I shall consider the OBN Investment Limited purported debt in brief as no one appears for OBN and there has been an agreement in respect of the proof of debt.

<u>Jonns to McCarthy</u>

106. As summarised above, the case against the existence of a loan made by Mr Jonns (or series of loans) is based on the absence of formal loan documentation, non-disclosure and inconsistency of the sums said to be due. I would add to that Mr Jonns has played no part in these proceedings. On the other hand, Mr

McCarthy has given evidence of a loan arrangement and has produced documentary evidence to support the transfer of monies. The proof of debt was submitted with Georgia Lee acting as proxy.

107. Mr McCarthy has provided an explanation as to the reason for not disclosing the purported Jonns loan during the bankruptcy proceedings and for the reason why Mr Jonns played no active part in the bankruptcy.

108. The explanation is that Mr McCarthy had deliberately not informed Mr Jonns of his financial difficulties believing that he would be able to pay or successfully dispute the debt of the petitioning creditor. When he discovered that Mr McCarthy had been made bankrupt he chose not to engage since to do so was unlikely to produce a return. Mr McCarthy's evidence is that Mr Jonns was angry with him for not repaying the debt. His anger may have led to a disinclination to assist Mr McCarthy with his debt issues.

109. I accept Mr McCarthy's evidence that he chose not to inform Mr Jonns about the bankruptcy proceedings. There also appears to have been limited disclosure in respect of debts said to be due when compiling the Paylor proposal. Mr McCarthy's explanation for not informing his creditors goes some way to explain the failure. Nevertheless, the lack of engagement is inconsistent with the aim of securing 75% of creditor votes. Mr McCarthy's evidence on the subject was that he was in regular (and at times daily) contact with Mr Jonns as he was being pressed for payment: "Oh, dear God.There have been emails, there have been text messages and WhatsApps and things, you know... some of the emails have been brutal. He clearly is not my friend. He has been absolutely brutal. If I read you some of those messages you would be shocked."

110. Mr McCarthy said in oral testimony that he received regular (daily) messages on his phone: some for the period April 2017 where Mr Jonns said he wanted money as he was going away: "PIs mate I have no money and am going away". The text messages show that Mr Jonns was asking for money until 3 January 2018 when he asked for an update. Mr McCarthy responded on the same day: "Happy New Year to you too. I've got good news and some money for you. Please text me when you wake up tomorrow." On 5 March Mr Jonns wrote asking for "GBP". The request is notably currency specific. The next message is in June from Mr Jonns asking if a "wand had been waved and funds sent?"

111. I make four observations about the exchange of messages. First, they do not appear regular. Secondly, they support some funds owing to Mr Jonns at that time but do not support the contention that the funds were owed personally by Mr McCarthy. Thirdly it may be inferred from the January correspondence that some money was sent to Mr Jonns. This inference maybe made by analysis of the language used in the 3 January response from Mr McCarthy, that he has funds for Mr Jonns. There were no chasing messages until March and then June 2018. If Mr Jonns was as persistent as Mr McCarthy said, it is unlikely that the period between January and March and March and June would have been silent. It is possible that there were communications in other forms, and indeed Mr McCarthy in evidence spoke of a "whole bunch of messages". Mr McCarthy produces no other messages to support his claim that Mr Jonns was a pressing creditor. Lastly, none of the messages produced to the court demonstrate that Mr Jonns was being "absolutely brutal". Quite the opposite.

112. As regards the proof of debt submitted by Ms Lee, no evidence of any meeting or agreement to provide the proof of debt has been produced. No evidence of any contact with Geogia Lee or Mr McCarthy has been produced. However imperfect the court is tasked with reaching a decision on the evidence before it.

113. By the proof of debt Mr Jonns claims to be a creditor in the sum of £2,343,750 which is said to be the equivalent of USD$3m. This included capitalised unpaid interest. The debt was said to be created 3 years prior to 11 November 2018 (the date of the proof) by reason of a "loan for investments" (singular). It was submitted on the day of the December 18 Meeting (3 December). Mr Jonns made no contact with Mr Sands. The proof of debt was provided by Mr McCarthy. In these circumstances it is not known if the proof of debt was completed by Mr Jonns or signed by him. No explanation has been provided for the delay in submission, or the reason why Mr Jonns relied upon Mr McCarthy to submit the proofof debt. Evidence of the debt is stated to be "bank statements and transfers".

114. In respect of the January 2014 Spitfire venture Mr McCarthy asked Mr Jonns if he would like to enter a venture with him. The purchase price of the Spitfire was £750,000 and the same sum was calculated for the cost of refit. Mr McCarthy proposed: "we would need to put up all of the purchase price now (£375,000 each) and the balance over 18 months."

115. Mr Jonns agreed and raised a transfer of USD$620,000 with an e-mail note "and away we go!". The e-mail is a contemporaneous note that the sum was sent. It also provides evidence that the lender/investor was a fund owned by Mr Jonns, not Mr Jonns. An e-mail dated 6 January 2014 provides evidence that the venture would be based on 50:50 partnership: "Chris, would you <u>like to own a share in</u> a Second

World War Spitfire." In his response Mr Jonns e-mailed on 22 January 2014 saying that there: "needs to be an agreement in the name of my fund." He refers to the inclusion of a jurisdiction clause. There is no evidence from the fund. There is no evidence regarding separate legal personalities, however the intention was clear. It is possible to ascertain that the fund manager was copied into the 22 January e-mail and the manager was left to conclude the agreement. Mr McCarthy was unable to assist with this detail, not surprisingly since his recall of detail appears impaired.

116. The contemporaneous documents lead me to conclude that there was a partnership or joint venture in respect of the Spitfire which was to be held 50% by Mr McCarthy and 50% by a fund owned by Mr Jonns. There is no documentary evidence to support the renovation or sale of the Spitfire, but Mr McCarthy says it was not renovated but sold.

117. If this is correct Mr Jonns's fund would have been entitled to 50% of the proceeds.

118. Mr McCarthy gave evidence that there was an oral agreement between them that he would retain the proceeds of sale from the Spitfire and this sum would be added to any sums "invested" in the Sierra Leone project. These sums combined would then "be turned into a loan." I find Mr McCarthy's evidence unreliable on the issue. Save for the April 17 Mail there is no evidence that this was agreed. The April 17 Mail itself does not provide evidence about when the proceeds from the sale of the Spitfire was realised, the sum realised, the agreement between the investment fund and Mr McCarthy or any agreement about the proceeds of sale. There is no correspondence from the investment fund and no explanation has been

given. This despite the redacted e-mail correspondence where an agreement was to be produced by a third party. The failure to produce any documentary evidence leads me to conclude that any sums that were due to the investment fund were paid to the investment fund.

119. There is some documentary evidence of a payment made by Mr McCarthy to Mr Jonns in the sum of $300,000 by way of a transfer made from an account held at Barclays Bank. The transfer was made in December 2015. The evidence does not disclose that the transfer was made to repay a personal loan.

120. It has been argued that any purported debt owed to Mr Jonns was created by the April 17 Mail. I reject that submission. In my judgment it is not possible to interpret the language used as creating a debt.

121. The documentary evidence supports a finding that there was a transfer for $USD125,000 made by Mr Jonns on 4 April 2017 via the First Republic Bank to a German recipient "Prios Industry Systems & Services". The first thing to note is that the purported lending was made after the period relied upon in the proof of debt. It is therefore not relied upon to demonstrate sums owed by Mr McCarthy. As it is not relied upon it is likely that the transfer was for investment. Prios Industry has not been directly mentioned in these proceedings, but the payment attracted the attention of the TIB. He discovered that Prios Industry specialises in finding oil refineries and power plants for acquisition or investment. According to the first witness statement of Mr McCarthy it was in 2016 when: "I also entered into negotiations for the purchase of an oil refinery situated in Switzerland, ultimately owned by the Libyan Sovereign Wealth Fund". Mr McCarthy says:

> "Though terms were agreed and a deposit of €2million paid by the purchasers, the transaction was suspended whilst the seller pursued final permission for the deal to proceed from the Libyan government. The purchasers conducted feasibility studies at great expense and all relevant sale and purchase documents were signed between the various interested parties."

122. It is unfortunate that none of the "relevant sale and purchase documents… signed between the various interested parties" are produced to the court. It is more likely than not that the "great expense" involved in the sale and purchase documentation and other pre-investment expenses was the spur for Mr McCarthy to ask Mr Jonns for USD$125,000. Although the April 17 Mail states the lending as having been made to "me" I find on balance that this expression was not intended to mean that the loan was made as a personal loan to Mr McCarthy but that he was the conduit through which an investment in the oil refinery was to be made. Mr McCarthy was grateful as he was either invested in the project himself, as he was invested in the Spitfire project, or more likely dependent upon the success of the project to receive consulting fees. This is likely as he describes himself as a "consulting venture capitalist" where his income "is generated from consultancy related fees". The consequence to him of a failure of the Libyan oil refinery project would have been a loss of fees or loss of investment or both.

123. I find on the balance of probabilities that the USD $125,000 paid to Prios Industry was paid for the purpose of investing in the Libyan owned oil refinery. It was not a direct loan to Mr McCarthy. Mr McCarthy acted as a consultant. This is consistent with marketing material produced by Mr McCarthy in which he said that he, through McCarthy Ventures, was an expert in "sourcing lucrative opportunities". It is consistent with his sworn statement made in the Paylor proposal that as a consulting venture capitalist his income was generated from

consultancy and related fees. It is consistent with the proof of debt that states that the debt owed to Mr Jonns accrued in or before November 2014. The purported loan of USD$125,000 was made on 4 April 2017.

124. The evidence in support of the contention that money was lent to Mr McCarthy by Mr Jonns with an obligation to repay comes from an e-mail sent by Morgan Pang at First Republic Bank on 16 June 2015:

> "Please see below for the dates and amounts wires were sent to Ms. McCarthy. We went as far back as June 2013.
>
> 1/22/14 — 620,000.00
>
> 3/4/14 — 1,000,000.00
>
> 9/9/14 — 125,000.00"

125. The sum paid on 22 January 2014 was in respect of the Spitfire investment project in which Mr Jonns was a joint venturer or partner through his fund. That did not create a debt owed by Mr McCarthy to Mr Jonns. There is no evidence that the sums paid in April and September 2014 were different. Due to the timing of these transfers, it is unlikely that they were made for the purpose of investment in the 2016 oil refinery project. Other sums paid by Mr Jonns (USD $500,000; $100,000 and $50,811.90) were sent from a different bank account: Merrill Lynch. I shall term the "2014 Transfers".

126. The best evidence before the court is that Mr McCarthy found the opportunity to invest in acquiring properties in St Lucia from the FCIB where there had been defaults (distressed debt). He presented the opportunity to others as the Bank was "seeking offers in the region of $15million and I put down a deposit of $500,000 to secure the purchase." Mr McCarthy uses the first person to describe the acquisition, but the St Lucia project was undertaken through a "joint venture"

company known as ROK Capital Partners Ltd (ROK). ROK proved in the bankruptcy of Mr McCarthy for loans made to him between September 2017 and February 2018. Mr McCarthy states in his evidence that he has or was to have a substantial shareholding in ROK.

127. The evidence of Mr McCarthy includes:

127.1. Mr Jonns initially invested in ROK, the "Sierra Leone Enterprise Company";

127.2. An agreement that he "would keep the £650,000 from the sale of the Spitfire project";

127.3. The proceeds of sale from the Spitfire project and sums invested by Mr Jonns in Sierra Leone via ROK would be turned into a loan whereby he would be liable to repay the entire sum;

127.4. The loan was later agreed "With the passing years" to be "rounded up to USD3 million".

128. On the other hand:

128.1. the April 17 Mail states that Mr Jonns would be paid by the oil refinery and St Lucia projects not from Mr McCarthy personally;

128.2. the payment made to Prios Investment for the oil refinery supports Mr Jonns investing in projects not lending money to Mr McCarthy;

128.3. ROK was the joint venture company for the St Lucia projects;

128.4. Mr McCarthy has a history of providing incorrect or incomplete information;

128.5. There is a lack of documentation to demonstrate a personal obligation to repay Mr Jonns;

128.6. The lack of documentation is critical as the conversion of an investment made in a project using ROK as the development vehicle is without explanation; and

128.7. There is no direct evidence from Mr Jonns.

I find it more likely than not 2014 Transfers were made as part of Mr McCarthy's consultancy business where particular investments were made by Mr Jonns in projects where the expectation was that Mr Jonns would receive his capital and a return on his capital from the project. I find there was no corresponding personal obligation on Mr McCarthy to make repayment. There is no explanation how the investment in ROK could have led to the investment in a separate legal entity becoming a personal debt for Mr McCarthy to repay. I find this evidence incredible.

129. To test this outcome I have considered the contemporaneous documentation. There is no contemporaneous documentation to suggest the contrary. The chasing texts from Mr Jonns are explained on the basis that Mr Jonns had bargained for a return on his investments and Mr McCarthy was slow to inform him that the projects had either failed or were failing. It made sense to Mr McCarthy to keep from Mr Jonns his precarious personal financial position from 2105 as he would have lost credibility as a consultant and undermined his self-promoted reputation

As a successful businessman. I do not doubt that Mr McCarthy believed he owed a moral obligation to Mr Jonns.

130. In my judgment there was a material irregularity at the December 18 Meeting.

Mr Bond to Mr McCarthy

131. In contrast to the Jonns purported debt Mr Bond has produced a witness statement in support of the debt obligation owed by Mr McCarthy, some supporting documentation, a skeleton argument and was tested in cross examination. I shall deal with each of the issues set out in paragraphs 95 and 100 above.

Issue 1) creditor-debtor relationship

132. The proof of debt submitted by Mr Bond is significant: £4,152,569. Like Mr Sands and Mr Judge, Mr Bond explained that he had made a human error when counting three repayments as payments made to Mr McCarthy. I accept that the oversight was accidental and not deliberate. He produced transfer documents and a "running total" to support the debt. The bank transfers demonstrate that repayments had not been accounted for and fees added. These sums had been added to the total rather than deducted or omitted providing an inflated claim.

133. He denied, when it was put to him in oral evidence, that the transfers or some were for joint investments. They were made direct to Mr McCarthy. They were personal loans. There is evidence to support the first of these statements (transfers were made direct to Mr McCarthy). The evidence is more mixed in respect of the second statement.

134. In cross-examination Mr Bond was taken to a note that appeared to show that he lent money direct to a company rather than Mr McCarthy. He understood the underlying nature of the question: was he investing into specific projects rather than lending money to Mr McCarthy. He responded that he remembered the deal but did not want to get involved "This note -which speaks of a loan to a company- I rejected it."

135. He was also cross-examined on the transcript of the December 18 Meeting where Mr McCarthy described the debt arising in the following way:

> "I've been in business at various times with Mr Bond, well not at various times, basically consistently for the last 25 years. We've done a number of transactions together including Bangkok land bonds. We have invested in property together. We've invested in various trading opportunities together…"

136. Mr Bond was taken to his own manuscript of a note he made and retained:

> "Loan to ~~Rory~~ Co [Sierra Leone Enterprise Co] -Guaranteed by Rory and Blackman Repayment 12 months, zero invest money next Tuesday not below 25%. Not willing to lend to Co, I know Rory as assets to Back up all money to go through West Africa business. IS Put through Guarantee can be called within 7 days. Full settlement like a Promissory Note." (Sic)

137. Having been taken to the note Mr Bond said:

> "I decided I did not want to get involved in this deal. If I had lent Rory money it would not have been for this deal- if I had lent him money he may use it for this deal, but unbeknown to me. This note which speaks of loan to the company- I rejected it." (sic)

138. He went on to say that he "never" entered joint ventures. Mr Bond explained that his method of lending is one where he invests in an individual who he trusts: "I do everything on a handshake, and everything is on trust".

139. At the December 18 Meeting, Mr McCarthy said in response to a question:

> "The money is owed to him, we have supplied Mark Sands with proof of transfers to my accounts to demonstrate that money was sent directly to me. And so basically, it's across a whole series of transactions, where we rolled up to pursue various opportunities."

140. This representation was not completely correct or consistent with his own or Mr Bond's evidence. Nevertheless, the "sending money direct to me…where we rolled up to pursue…opportunities" is reasonably consistent with the evidence provided by Mr Bond.

141. Mr Robinson submits that the evidence is not sufficient to meet the standard of proof in respect of any sums outstanding:

141.1. Mr Bond thought that in the region of £35m had passed between he and Mr McCarthy during the course of their working relationship;

141.2. There is no evidence in respect of such sums and no reconciliation account to demonstrate what is owing now;

141.3. Mr Bond's evidence is that there was no agreement to charge interest, but rather it was applied unilaterally by him for the purposes of the schedule, because the debt "was going nowhere". His evidence was also that if the investment made by Mr McCarthy came good he would take a share of the uplift. Although not inconsistent with the application of an interest rate as well, there is little or no evidence to support the application of an interest rate, no negotiations and no agreement.

142. Mr Bond exhibited four documents to his fourth witness statement that were produced for the purpose of demonstrating that there was a creditor-debtor

relationship where the monies lent attracted interest. His commentary on bank statements exhibited is as follows:

> "31/01/2011 - £10,000.00 received from RM — debt repayment on account of earlier debt. At this distance of time I cannot be sure of what this money was repaying ; it would be at best a capital payment.
>
> 02/02/2012 - £50,000.00 transfer - this document shows that I transferred 50K to Rory to enable him to conduct a deal, at this distance of time I cannot be sure but I expect the interest rate was 7.5% payable back within a year.
>
> 10/02/2012 - £150,000.00 transfer — this document shows that I transferred 150K to Rory to enable him to conduct a deal, at this distance of time I cannot be sure but I expect the interest rate was 7.5% payable back within a year.
>
> 19/12/2012 - £65,000.00 transfer - this document shows that I transferred 65K to Rory to enable him to conduct a deal, at this distance of time I cannot be sure but I expect the interest rate was 7.5% payable back within a year"

143. Other supporting documents are exhibited. These documents taken together do not present clear evidence on the issue. They do show firstly, money had been sent to Mr McCarthy from the account of Mr Bond and Mr McCarthy had sent money to Mr Bond. Secondly, money was sent to surveyors acting for Niku Restaurant Company Limited. Mr Bond says that the money sent to the surveyor Mr R Wilson to be used for Niku Restaurant but was a loan to Mr McCarthy. Mr Robinson says that it is fair to infer that Mr Bond was acting as agent for the restaurant, but I think it more likely that the loan was direct to Mr McCarthy since Mr Bond had no clear interest in the restaurant business. Thirdly, a record of what Mr Bond says was a loan to Mr McCarthy in 2012 in the sum of £950,000. The manuscript is ambiguous in that it is not clear whether the "principle" (sic) referred to a sum of money invested or lent. A fair reading of the document is that it records item 1) the return of capital paid out by Mr Bond; item 2) a return on the

capital lent and item 3) a profit payment calculated by dividing the return between himself and Mr McCarthy having deducted items 1) and 2). Fourthly, a note on "Cunard" paper which is said by Mr Bond to be "a reminder on funds sent 07/07/2007, this was a record for me on the FX rates keeping my GBP amount for interest and principal repayment". Mr Bond cannot recall why the money was lent but thinks it was in respect of a property transaction in Thailand. Fifthly, a "document for Rory and myself to keep Rory updated on funds lent to him". The document does refer to a "loan" but also refers to "Total to us" and "investment" funds with returns. Mr McCarthy has not commented on it.

144. In my judgment Mr Bond's oral evidence was reasonably consistent with his written evidence in respect of issue 1. I accept his assertion that he invests with individuals like Mr McCarthy rather than structures or ventures, but his investment decision making process does not end with the trust of an individual. His decision-making process is more subtle and complex. The rate of return he says he applies varies from project to project. It follows that he has regard to the project as well as the individual who introduces the prospect of an investment.

145. It is undoubtedly the case that there is no reconciliation account and there remains an issue in respect of the interest rate said to have been applied (I return to the interest rate below). I am not convinced that a reconciliation account is a necessary ingredient to a finding that there is a creditor-debtor relationship. In my judgment although the evidence does not wholly point in the direction of such a relationship[1] there is sufficient evidence, when taking account of the oral evidence

[1] See paragraph 155

given by Mr Bond and Mr McCarthy to support a finding on the civil standard of proof that he is a creditor of Mr McCarthy.

Issue 2) the value of the proof of debt

146. Mr Bond's evidence on the sums due to him was not reliable due to the lack of particularity and inconsistency. That does not mean that I conclude that no sums are due.

147. As to the inconsistencies of proof of debt Mr Bond explained that he entered the sum that he thought he could prove and that the sums added were to "the best of my knowledge". He had produced a "running total" for the December 18 Meeting headed "Payments to Rory". The schedule demonstrates amounts paid and the dates of payment.There are also "Transfer advices" for dates and amounts paid.

148. In his second witness statement dated September 2019 Mr Bond provides the following details about his proof of debt:

Date	Transfer
10/10/2013	167,739.80
30/10/2013	62,710.80
11/12/2013	140,070.22
19/12/2013	300,070.01
06/02/2014	516,235.00
06/02/2014	800,084.00
07/03/2014	1,400,000.00
10/03/2014	25.00
02/04/2014	100,000.00
21/05/2014	150,060.00
19/08/2014	80,067.33
Current Claim	**3,717,062.16**

149. Having said that he produced transfer documents to Mr Sands to support these payments he explains:

> "My bankers until 2012 were KBL Monaco, but they converted into an Investment Bank, and I was not interested in investing with them so I closed my accounts. I have asked them for copies of earlier accounts, but they have declined to provide these…the payments that I have listed were all in respect of money loaned to him, and not investments in a joint venture or anything of that kind. I realise that I will be challenged regarding the casual nature of my record keeping regarding my dealings with Mr McCarthy, and the absence of paperwork, but this is how I have dealt with him."

150. Having found the "running total" notes he provided a third witness statement:

> "To my surprise I discovered on about 16 May 2021, when looking for documents for an unrelated matter, at my UK home a number of notes, I had made and bank funds transfer advices I can explain orally if required. I should mention that where I use the word "profit" I mean gain or interest. The monies lent Rory Mr McCarthy were just that, loans and interest would range from 6% pa or 10% pa, depending very often on how keen he was for the money. The fact that I describe the interest as "profit" does not change the nature of the transactions between us."

151. In my judgment his evidence leads to the conclusion that Mr Bond expected a return on his capital and tended to agree a percentage return on each occasion. It follows that if a return on capital the obligation was to provide the return of capital only. This is inconsistent with his evidence that he agreed that all projects would produce a 7.5% return. I find on the balance of probabilities that Mr Bond would make some sort of evaluation to decide where in the range of 6% to 10% the return in capital would land and seek to negotiate with Mr McCarthy. I should add that although there was an inconsistency in his oral evidence, that was not surprising given the time lapse between events, the lack of documentation and reconstructive memory process inevitably in play.

152. The figures he exhibits includes fees incurred on the account and the bank supporting bank statements show bank fees added. In his skeleton argument he appears to acknowledge the errors [41]:

> "However, even this is wrong, because I did not deduct the three payments from the total of £4,152,569 but simply ignored them. If I had deducted the three payments totalling £875,000 from £3,717,062.16, the true balance would be £2,842,062.16. At this distance of time, I simply cannot remember the precise details."

153. The words "the precise details" have been criticised by Mr Robinson. He argues that the onus is on Mr Bond to prove on the balance of probabilities the sums due from Mr McCarthy and the precise detail supported by documentary evidence is important. That must be right although regard should be had to the factors I have mentioned in paragraph 141.

154. Mr Bond explained that he was embarrassed at the failure to provide an accurate proof of debt on the first occasion: "it was done in a hurry" and was "incorrect". He conducted his business "on a handshake" and trusted Mr McCarthy. As such there is little or "no paperwork". He had produced a "running total" of the debt to "remind Rory of where we are at- to remind us both in respect of the sums owed".

155. The relationship between Mr Bond and Mr McCarthy has endured over many years where, I accept, a considerable amount of money has been transferred between them. The evidence is not sufficient to label each transfer as a loan or investment: see paragraph 145 above. It is likely that over the years some transfers were for the purpose of investment. This explains Mr McCarthy's evidence that they had "invested in property together" and "invested in various trading opportunities together". Having regard to the written and oral evidence of Mr Bond, accepting as I do that their "relationship … was such that documents were

rarely relied upon. Our business was on a handshake", I find that joint investments were not Mr Bond's only option. As an astute man of business, he would choose whether to invest or to lend or not to lend dependent upon anticipated return and risk. In my judgment Mr Bond has established to the satisfaction of the court that the balance of transfers to Mr McCarthy total £2,800,966 and this balance constitutes loans made. Owing in part to the lack of documentation Mr Bond was unable to provide the court with sufficient material or sufficiently clear oral evidence concerning interest rates. Overall, his evidence was that the interest to be charged for loans made would vary within a range. There is insufficient evidence for the court to attach a specific rate of interest to any one transfer. As I am satisfied that Mr Bond lent money on the condition that he would receive the return of his capital and a simple rate of interest I find that the lowest end of the range is repayable, namely 6%.

Issue 3)

156. In his fourth witness statement Mr Bond says:

> "Rory McCarthy took an option on the property known as Gordon House and I lend (sic) him money to assist in the full purchase of the property. As I understand it his intention was to sell it on at a profit as he purchased the property when the developer became in trouble for money. As the letter [written by me] explains the developer reneged on the deal; this letter was sent to the developers solicitors trying to retrieve the position for Rory, explaining that we have invested interest in the property."

157. Mr Bond sought to introduce money lent on the Gordon House project as part of his evidence that he worked with Mr McCarthy for a long time and Mr McCarthy had introduced many business ventures to him. Later he became involved in the "Gordon House" project, but he hadn't included any debt arising from the lending within his proof of debt.

158. Mr Bond explained that he had "not forgotten about the deal but I had no documents to prove it, so I did not mention it. I did not want to waste everyone's time putting in an amount I could not show". He repeated this in closing. The letter he referred to in his fourth witness statement is dated 18 November 2013 and written to Charles Russell LLP. The letter provides some evidence, which although not contemporaneous was written before the bankruptcy proceedings and nearer in time to the event than now. It states that a loan of £850,000 was advanced on 26 January 2012 on the basis that Mr McCarthy would pay 20% of any profit on the disposal of the property and interest at the rate of 5% per month. There is no reason to disbelieve that the letter was written at the time but there is reason to doubt, as I shall explain, whether the letter is sufficient to permit Mr Bond to include the Gordon House lending in his proof of debt.

159. Mr Bond said that the reason why he wrote the letter was to remonstrate against the developer company known as Octagon as: "by essentially reneging on the deal with Mr McCarthy, Octagon were able to not only keep all the deposit paid by Mr McCarthy but were able to sell the property for an additional £250,000". Mr Bond said that none of this debt had been repaid.

160. It is important to bear in mind that Mr Bond does not seek to amend his proof of debt. In any event it is likely that the letter by itself is insufficient to satisfy the standard of proof. There are some questions that remain unanswered such as who comprised the investment group (the letter is redacted); the reason why the other two names were redacted; the reason why the other two had not been mentioned in

the Paylor proposal, to the TIB or to Mr Sands; and the precise sum lent by Mr Bond with supporting documentation. There is no certainty that the letter was ever sent to Octogan as it was addressed to the solicitor acting for Mr McCarthy: no evidence has been adduced from the solicitor.

161. It is curious that the same solicitors appeared to be unaware of the debt in May 2016 when a statement of assets and liabilities was first produced in draft form and by way of e-mail. This casts some doubt about whether the letter was ever sent by Mr Bond, received by Mr McCarthy's solicitors or sent and received by Octogan.

162. In cross examination Mr Bond was gracious enough to accept that he had not added the purported Gordon House loan to his proof of debt as he had insufficient evidence to so do. It is unnecessary to decide the point on this application, but if I had to do so I would have found, as Mr Bond appeared to accept, that the burden of proof had not been satisfied.

OBN Investments Limited

163. Stephen Kaye is a director and shareholder of OBN Investments Limited. He provided a statement in these proceedings but did not attend court for cross examination. The reason for his nonattendance is explained by a recital to a consent order dated 24 September 2020 that states OBN agreed:

> "…to withdraw its claim in the Individual Voluntary Arrangement of the Third Respondent that was voted upon by creditors on 3 December 2018 and not to vote its claim in support of any future voluntary arrangement proposed by the Third Respondent."

164. The proof of debt produced by OBN, accepted by Mr Sands at the December 18 Meeting, was for £3m. The withdrawal of the proof of debt will have had a material effect on the outcome of the December 18 Meeting.

Conclusion

165. In my judgment there was a material irregularity at the December 18 Meeting. Mr Jonns has not produced a witness statement of fact or attended court to permit scrutiny of the proof of debt he submitted at the December 18 Meeting. The claim he has submitted has not been established on the evidential standard of proof. The acceptance of his vote for the proposal at the December 18 Meeting was a material irregularity. I shall declare his vote invalid.

166. Mr Bond has established that monies were lent to Mr McCarthy and the balance due to him is £2,800,966.

167. The OBN debt was accepted at the December 18 Meeting. OBN has played no part in these proceedings since September 2019; it has withdrawn its proof and the Applicant does not appeal the decision to admit.

168. Mr McCarthy has failed to make any payments into the arrangement. He failed to continue to make payments under an income payments agreement. These failures coupled with the decision of OBN not to vote in favour of an arrangement at any further meeting and the failure of Mr Jonns to demonstrate he is a creditor

of Mr McCarthy leads me to conclude that the cost and time of convening a new meeting of creditors would be pointless.

169. Pursuant to Rule 15.35 (3) I shall reverse the decision at the meeting.