Neutral Citation Number: **[2023] EWHC 851 (Ch)**

Case No: CR-2022-002487

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

Rolls Building
Fetter Lane
London EC4A 1NL

Date: 17th April 2023

Before :

RICHARD FARNHILL
(sitting as a Deputy Judge of the Chancery Division)

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Between :

SNOOZEBOX LIMITED

Claimant

- and -

(1) THE HEALTH AND SAFETY EXECUTIVE
(2) HIS MAJESTY'S TREASURY

Defendants

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- -

Ms Raquel Agnello KC and Ms Anna Scharnetzky (instructed by **Cardium Law Limited**) for the **Claimant**
Mr Jeremy Bamford (instructed by **the Government Legal Department**) for the **First Defendant**
Mr Christopher Brockman (instructed by **the Government Legal Department**) for the **Second Defendant**

Hearing dates: 27 and 28 March 2023

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JUDGMENT

Richard Farnhill (sitting as Deputy High Court Judge for the Chancery Division):

The dispute

1. This dispute concerns the recoverability of any fine and award of costs that may be ordered against Snoozebox Limited (the **Company**) in ongoing criminal proceedings (the **Prosecution**) being brought against it by the Health and Safety Executive (the **HSE**).

2. The Company accepts that the underlying obligation remains extant: the HSE is entitled to pursue the Prosecution, and if the Company is found guilty the Crown Court can fine the Company and order it to pay the HSE's costs of the Prosecution. However, the Company asserts that a company voluntary arrangement (the **CVA**) it entered into after the events giving rise to the Prosecution but before the Prosecution was commenced applies to any fine or award of costs. Because the HSE (and, so far as it is relevant, HM Treasury) did not submit proofs of loss in the CVA within the required time limits, the Company further submits that it is too late for them now to do so. The practical effect of those submissions, if successful, would be to render any fine and any award of costs uncollectible.

3. The claim was brought by way of Part 8 proceedings and the facts were almost entirely agreed. The issues for determination were largely set out in Mr Brockman's skeleton. For the reasons set out more fully below, I answer them as follows:

    i) As at 16 February 2018, the date of the CVA, did the HSE and/or HM Treasury have contingent claims or debts for any fine or prosecution costs that may be ordered in the Prosecution? The necessary legal relationship had been established and the prospect of liability was sufficiently real to render any fine a contingent liability. Costs arise under a different regime and the relevant legal relationship had not been established at the time of the CVA, such that there was no contingent liability for costs.

    ii) Are the HSE and HM Treasury bound by the CVA? The HSE and HM Treasury are both emanations of the Crown, meaning that notice of the CVA was properly given to both of them through notice provided to the HSE. Under the Insolvency Act 1986 (the **1986 Act**) the Crown is bound by a CVA like any other creditor.

    iii) Do the terms of the CVA limit enforcement of any fine or order for prosecution costs that may be made by the Crown Court? The CVA prevents collection of any fine; for the avoidance of any doubt it does not limit the imposition of such a fine, nor does it affect anything other than collection (for example, the fact that a fine was imposed could still be an aggravating factor in any future prosecution). The CVA does not prevent the collection of any prosecution costs if ordered by the Crown Court against the Company.

    iv) Was the Company subject to a debt or liability at the administration date of 8 November 2017? Yes as regards the fine. The investigation giving rise to the Prosecution had commenced a year before pursuant to the HSE's requirements for mandatory investigations. Nothing of substance

changed in respect of it between November 2017 and February 2018, meaning that the relevant legal relationship and the prospect of liability were unchanged between those two periods. No as regards prosecution costs.

v) Was the Company released and discharged from any claim or order for a fine or prosecution costs on 18 October 2018 under clause 7.6 of the CVA or otherwise? The Company was released from the obligation to make payment of any fine on 18 October 2018 under clause 7.6 of the CVA. Any order for costs is unaffected. It remains open to the Crown Court to make either or both such orders.

vi) If the CVA covers any fine or award of costs, can the HSE or HM Treasury recover under section 5(2A) of the 1986 Act? Recovery under section 5(2A) is in accordance with the terms of the arrangement. Under the terms of the CVA it is now too late to file a proof of loss, and so no recovery can be made under that provision.

Events giving rise to the CVA and the Prosecution

4. The Company provides semi-permanent, modular hotel accommodation on an ad-hoc basis for events such as music festivals and sporting events. Until early 2018 the Company was a subsidiary of Snoozebox Holdings plc, an AIM listed company.

5. In August 2016, the Company rented a site at Primrose Hill Farm, Silverstone, Northamptonshire. It was carrying out works in order to make a barn on the site suitable as a dining area for guests of a nearby hotel. The Company engaged an external contractor to carry out some of those works who in turn engaged Mr Petraru.

6. On 20 August 2016 Mr Petraru fell through the roof of the barn. He sustained a severe head injury which sadly resulted in his death on 25 August 2016. On 30 August 2016 the Company submitted a report under the relevant regulations to the HSE detailing the circumstances surrounding Mr Petraru's accident.

7. In September 2016 the HSE appointed Mr Poulter, one of His Majesty's Inspectors of Health and Safety, to investigate the accident. As is usual, the initial stages of the investigation were conducted jointly with the local police. Mr Poulter first attended the site of the accident on 2 September 2016.

8. By letter dated 16 November 2016 the HSE informed the Company that the accident met the HSE's requirements for mandatory investigation and that its enquiries were ongoing. Plainly, the HSE must by that time have formed at least an initial view of the accident and the Company's potential guilt in order to have reached that conclusion. The letter also notified the Company that the HSE would seek to recover its costs of the investigation if the Company were in due course found to have been in material contravention of health and safety law. Those costs are referred to as the "Fee for Intervention" or "FFI" costs. Under the Health and Safety and Nuclear (Fees) Regulations 2016 (**the 2016**

Regulations) regulation 6(a), the FFI does not include costs connected with any criminal investigation or prosecution.

9. In August 2017 the HSE received primacy for the investigation, meaning that it took the lead, with the police working in parallel.

10. The Company's financial position was increasingly precarious by this stage. When it proved impossible to restructure its funding arrangements with its secured lender, SQN Asset Finance Income Fund Limited (**SQN**), the Company's director considered that it was insolvent and took steps to appoint administrators. On 8 November 2017, the Company entered administration. Jeremy Willmont and Neville Side of Moore Stephens (now BDO) were appointed as joint administrators (**the Administrators**).

11. On 15 November 2017 the Administrators wrote to known creditors, informing them of their appointment. The HSE accepts it received that letter. Mr Poulter discussed the appointment with his Principal Inspector at the time but they decided that there was no need to respond or become involved in the administration as it would not affect the HSE's on-going investigation. The Administrators' letter was also sent to HM Revenue and Customs (**HMRC**) and the Department of Work and Pensions (**DWP**), but not to HM Treasury (or any other government department).

12. The Administrators attempted to sell the Company as a going concern and sought indicative offers by the end of November 2017. From the offers received they considered that the one from SQN AFIF (Bronze) Limited (**Bronze**), a subsidiary of SQN, represented the best overall outcome for creditors. The Administrators therefore agreed a sale of the entire issued share capital in the Company to Bronze. A condition of the sale was that the creditors of the Company approve a company voluntary arrangement (the proposal for which became the CVA) pursuant to Part I of the 1986 Act.

13. On 1 February 2018, the Administrators, as joint nominees, sent a letter to all known creditors of the Company enclosing a copy of the CVA proposal (the **Proposal**) and notice of the meeting of creditors. The Proposal noted that if the CVA was approved SQN and the Company's parent would release claims totalling approximately £58 million and would not participate in any dividend declared to unsecured creditors. The only asset to be included in the CVA was the sum of £400,000 which would be paid by the Company to the Supervisors (defined below) for the benefit of the CVA creditors, to be available for payment of CVA (and related) fees and for distribution to unsecured creditors. The estimated outcome statement in section 16 and Appendix D to the Proposal recorded that (i) under the CVA a dividend of 100p in the £ would be paid to Preferential Creditors (as defined in the proposal) and a dividend ranging from 36p to 83p in the £ would be paid to the Unsecured Creditors (again as defined in the proposal) whereas (ii) in the alternative to the CVA, being a liquidation of the Company, a dividend of only 1p in the £ would be paid to Unsecured Creditors.

14. The Schedule of Creditors at Appendix C to the Proposal included the "Health and Safety Executive" as a creditor in respect of an unspecified amount and

records "FAO: Roy Poulter, Nicker Hill, Keyworth, Notts, NG12 5GG" as the HSE's address. The Schedule of Creditors also included HMRC (Debt Management) and DWP Debt Collection in respect of £11,035 and £292, respectively. It did not include any other Crown creditors.

15. According to the Administrators' records and the proposal documentation that letter was sent to the HSE, which was also included in the Schedule of Creditors appended to the CVA proposal. The HSE and Mr Poulter are now unable to say whether the HSE received the letter because the hard copy file into which Mr Poulter would have placed it (and other letters received in connection with the administration and the CVA) has been lost. These are Part 8 proceedings, such that the facts should be largely undisputed. Mr Bamford accepts that evidence exists to suggest that the letter was sent to the HSE and that I can properly find that this happened; in my view it did happen. The letter was not sent to HM Treasury.

16. The meetings of creditors and members of the Company were held on 16 February 2018. According to the chairman's report dated 16 February 2018 the CVA was approved by both meetings without modification. The schedule of creditors appended to the Chairman's report shows that the CVA was unanimously approved by those who voted at the creditors' meeting. No claim had been submitted for voting purposes by HM Treasury (which is unsurprising given that it had not been served with notice of the meeting) or the HSE (which did not vote) in connection with any possible fine or prosecution costs award.

17. The Administrators were appointed as supervisors of the CVA (**the Supervisors**). By letter dated 16 February 2018 the Supervisors informed all known creditors that the CVA proposal had been approved without modification. Again, it appears that the letter was sent to the HSE but the HSE is now unable to say whether it has received the letter or not. In my view it probably did receive that letter. The letter was not sent to HM Treasury.

18. Section 6 of the CVA contained provisions in relation to the submission, admission and rejection of creditor claims. Pursuant to clause 6.5 the deadline for submitting a formal proof of debt to the Supervisors was 31 March 2018 or such other date as the Supervisors prescribed.

19. In accordance with clause 7.7 of the CVA, the Supervisors sent a second notice to the HSE as creditor on 23 May 2018 and asked the HSE to submit its claim by 16 August 2018. The letter notified the HSE that absent submission of a claim, the HSE may be excluded from the benefit of any dividend in the CVA, reflecting the terms of clause 7.17 of the CVA. The HSE accepts that it received this letter but did not respond as, at the time, no monies were owed to the HSE by the Company. Mr Poulter thought the letter was a reminder of the letter that had been received in November 2017.

20. The Supervisors implemented the CVA and, in accordance with its terms, made two distributions on 15 August 2018 and 18 October 2018 to those creditors who had submitted proofs of debt which had been accepted by the Supervisors. Neither the HSE nor HM Treasury (nor, it seems, any government department) submitted a proof of debt.

21. On 20 March 2018 the Joint Administrators filed a Notice of the end of the administration with the Registrar of Companies enclosing their final progress report. The entire share capital in the Company was sold to Bronze. Following implementation of the share sale agreement in March 2018, the Company's board of directors was replaced. The new directors had no involvement in the management of the Company at the time of Mr Petraru's accident. There followed an onward sale to The Portable Living Group Limited (**PLG**), as contemplated in the Proposal. From October 2018 the Company has been a wholly owned subsidiary of PLG.

22. According to the Supervisor's notice of termination and final report to members and creditors dated 13 September 2018 and filed with the Registrar of Companies the Company had complied with the terms of the CVA, which was therefore deemed to have been fully implemented and terminated six months after the date of commencement in accordance with clause 5.16 of the CVA.

23. The HSE's investigations were largely complete by May 2018. However, before taking further action the HSE awaited the conclusion of the inquest into Mr Petraru's death, which took place in October 2019.

24. On 30 April 2020 the HSE wrote to the Company, enclosing a Notice of Contravention. The letter explained that the HSE's investigation had concluded that the Company had been in material breach of health and safety laws and that a decision had been made to prosecute the Company over its role in the accident. The letter went on to state that the Company would have to pay FFI costs. Subsequently, the HSE issued two invoices in respect of those costs. The first was dated 18 May 2020 for £12,517.05 and the second was dated 16 July 2020 for £471.

25. The HSE accepts that its claim for FFI costs, as claimed under those invoices, was a contingent and unquantified claim on 16 February 2018, the date of the creditors' meeting approving the CVA. The HSE further accepts that if it did receive notice of the creditors' meeting it could have voted at the creditors' meeting in respect of its claim for FFI costs and that it is bound by the CVA in respect of those costs.

26. The HSE sent two Informations dated 21 October 2021 to Wellingborough Magistrates Court for issue. Obviously, this was some considerable time after Mr Petraru's death. As Mr Poulter explained in his evidence, the delay was the result of other ongoing investigations, staff changes within the HSE and the Covid 19 pandemic. The delay was not in any way connected with the actions or inactions of the Company or any aspect of the CVA, therefore.

27. The first Information alleged that the Company had between 28 July and 20 August 2016 failed to discharge the duty imposed on it by section 3(1) of the Health and Safety at Work etc. Act 1974 (**the 1974 Act**) by failing to conduct its undertaking in such a way as to ensure, so far as was reasonably practicable, that persons not in its employment, including Mr Petraru, were not thereby exposed to risks to their health or safety, and that therefore the Company was guilty of an offence contrary to section 33(1)(a) of that Act. The second Information alleged that the Company had between 28 July and 20 August 2016

breached regulation 4 of the Construction (Design and Management) Regulations 2015 (**the 2015 Regulations**) by not making suitable arrangements for managing the project on which Mr Petraru worked and was therefore guilty of an offence contrary to section 33(1)(c) of the 1974 Act.

28. On 8 November 2021 Wellingborough Magistrates Court issued the summons based on the HSE's Informations. The HSE argues that it was only at this stage that the Prosecution commenced, over three years after the CVA. The Company's former executive managers as well as its external contractor are also defendants in the Prosecution. Mr Poulter acts as prosecutor.

Who is the creditor in respect of any fine?

29. Initially these proceedings were brought by the Company solely against the HSE. The HSE objected to this on the ground that any fine would properly be payable to HM Treasury, meaning that it was the creditor. If correct this would raise a question as to notice, since details of the CVA and the various steps to be taken were only ever given to HSE, HMRC and DWP; nothing about the CVA was ever sent to HM Treasury. As I will come to address, failure to give proper notice would give rise to a ground to challenge the CVA.

30. The Company accordingly sought to join HM Treasury. As with many aspects of this case, the parties have behaved commendably in handling the issues of procedure: the Government Legal Department identified HM Treasury as the emanation of the Crown that it believed was the proper party and facilitated joinder; the Company cooperated while retaining its right to challenge the need for a further party to be added.

31. The Company's position is based principally on two authorities. *Town Investments v Department of the Environment* [1978] AC 359 concerned a lease of premises. The tenant was "*the Minister of Works … for and on behalf of Her Majesty*" but the premises were used by civil servants from other government departments. When the lease expired a new lease was negotiated, with the tenant this time being described as "*the Secretary of State for the Environment*". A question arose as to the application of rent control provisions, which would only apply if the premises had been occupied by the tenant for the purposes of its business.

32. The House of Lords held that the tenant was the Crown and the Crown had occupied the premises, such that the rent control provisions applied. Lord Simon emphasised at 400F-G:

> It follows that prima facie in public law a minister or a Secretary of State is an aspect or member of the Crown. Except in application of the doctrine of precedent analogies are to be regarded warily in legal reasoning. But in view of all the foregoing the analogy to the human body and its members is, I think, an apt one in relation to the problem facing your Lordships. It is true to say: "My hand is holding this pen." But it is equally true to say – it is another way of saying: "I am holding this pen." What is nonsensical is to say: "My hand is holding this pen as agent or as trustee for me."

> The Minister of Works and the Secretary of State for the Environment are aspects or members of the Crown, incorporated and charged for administrative convenience with holding and administering property required by other Crown servants, who are also aspects or members of the Crown.

33. *Secretary of State for Trade and Industry v Frid* [2004] UKHL 24 concerned the rules on set-off. The debtor was entitled to a VAT credit but in turn owed sums to three different government departments. HM Customs and Excise, the Crown entity that owed the VAT credit, proposed to set that sum off against the debtor's liabilities, allocated pro rata to each department by reference to the amount it was owed by the debtor. The debtor objected. The House of Lords permitted the set-off, Lord Hoffmann emphasising at [27] that:

> The constitutional accountability of the Crown to Parliament for the expenditure of public money means that, as a matter of public law, the Crown may have to deal differently with money from different sources. …In private law the Crown through its various emanations is the beneficial owner of all central funds. If it fails to comply with the provisions which require such funds to be segregated, the remedy lies in public law.

34. The Company's position is that the HSE was the relevant emanation of the Crown; all notices and correspondence were sent to the HSE, and so to the Crown. HM Treasury was simply another emanation of the Crown, which did not need to be separately notified.

35. The HSE and HM Treasury accept that they are both parts of the Crown. HM Treasury, with whom the HSE agrees, bases its position on the statutory framework concerning payments made into the Consolidated Fund, which was established under section 1 of the Consolidated Fund Act 1816 and is administered by HM Treasury. Under section 10 of the Exchequer and Audit Departments Act 1866 (the **1866 Act**), all public moneys payable to the Exchequer must be paid into the Consolidated Fund.

36. That, in itself, does not seem to me to take matters much further, since it addresses how funds are dealt with when they are received by the Crown. It is precisely the point that Lord Hoffmann makes when he talks about the potential need for the Crown to deal differently with money from different sources. It is a public law question. The issue here is the private law matter of to whom the Company needed to send notices regarding the CVA.

37. Mr Bamford, for the HSE, accepted that for purposes of the investigation itself the Company was right to deal with the HSE. He equally accepted that the HSE would be the prosecuting authority under section 38 of the 1974 Act, and so the Company would (and indeed does) deal with the HSE on the conduct of the Prosecution. The HSE as prosecutor is the body that will therefore seek any fine and address the Crown Court on the appropriate level, although it is ultimately for the judge passing sentence to determine the amount. There is an obvious appeal to concluding that if the HSE is responsible for the Prosecution and is the right entity to receive notice of the CVA in respect of any costs award

(which is not disputed), it is logically the right entity to receive notice of the CVA in respect of any fine that might flow from the same Prosecution.

38. If the Prosecution succeeds the focus shifts to His Majesty's Courts and Tribunal Service (**HMCTS**). The evidence of Mr Roberts, a director of the Company, by reference to the trust statement for HMCTS was that any fine and any award of prosecution costs would be collected in the first instance by HMCTS. The parties helpfully produced an agreed note of the provisions in the Magistrates Courts Act 1980 and the Courts Act 2003 by which this would be achieved. Mr Bamford accepted that HMCTS could give good discharge for the debt, both as regards a fine and any costs award. He emphasised that the ultimate recipient of any fine would be the Treasury. To be precise, under section 81 of the 1974 Act any fines are paid into the Consolidated Fund.

39. This creates two difficulties for the argument that HM Treasury is a necessary party to these proceedings or needed to be separately notified of the CVA. First, neither of the Defendants explained why initial receipt and ultimate receipt should be treated differently. If anything, however, one would expect initial receipt to be the correct test, since that is what matters to the payer in securing discharge of the debt. Yet nobody suggests that HMCTS needed to be notified of the CVA or to be a party to these proceedings. Logically, HM Treasury should be treated in the same way. Secondly, as I have noted section 10 of the 1866 Act provides for all public moneys payable to the Exchequer to be paid into the Consolidated Fund. If the test were focussed on the ultimate recipient, therefore, virtually any matter involving Crown funds would necessarily involve HM Treasury as a party in its role as the administrator of the Consolidated Fund. Plainly that is not the position, which calls into question why it needs to happen in this case.

40. In his skeleton on behalf of HM Treasury, Mr Brockman noted that: "*Following conviction and sentence, the role of HMCTS and HMT is administrative and limited to the collection of the fine.*" Mr Brockman clarified that he was referring to the separation between the Crown Court, which imposes the fine, and HMCTS and HM Treasury, which collect it. Again, that position seems to me less than straightforward. First, HM Treasury does not collect the fine; it receives it. If collection were relevant the proper party would have been HMCTS, and as I have noted no one suggests that. Secondly, the administrative nature of HM Treasury's role reflects precisely the point that Lord Simon was making in *Town Investments* in the second paragraph that I have quoted above – HM Treasury administers the accounting for any fine and possibly, alongside HMCTS, its collection, but it does so as an aspect of the Crown. Similarly, HSE administers the prosecution, also as an aspect of the Crown. All this reinforces the view that the HSE was the correct emanation of the Crown for the purposes of the CVA and this claim.

41. A final point, advanced principally by Mr Bamford, was that treating the Crown as a whole would leave it open to abuse by a party that notified one emanation of the Crown with which it had limited dealings and sought to use that as notice to other emanations with which it had much more extensive dealings. To take a hypothetical example, if in this case the Company had given notice of the CVA only to DWP (which had a claim for £292) but not the HSE or HM

Treasury (in circumstances where the fine could be as much as £10 million), would that still be notice?

42. In my view, at least in the context of CVAs, that point is dealt with by David Richards J as he then was in *Re T&N Ltd (No 3)* [2006] EWHC 842 (Ch) at [17]:

> A difference may however exist as regards challenge under section 6(1)(b) [of the 1986 Act] based on "some material irregularity at or in relation to" the meeting. An obvious irregularity is a failure to give notice to a person who should have received it. If therefore, through oversight, notice is not sent to a creditor whose claim, name and address is known to the administrators, there has been an irregularity in relation to the meeting.

43. It seems to me clear from this that giving notice of the CVA to DWP alone would not have been sufficient. At the very least the address of the creditor would be wrong; to my mind it is fair to include, in the reference to name and address, such things as the contact name of an individual or a reference if those are known. If notice had only been sent to DWP, when the HSE received notice it would have had 28 days from the date of receipt in which to challenge the CVA under section 6(3)(b) of the 1986 Act.

44. In this case, that argument is purely hypothetical. The evidence demonstrates that the CVA was sent to the HSE at their Keyworth office, marked for the attention of Mr Poulter. There was no irregularity in giving notice, therefore.

45. Accordingly, I find that, throughout, the Company has been dealing with emanations of the Crown and in giving notice of the CVA to the HSE it dealt with the appropriate emanation of the Crown. The HSE conducted the investigation and is pursuing the Prosecution from which any financial liability will flow. There was no need to give duplicate notice to HM Treasury, whose role, at least for private law purposes, was at most administrative.

Would any fine or award of costs be contingent claims for the purposes of the CVA?

46. Showing that notice of the CVA was properly given is only part of the battle for the Company. If the fine or the costs claim were too inchoate at the time of the CVA they would fall outside its scope.

47. Under section 5(2)(a) of the Insolvency Act 1986 the CVA took effect from the date that creditors approved it, in this case 16 February 2018. Under section 5(2)(b) it was binding on any party that was entitled to vote at the meeting or that would have been entitled to vote if they had been given notice of the meeting. IR r.15.28(5) makes clear that it is creditors who are entitled to vote at that meeting in respect of their respective debts. Under section 434 of the 1986 Act the Crown can be bound by the CVA like any other creditor. The effect of those provisions and my finding above that notice to the HSE is sufficient notice to the Crown means that the Crown is bound by the terms of the CVA to the extent that it was a creditor at the date of the meeting.

48. That shifts the focus to ask which debts are covered by the CVA. The starting point in answering that question is the CVA itself. Under clause 7.6, it is only to apply to "*debts and liabilities owing to the Creditors to which it was subject at the Administration Date*". The Company entered administration on 8 November 2017. It arguably makes no difference whether one takes the relevant date as being the date of administration or the date of the CVA, 16 February 2018, since for a variety of reasons nothing of consequence seems to have happened with the HSE's investigation in the interim. For the avoidance of doubt, however, I have taken 8 November 2017 to be the relevant date for considering whether the Crown was a creditor in respect of any fine or costs award.

49. In *Discovery (Northampton) Ltd v Debenhams Retail Ltd* [2019] EWHC 2441 (Ch) Norris J noted that the 1986 Act does not contain a definition of "creditor" for the purposes of CVAs, but that the effect of IR r15.28(5) is to link the concepts of "creditor" and "debt". While "debt" is also not defined for the purposes of CVAs, Norris J observed (at [26]) that it is defined for the purposes of administration and winding up under IR r.14.1(3) to mean:

    a) any debt or liability to which the company is subject at the relevant date;

    b) any debt or liability to which the company may become subject after the relevant date by reason of any obligation incurred before that date.

50. He highlighted that liability was something other than a strict debt, and that the definition applied equally in the context of CVAs. He summarised the position at paragraph [58]:

> Where does this leave a first instance judge? Pulling together these threads the position seems to me to be this. A CVA requires a proposal to be put to creditors. The term "creditor" must be given a wide meaning, but a "creditor" must have a "debt". The term "debt" has a meaning that extends well beyond a debt strictly so called. It includes pecuniary liabilities (obligations that may turn into debts strictly so called) that might spring out of an existing legal relationship.

51. Plainly, any fine and award of criminal costs pursuant to the Prosecution were not debts or liabilities to which the Company was subject at the relevant date. The Company therefore needs to show that they were contingent debts or liabilities that might spring out of a legal relationship existing at that time.

52. *Debenhams* concerned a lease, such that it was clear that the legal relationship existed before the date of the CVA. The position where the legal liability arose from facts that occurred before a CVA but only came into existence after that CVA was considered by David Richards J in *Re T&N Ltd* [2005] EWHC 2870 (Ch). T&N mined asbestos and manufactured and distributed asbestos products. As a consequence of the increase in asbestos claims T&N sought insolvency protection. As David Richards J noted at paragraph [12], it was an "*essential*

feature of the proposals" that any CVA should bind both those who were then entitled to bring claims and any future claimants.

53. That presented a potential issue where the future claims arose in the tort of negligence. Damage is a necessary element of the tort (paragraph [25]). The majority of those exposed to asbestos dust never go on to suffer any actionable injury but it was impossible to predict which individuals would be injured, and so have claims, and which would not (paragraph [13]). The nature of the relevant conditions meant that it was not simply the symptoms but the injury itself that could take years to occur (paragraph [24]). Put another way, exposure that happened exclusively before the CVAs in that case could result in injury, and so actionable claims, only years after the CVAs.

54. The same issue did not arise in breach of contract claims, including those founded on contractual negligence, because in contract breach is actionable without the need to show damage. As David Richards J noted at [27], that could have produced "*surprisingly different results*" depending on whether the claim was based on contractual or tortious negligence.

55. After analysing *Re Sutherland* [1963] AC 235 and *Frid*, David Richards J concluded, at paragraph [60], that the future potential tort claims were caught by the CVA:

> The creditors in respect of those contingent liabilities are the persons who have been carelessly exposed to asbestos and who will have claims in negligence if they suffer a loss as a result. …the contingent liability to pay damages is a liability which, by reason of something done by the person (i.e. the use or distribution by T&N of asbestos or asbestos products) will necessarily arise or come into being if one or more certain events occur (i.e. the onset of asbestos-related conditions in persons previously exposed to asbestos by T&N). …The careless exposure of persons to asbestos by T&N will automatically by the operation of the law of negligence lead to the liability to pay damages, assuming the existence of the other necessary elements of a claim in negligence.

56. The breach of the duty of care in carelessly exposing potential claimants to asbestos therefore created a sufficient legal relationship to create a contingent claim.

57. The analogy that the Company seeks to draw is obvious: just as T&N's exposure arose from events that took place in the past, so the Company's liability in the Prosecution (if any) must arise from, and only from, the events surrounding Mr Petraru's death in 2016.

58. *Re T&N* itself presents a potential issue for the Company in that regard, however, because of David Richards J's stress on the inevitability of legal liability in the case of those who did go on to suffer some form of actionable damage. David Richards J was faced with a line of authority culminating in *Glenister v Rowe* [2000] Ch 76 which held that where liability arose in exercise of a court's discretion, that discretion prevented there being a contingent liability. His reference to *Re Sutherland* at paragraph [61] of his judgment,

where inevitability was not a necessary element of a contingent liability, raises the question of whether such inevitability was critical in *Re T&N*. However, because, as he noted at paragraph [65], liability to the future tort claimants did not turn on any discretion the *Glenister* line of cases was not on point and David Richards J did not need to deal with the apparent conflict.

59. The conflict was squarely addressed in *Re Nortel GmbH (in administration)* [2013] UKSC 52, a case that arose in connection with the Pensions Act 2004. Under section 43(2) of the 2004 Act, where the Pensions Regulator was of the opinion that the employer in relation to a pension scheme was a service company or was insufficiently resourced it could issue a financial support direction (an **FSD**). Lord Neuberger summarised the regime at paragraph [12]: "*In a nutshell, it enables the regulator in specified circumstances (i) to impose, by the issue of a FSD to some or all of the other group companies (known as 'targets'), an obligation to provide reasonable financial support to the under-funded scheme of the service company or insufficiently resourced employer, and (ii) to deal with non-compliance with that obligation by imposing, through a contribution notice (a **CN**), a specific monetary liability payable by a target to the trustees.*"

60. The path between an FSD and a CN was by no means an inevitable one. It involved a "*fairly elaborate procedural code*" (paragraph [30]) and six stages at which it was open to the target and others to make representations (paragraph [33]).

61. Lord Neuberger set out the question for determination at paragraph [54]: "*The issue in both appeals is how the administrators of a target should treat the target's potential liability under the FSD regime (and in course the liability under a CN) in a case where the FSD is not issued until after the target has gone into administration.*"

62. Lord Neuberger considered it "*dangerous to try and suggest a universally applicable formula*" but went on to note at paragraph [77]:

> However, I would suggest that, at least normally, in order for a company to have incurred a relevant 'obligation' under rule 13.12(I)(b), it must have taken, or been subject to, some step or combination of steps which (a) had some legal effect (such as putting it under some legal duty or into some legal relationship), and which (b) resulted in it being vulnerable to the specific liability in question, such that there would be a real prospect of that liability being incurred. If these two requirements are satisfied, it is also, I think, relevant to consider (c) whether it would be consistent with the regime under which the liability is imposed to conclude that the step or combination of steps gave rise to an obligation under rule 13.12(I)(b).

63. At paragraphs [84]-[85], Lord Neuberger found that criteria (a) and (b) were satisfied. Membership of the group of companies was a sufficient legal relationship; the target entities were precisely the types of entities to which the FSD regime applied. He emphasised:

> In other words, the Target companies were not in the sunlight, free of the FSD regime, but were well inside the penumbra of the regime, even though they were not in the full shadow of the receipt of a FSD, let alone in the darkness of the receipt of a CN.

64. It is sensible to deal with the application of that approach here in two stages, seeing if (a) and (b) are satisfied before moving on to consider if there is anything specific to the regimes in this case that might be relevant at (c). In addressing (a) and (b), two points seem to me particularly significant in this case.

65. First, the reference at (a) to some step or steps having some legal effect involves a separate analysis for each legal regime that may give rise to a contingent liability. To the extent that the step or steps happen at different times, the contingent liabilities connected to the different legal effects will potentially arise at different times. Even where the different legal effects have some common underlying facts (or steps), if additional steps are necessary for one of those legal effects to arise, it may well arise later in time.

66. Secondly Lord Neuberger's reference in (b) to a party being "*vulnerable*" to a liability or facing a "*real prospect of such liability being incurred*" by definition means that he intended to catch situations where liability was not certain. Put another way, a contingent liability could exist even where the court had a discretion in imposing the final liability. His endorsement of *Re Sutherland* and his decision to overrule the line of authority culminating in *Glenister v Rowe* support that conclusion. Lord Sumption at [136] left no room for doubt: "*It is not a condition of the right to prove for a debt or liability which is contingent at the date when the company went into liquidation that the contingency should be bound to occur or that its occurrence should be determined by absolute rather than discretionary factors.*"

The fine

67. The HSE asserts, in the Prosecution, that legal obligations on the Company under section 3(1) of the 1974 Act and regulation 4 of the 2015 Regulations had arisen by no later than 20 August 2016. If that is correct, those are the necessary legal relationships under (a).

68. The alleged failure to discharge the duties arising from those relationships is what is said to give rise to breaches of section 33 of the 1974 Act, upon which the Prosecution is founded. That is the specific liability to which the Company is now vulnerable under (b). It is apparent, from Lord Neuberger's reference to the penumbra of the regime, that an entity may be considered "*vulnerable*" well before steps are taken to commence the process that results in the liability. In *Re Nortel* itself no FSD had been issued and indeed no investigation had even been started by the regulator before the administration; it was sufficient that the group contained a service company pension scheme or insufficiently resourced pension scheme. *Re Nortel* endorsed *Re T&N* where breach of the duty of care was sufficient to create the requisite relationship long before that relationship gave rise to an actionable claim. Here, the facts giving rise to the Prosecutions had all happened and the Company was under investigation. Moreover, at least

from Mr Poulter's letter of 16 November 2016 that process had ceased to be a routine matter: the facts had been considered by the HSE and found to meet the criteria for mandatory investigation. In that sense it is a stronger case than *Re Nortel*. The Company was, it seems to me, well within the penumbra of criminal prosecution from at least November 2016.

69. In saying all this I have in mind David Richards J's admonition at [40] that the power to bind those who dissent or do not participate "*is not to be construed as extending so as to bind persons who cannot properly be described as 'creditors'.*" That was in the context of schemes of arrangement, but it is clear from what he went on to say at [42] that he regarded schemes and CVAs as alternatives, such that the term creditor should have a similar meaning for both. Even with that in mind, however, if a regulator can properly be described as a contingent creditor before any investigation starts the position can only be stronger after its commencement. Accordingly, for the purposes of any fine I consider that (a) and (b) were satisfied by no later than the commencement of the mandatory investigation in November 2016.

Costs

70. The particular issue of civil costs was directly addressed in *Re Nortel*. At paragraph [89] Lord Neuberger stated:

> In my view, by becoming a party to legal proceedings in this jurisdiction, a person is brought within a system governed by rules of court, which carry with them the potential for being rendered legally liable for costs, subject of course to the discretion of the court. An order for costs made against a company in liquidation, made in proceedings begun before it went into liquidation, is therefore provable as a contingent liability under rule 13.12(I)(b), as the liability for those costs will have arisen by reason of the obligation which the company incurred when it became party to the proceedings.

71. Lord Sumption adopted a similar approach at paragraph [136]:

> In the costs cases, I consider that those who engage in litigation whether as claimant or defendant, submit themselves to a statutory scheme which gives rise to a relationship between them governed by rules of court. They are liable under those rules to be made to pay costs contingently on the outcome and on the exercise of the court's discretion.

72. Mr Bamford submitted that this was how all costs cases should be treated: the claim would be contingent only if the proceedings had commenced before insolvency, which was not the case here.

73. There is considerable attraction to that submission. Both Lord Neuberger and Lord Sumption found that the necessary relationship that is required under head (a) arises on the commencement of proceedings. It is that relationship that brings into play the rules that render the parties vulnerable to a financial liability for costs, the requirement under (b). It would have been open to the Supreme Court in *Re Nortel* either to find that the costs cases were wrong without stating

what created the necessary relationship, or to lay down a different relationship, for example that the liability for costs is tied to the facts giving rise to the underlying claim and so arises at the same time as that claim for insolvency purposes. It did not do so. Lord Neuberger and Lord Sumption were explicit both in saying that the costs cases were wrong and, separately, in saying that the legal relationship that underpins a contingent claim for costs is created by entering litigation.

74. *Re Nortel* concerned costs in civil proceedings, but it does not seem to me that there is a material difference for criminal proceedings. Costs in criminal cases are awarded under section 18 of the Prosecution of Offences Act 1985. That provides, so far as is relevant here, that costs can only be ordered following a conviction. While the Crown Court's discretion to award costs is broad – "*such order as to the costs to be paid by the accused to the prosecutor as it considers just and reasonable*" – under the 2016 Regulations FFI costs have already been charged in respect of the period before the Prosecution, such that any award of costs would presumably be limited to those associated with the Prosecution itself. As such the legal relationship required to satisfy (a) must involve a prosecution. That in turn renders the Company vulnerable to the specific liability for prosecution costs, as required under (b).

75. Ms Agnello KC advanced a number of arguments in opposition. She submitted that criminal proceedings are different in their nature because a party cannot avoid the costs. The same is true of defendants in civil claims, however, but *Re Nortel* does not distinguish between claimants and defendants – the trigger for both is the commencement of proceedings.

76. She also highlighted the risk of an arbitrary distinction. That was something that Lord Neuberger cautioned against in *Re Nortel*, in particular at paragraph [59], where he emphasised that the characterisation and treatment of a liability under a regime should not turn on when particular steps happen to have been taken if it is based on a state of affairs that existed before the insolvency event. I also have in mind the concern that David Richards J raised in *Re T&N* when he referred to the possibility of "*surprisingly different results*".

77. Where a fine and a costs award are both potential consequences of the same underlying event, it may seem noteworthy if the former is caught by the CVA but the latter is not. Properly analysed I do not think the outcome is surprising, however; less still is it arbitrary.

78. Lord Neuberger and Lord Sumption both found that the commencement of proceedings was necessary to create the legal relationship that gives rise to the contingent liability to pay costs. That is an additional requirement (or step, to use Lord Neuberger's term) to those required to create the cause of action. Moreover, that additional step must, realistically, occur after accrual of the cause of action, since proceedings cannot properly be commenced without a cause of action. By contrast, a contingent liability in respect of the substantive claim can arise for the purposes of the 1986 Act some time before accrual of the cause of action. If a CVA is adopted between the time when the contingent liability for the substantive claim arises and the commencement of proceedings to enforce that liability, obviously those legal relationships will be treated

differently under that CVA. That is not in the least surprising; it is an inevitable consequence of the finding in *Re Nortel* that the relevant relationship in the case of costs claims depends on the commencement of proceedings.

79. In most civil cases that makes no practical difference to the recovery of costs because costs normally follow the event. Where the CVA discharges the debtor's liability in respect of the substantive claim a creditor who subsequently attempted to bring proceedings on that claim would fail and so no liability for costs would typically arise. That is not, however, because the underlying claim and the costs of enforcing it are always treated in the same way by a CVA. It is because recovery of costs depends on having a valid claim and anything, including but not limited to a CVA, that discharges liability for the claim in turn means that any costs claim in respect of pursuing it should fail.

80. What is unusual here is that the obligation can be partly but not wholly financial. The parties are agreed that the CVA does not affect any criminal liability of the Company or the appropriateness of the HSE pursuing the Prosecution. Even if the fine cannot be recovered the liability can be pursued and, as I address below, there are reasons for the HSE to do so. Where the underlying obligation is unaffected by the CVA such that the claim to enforce it can still be brought after the CVA it does not seem to me arbitrary that the costs of doing so may be recoverable even where one aspect of liability, the fine, has been discharged by the CVA.

81. In my view that is wholly consistent with what Lord Neuberger says in *Re Nortel* at paragraph [59]. His concern there was to do with liability arising under a single regime, governing FSDs. In such a case it may well be arbitrary that the timing of steps taken within that regime determines the insolvency treatment of the ensuing liability when that liability is based on facts that pre-date the insolvency event. Here, though, there are two regimes – that governing costs and that governing the imposition of a fine – that have different rules and that give rise to contingent liabilities at different times. It is unsurprising that they produce different outcomes.

82. Ms Agnello KC suggested that the Supreme Court was simply over-ruling the costs cases but was not seeking to set down a rule for costs going forward. As I have noted, I do not accept that. In my view the language used by Lord Neuberger and Lord Sumption clearly had the effect of both over-ruling the previous cases and stating what the necessary relationship is for costs cases. She further suggested that I could treat what was said as *obiter*. I would have significant reservations about treating a decision of the Supreme Court that expressly stated it was over-ruling long-standing authority of the Court of Appeal as being *obiter*, but even if that were right, for the reasons I have given *Re Nortel* seems to me to take the right approach to the costs regime and I would follow it.

83. Ms Agnello KC raised the concern that this approach risked claimants trying to play the system to their advantage, waiting to commence proceedings until after any CVA with a view to maximising their costs recovery. Given that the factor identified by *Re Nortel* – the commencement of proceedings – is within the control of one party, that risk cannot be ruled out. To be clear, the unchallenged

evidence was that costs recovery was not a factor that affected the timing of the Prosecution in this case: the delay was down to resourcing at the HSE and the Covid 19 pandemic. Moreover, as Mr Bamford noted, given that the claimant (or in this case the prosecutor) has no control over the insolvency process it would take a considerable risk in delaying because it may find that the outcome is not a CVA but, instead, an insolvency in which it lacked a provable debt. Similarly, as I have noted if the underlying claim is discharged by the CVA without proceedings being commenced there would be no costs recovery, including for any costs incurred in investigating the claim.

84. Finally, Ms Agnello KC urged me to keep in mind that *Re Nortel* did not concern CVAs, for which the test of creditor was wider. While that is true, Lord Neuberger at paragraph [93] was clearly attempting to cast the net of provable claims as widely as he could "*within reason*". Moreover, *Debenhams* also requires me to identify an "*existing legal relationship*" for the purposes of CVAs, and for the reasons I have given the components of the costs relationship are different to those of the underlying liability.

85. I agree with the HSE, therefore, that the necessary legal relationship for an award of costs is different to that under which any fine will be imposed and arises later in time. Applying *Re Nortel*, the commencement of proceedings, in this case the Prosecution, was a necessary step for the relevant "*legal effect*" to come into existence. That step was not taken until some time after the CVA, such that any costs award is not affected by the CVA.

The regime under which liability is imposed

86. Given my finding that, applying (a) and (b), the Company's exposure to costs was not a contingent liability at the relevant time, question (c) is relevant only to any potential fine.

87. At one stage I understood Ms Agnello KC to be submitting that the regime being referred to by Lord Neuberger in (c) was the insolvency regime or, potentially, the insolvency regime and the regime that created the debtor-creditor relationship. With respect, neither can be right. Lord Neuberger referred only to one regime and was explicit that it was the regime giving rise to liability, which for the fine is section 125 of the Sentencing Act 2020. I entirely accept what Mr Brockman had to say up to that point.

88. Mr Brockman submitted that there were two aspects of that regime that meant liability should, in any event, fall outside the CVA. First, he addressed the nature of a fine. He accepted, as I think he had to, that a fine in existence at the time of the CVA would be a debt for the purposes of the CVA. That point was determined by *Re Pascoe* [1944] 1 Ch 310 and, in the case of corporate insolvency, is reflected by IR r.14.2.

89. Mr Brockman's argument was, instead, that because the fine is only imposed at the time of sentencing there was nothing to which the CVA could attach. He emphasised that there were four outstanding stages to get to before the liability existed: the HSE must decide to prosecute; the Informations must be laid before

the criminal court; there must be conviction by a jury; and the judge must pass sentence.

90. The problem with that argument is that it is closed off by both *Re T&N* and *Re Nortel*. In *Re Nortel* the regulator had to commence and carry out its investigation, issue an FSD, consider the support put in place (which would include receiving further representations) and issue a CN before a financial liability arose. Similarly, in *Re T&N* the claimant had to suffer actionable damage before liability could legally arise, commence a claim, demonstrate breach and demonstrate loss before it could recover. If anything those cases were more, not less contingent that this one, where sufficient evidence plainly existed for the HSE to commence its mandatory investigation before the CVA was put in place.

91. Mr Brockman's second argument related to deterrence. It was not disputed that the purpose of a fine is different to that of damages; it does not in any way compensate the Crown, but rather is intended to make an example of the defendant and deter such wrongdoing in the future, particularly by others. Offenders should not be insulated from the consequences of their wrongdoing; to do so could render prosecutions meaningless and deter prosecuting authorities from pursuing them.

92. In considering this I am conscious of the concerns expressed by, for example, Lord Hoffmann (at paragraph [62]) and Lord Rodger (at paragraph [155]) in *Fairchild v Glenhaven Funeral Services* [2002] UKHL 22 about the risk of "*emptying the duty of content*" if no financial consequences were to flow from its breach. *Fairchild* was a very different situation on very different facts, but I can see the argument in principle.

93. The difficulty that I have with the submission is threefold. First, the questions of what a fine is to achieve and how it achieves it are policy questions, on which I had no evidence. Secondly, it would not be a case of emptying the duty. While the stigma associated with an employer being in breach of its duties to its employees was plainly considered insufficient in *Fairchild*, this is a criminal conviction where the degree of social condemnation is greater. More to the point, however, I was informed that even if the fine is not paid the fact of the conviction is an aggravating factor in respect of sentencing for any future breaches under the Health and Safety Offences, Manslaughter and Food Safety and Hygiene Offences Definitive Guideline issued by the Sentencing Council, such that the conviction itself has legal effect with or without financial consequences. Finally, as I have noted, both Parliament and the Courts have considered this question and, in respect of corporate insolvency at least, have answered it in the same way: a fine can be the subject of an insolvency process, and there seems to me no good reason why a contingent exposure to a fine should be treated any differently.

94. Accordingly, I do not accept that the regime under which any fine may be imposed calls for special treatment.

HM Treasury's right to a distribution

95. Mr Brockman submitted that if I were to find, as in fact I have, that the fine was caught by the CVA as a contingent claim I ought still to find that the Crown was entitled to a dividend under section 5(2A) of the 1986 Act. That provides:

> If –
>
> a) when the arrangement ceases to have effect any amount payable under the arrangement to a person bound by virtue of subsection (2)(b)(ii) has not been paid, and
>
> b) the arrangement did not come to an end prematurely,
>
> the company shall at that time become liable to pay to that person the amount payable under the arrangement.

96. As such, the Crown is only entitled to a distribution in accordance with the terms of the arrangement, that is the CVA. According to the terms of the CVA, any creditor that has not already filed a proof of debt is now out of time to recover under it. No proof of debt was ever filed in respect of any fine, so section 5(2A) does not apply.

97. Mr Brockman submitted that this would be an unfair outcome, effectively shutting the Crown out in circumstances where HM Treasury, at least, had no notice of the CVA at the time. I have rejected the submission that HM Treasury constitutes a creditor independent of the Crown or, therefore, the HSE. That finding is fatal to this argument: the relevant Crown body did have notice.

98. Even were that wrong, however, I would still not accept Mr Brockman's point. If HM Treasury were a creditor that had not received notice of the CVA then it would, as I have noted above, have had 28 days from the date on which it received notice in which to challenge the CVA for procedural irregularity under section 6 of the 1986 Act. There is no dispute that the time limit is absolute (*Re Bournemouth & Boscombe Athletic Football Club Ltd* [1998] BPIR 183). Nor is there any dispute that HM Treasury had notice of the CVA by October 2022 at the latest and has initiated no such challenge. That was the appropriate route for HM Treasury to take if it felt that it ought to have been treated as a creditor; it chose not to do so, and it is too late for it to change its mind now. The Crown is bound by the terms of the CVA and is out of time to file a proof of loss under it.

Conclusion

99. I am conscious that this judgment will be handed down shortly before the hearing of the Prosecution is due to commence before the Crown Court. It is therefore worth reemphasising that the facts for the purposes of the trial before me were agreed, and as such I make no determination on any of the issues surrounding the tragic death of Mr Petraru. That is a matter for, and exclusively for, the Crown Court.

100. The purpose of this judgment is to determine what, if any, payments the Company may be obliged to make following the Crown Court's determination

of liability, sentencing and costs. That concerns the 1986 Act and the terms of the CVA. My view is that the CVA discharged the Company of its liability to pay any fine that may be imposed in the Prosecution. By contrast, the requisite legal relationship that gives rise to any costs claim had not formed at the time of the CVA, such that it did not operate to discharge that claim.