Neutral Citation Number [2024] EWHC 444 (Ch)

BR 2023 000210

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

IN THE MATTER OF KAMBIZ BABAEE
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

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

Date: 01/03/2024

Before :

ICC JUDGE BARBER

- -

Between :

EFG PRIVATE BANK LIMITED

Petitioner

- and –

KAMBIZ BABAEE

Debtor

- -

Mr Christopher Buckley (instructed by **Charles Russell Speechlys LLP)** for the **Petitioner**
Mr Clive Wolman (instructed on a **direct access** basis) for the **Debtor**

Hearing date: 9 February 2024

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Approved Judgment

This judgment was handed down remotely by email. It will also be sent to The National Archives for publication. The date and time for hand-down is 9.00 a.m. on 1 March 2024.

ICC Judge Barber

1. At a hearing on 9 February 2024, I ordered that the Debtor be adjudged bankrupt, with written reasons to follow. This judgment sets out my reasons for that decision.

Background

2. The petition debt arises out of an interest-only mortgage facility originally provided to the Debtor on 15 June 2012 and renewed on 23 June 2015. The facility consists of two interest-only loans totalling £5,950,000, both of which were repayable on 30 June 2018.

3. The sums due under the facility are secured by a charge by way of legal mortgage over properties known as 20 Stamford Brook Road, London W6 0XH and land lying to the north side of Stamford Brook Road, London W6 0XH (together, 'the Property'), dated 3 September 2012 ('the Charge').

4. The term of the facility expired on 30 June 2018 and payment was demanded. The sum lent to the Debtor was not repaid.

5. The Debtor has made several attempts to sell or refinance the Property, but none have been successful.

6. Several valuations of the Property have been obtained in recent years. These include the following:

(1) J D Wood & Co, 12 July 2021: £2.15m (a joint expert report obtained in the ancillary relief proceedings between the Debtor and his ex-wife);

(2) Savills, 16 June 2021: £3m to £3.25m;

(3) Knight Frank, 12 July 2021: £3.5m;

(4) Fletchers, 3 August 2021: £3.5m to £3.75m;

(5) Justin Mason, 30 August 2022: £3m (an expert report obtained by the Petitioner in the set-aside proceedings);

(6) Justin Mason, 15 February 2023: £3m (an updating report obtained by the Petitioner in the set-aside proceedings), subsequently increased to £3.15m;

(7) Knight Frank, 13 March 2023: £5m.

7. The Petitioner served a statutory demand on the Debtor on 28 April 2022. The debt due from the Debtor as at 13 April 2022 was £5,341,521.05 and the Petitioner valued its security over the Property at £3m, leaving an unsecured balance of £2,341,521.05, which was the subject of the statutory demand.

8. On 16 May 2022, the Debtor applied to set aside the statutory demand pursuant to rule 10.5(5)(c) IR 2016, contending that the Property was worth at least £5.5m and that

accordingly the security held by the Petitioner equalled or exceeded the full amount of the debt.

9. The Debtor's application to set aside the statutory demand was dismissed by ICC Judge Prentis on 9 March 2023, the judge concluding on the evidence before him that the value of the Property was £3m. The Petitioner was granted permission to present a petition from 14 March 2023.

10. The petition was presented on 21 March 2023 and personally served on the Debtor on 27 March 2023.

11. On 30 March 2023, the Debtor filed an appeal against the dismissal of his set aside application. Permission to appeal was later refused by Mr Justice Fancourt.

12. In the meantime, on 25 April 2023, the Debtor filed a notice of opposition to the petition, which raised three grounds of opposition:

(1) that, in refusing to set aside the statutory demand, ICC Judge Prentis had erred in his review of the evidence of the value of the Property;

(2) that the Debtor had a cross claim against the Petitioner for allegedly mis-selling the loan in July 2015 ('the cross-claim'); and

(3) that the Debtor was actively seeking to refinance or sell the Property to discharge the petition debt in full.

13. The first effective hearing of the petition was on the 2 May 2023. On that occasion Chief ICC Judge Briggs adjourned the petition for six weeks, for the following reasons:

(1) to allow the Debtor to obtain a transcript of the judgment of ICC Judge Prentis dismissing his application to set aside the statutory demand;

(2) to enable the alleged cross-claim to be addressed;

(3) to enable the Debtor to pursue a refinancing that he claimed would enable him to discharge the petition debt in full.

14. On 13 June 2023, the petition was again adjourned six weeks to allow the Petitioner time to consider new evidence from the Debtor, (a claim form in respect of the alleged cross-claim of c£5m having been issued and a witness statement served by the Debtor on the day prior to that hearing).

15. On 22 June 2023, Mr Justice Fancourt refused permission to appeal against the dismissal of the Debtor's application to set aside the statutory demand.

16. On 19 July 2023, the Petitioner issued an application to strike out the cross-claim.

17. On 25 July 2023, ICC Judge Jones again adjourned the petition, with directions for final hearing.

18. On 7 December 2023, Mr Justice Miles heard the Petitioner's application to strike out the Debtor's cross-claim.

19. On 8 December 2023, the parties and their respective Counsel (Mr Buckley and Mr Wolman) were each notified by the Court by email of the final hearing date of the petition, which was 9 February 2024.

20. On 19 December 2023, Mr Justice Miles handed down judgment on the application to strike out the cross-claim, concluding that the cross-claim should be struck out and dismissed. Following written submissions on costs, the judge ordered the Debtor to pay the Petitioner's costs (1) of the strikeout application, summarily assessed in the sum of £95,899.23 and (2) of the cross-claim, to be assessed if not agreed (the latter costs being £82,144.82, subject to assessment).

21. On 20th December 2023, Begbies Traynor wrote to the Petitioner giving notice that they had been instructed by the Debtor to prepare an IVA proposal, which they said would be circulated to creditors by mid-January 2024. No proposals having been received by mid-January, on 2 February 2024, the Petitioner's solicitors chased Begbies Traynor. It was only late on 6 February 2024, very shortly before the final hearing of the petition, that the Debtor's solicitors emailed (i) the Debtor's IVA proposals (sent at 16.43) and (ii) an unissued application for an interim order (sent at 18.46). The unissued application for an interim order sent at 18.46 on 6 February 2024 failed to comply with the requirements of rule 8.8(4) IR 2016, in that it was served (unissued) less than 2 clear business days ahead of the hearing and it did not include particulars of the time and place for the hearing. By the time of the hearing before me, the Petitioner had still not received from the Debtor a compliant application notice in respect of the interim order application.

The notice of opposition: current position

22. The current position as regards the Debtor's grounds for opposing the petition is as follows:

(1) The Debtor's application for permission to appeal the dismissal of his application to set aside the statutory demand was dismissed on 22 June 2023;

(2) the cross-claim was struck out following the hearing on 7 December 2023;

(3) the proposed refinancing has not proceeded.

23. Mr Wolman accepted in submissions before me that the Notice of Opposition had 'fallen away'.

Valuation

24. The following expert evidence has been filed post-presentation:

(1) Jason Mason (instructed by the Petitioner) valued the Property at £3.15m as at 6 October 2023. Mr Mason increased his valuation to £3.3m following a meeting between experts;

(2) BR Maunder Taylor (instructed by the Debtor) valued the Property at £5m as at 24 October 2023;

(3) the experts joint statement dated 23 November 2023.

25. The order of 25 July 2023 envisaged updating valuation reports, to allow for any uplift in value resulting from works of repair or improvement. In the event, there have been no updating reports; the Debtor having confirmed on 22 November 2023 that no material work had been carried out since Justin Mason visited the Property on 25 September 2023.

26. Mr Maunder Taylor's report is unsatisfactory in certain respects. It contains virtually no reasoning to support the valuation.

27. I also note that, for the purposes of his IVA proposal, certified by the Debtor to be correct to the best of his knowledge and belief, the Debtor included an 'estimated to realise' figure for the Property of £3m.

28. There was some debate at the hearing before me as to whether the Debtor really meant by his statement of affairs to concede that the Property was only worth £3m. Mr Wolman sought to argue in favour of a somewhat strangled construction of section 6.2 of the proposal on this issue. I reject his construction. The proposal must be read as a whole. I also note that the Nominee has confirmed at paragraph 1(f) of his report that whilst the Property is currently on the market for £6.9m, the Debtor had advised him that the only offer for the Property has been at £3m.

29. Overall, on the evidence before me, I am satisfied that it is more likely than not that the true value of the Property is at present in the region of £3m-£3.3m.

30. Little turns on that however. Even if the valuation of £5m put forward on behalf of the Debtor was correct, an unsecured balance of at least £341,521.05 would remain due on the petition. There is no evidence from the Debtor as to how even that sum could be paid within a reasonable period of time, the debt having been outstanding since 30 June 2018.

Further sums due post-presentation

31. The Petitioner contends that, as at 9 February 2024, further sums are due to it, bringing the updated total to £6,810,635.06, as follows:

(1) £6,249,408.06 in respect of capital and updated interest on the two loans referred to in the petition;

(2) the costs of the strike-out application, summarily assessed by Miles J at £95,899.23;

(3) the costs of the cross-claim, awarded by Miles J, which stand at £82,144.82 subject to assessment;

(4) further costs recoverable under the 'indemnity' provisions of the Charge totalling £383,182.95. These include the costs of LPA Receivers appointed in respect of the

Property, who have been in office for some years. Under the terms of the Charge, the Petitioner is entitled to such sums (and others) on a full indemnity basis.

32. These figures, which were set out in Mr Buckley's skeleton argument sent to the Debtor's legal team 2 days prior to the hearing, were not queried at all ahead of the hearing. At the hearing however, on a completely unheralded basis (Mr Wolman having failed to file a skeleton argument), Mr Wolman sought to challenge various of the figures.

33. Given that there was, on any footing, an unsecured debt of at least £300,000 on the petition itself, it was difficult to see what purpose was served by challenging the Petitioner's updated figures, save perhaps to support the Debtor's case on the voting power which might be enjoyed by given creditors in the event that his IVA proposal was put to vote. In the event, to save arid debate on the issue, Mr Buckley took me through various documents, including the Mortgage Offer letter and mortgage terms, an up-to-date redemption statement, and the costs order made by Mr Justice Miles, in order to demonstrate the basis upon which given sums were due.

34. Mr Wolman (actively assisted by Mr Birne, the Nominee, on this issue) initially maintained that the £6,249,408.06 figure (at [31(1)] above) must be wrong, as they couldn't get to it arithmetically. After some debate, however, it was clear that Mr Wolman and Mr Birne were mistakenly calculating interest at the daily rate set out in the statutory demand, rather than at the variable rates and default rates provided for under the Charge. They had also failed to take any account of the fact that Bank of England base rates had risen from 0.5% at the time of service of the statutory demand in 2022 to 5.25% at the date of the hearing, which had obvious knock-on effects on the rates charged under the Charge.

35. Ultimately, the question of precisely what total sum is due from the Debtor to the Petitioner is not a matter for this court to determine. Whilst it is clear that the sum of £5,892,809 set out in the Debtor's statement of affairs as the total sum owed to the Petitioner (inclusive of costs and interest) materially understates the sum actually due to the Petitioner, little turns on this in the current context.

Supporting Creditors

36. The Petition was supported by three creditors. All three attended or were represented at the hearing before me. I invited each of the supporting creditors to address the court. For the purpose of this judgment I shall put to one side any comments made by the supporting creditors (i) regarding what other judges may have said about the Debtor or his evidence in other proceedings and (ii) regarding the validity or otherwise of other debts set out in the Debtor's IVA proposal. The key issue upon which I invited them to address the court was whether they wished the court to make a bankruptcy order that day. All three confirmed that they did.

37. The three supporting creditors were as follows:

(1) Leighton Denny

On 20 April 2023, Leighton Denny obtained a judgment against the Debtor (and his company, K10 Developments Limited) in the sum of £549,773.90 plus £180,000 on

account of costs (total £729,773.90). Inclusive of interest that total figure has now risen to approximately £765,000. Mr Denny has served a statutory demand on the Debtor and the Debtor's application to set aside such demand was dismissed by ICC Judge Greenwood on 27 September 2023. The Debtor was ordered to pay Mr Denny's costs of £6,300 and Mr Denny was granted permission to present a bankruptcy petition (but not before the determination/resolution of this petition).

(2) Ms Roya Namazi (the Debtor's former wife)

Ms Namazi has served a statutory demand on the Debtor for £1,515,225 plus interest. According to the statutory demand, such debt arises from (i) the order of Lord Justice Baker dated 9 March 2019, pursuant to which a balance of £1,489,225 plus interest is outstanding, and (ii) an order for costs in the sum of £26,000 made on 5 April 2023.

(3) Irwin Mitchell LLP

Irwin Mitchell are the Debtor's former solicitors and claim to be owed £96,534.55 in unpaid legal fees. Again, a statutory demand has been served.

Opposing Creditors

38. No creditors have given notice of intention to oppose the Petition.

Insolvency

39. On the evidence before me, the Debtor is hopelessly insolvent.

The Petition

40. Whether this court (for the purposes of the petition) values the Property at £5m, £3.3m, or somewhere in between, the Petitioner has made good its petition. On any footing at least £300,000 of the petition debt is unsecured. The Debtor has raised no bona fide, substantial grounds for disputing the petition debt (be it £2m or £300,000) and has raised no bona fide substantial cross claim equalling or exceeding the same. The Debtor has adduced no evidence suggesting an ability to repay the petition debt (be it £2m or £300,000) within a reasonable timeframe either.

The impact of the IVA proposal/Interim Order application

41. The late introduction of the IVA proposal is addressed at paragraph 21 above.

42. The Petitioner expressed serious concerns both as to the timing of the IVA proposals, which it maintained appeared designed to frustrate the hearing of 9 February 2024, and the content of such proposals.

43. Mr Buckley's primary position was that the court should not hold off making a making a bankruptcy order to allow time for creditors to consider the IVA proposal, as the proposal was not a 'serious and viable' proposal.

44. Mr Buckley also raised two other points, but stressed in submissions that these were 'more minor' points in context:

(1) The first was the inclusion in the IVA proposal of a creditor (John Caudwell), said to be owed £17.1m in respect of 'various loans and interest' on an entirely unsecured basis and 'prepared to consider' an IVA proposal. Mr Buckley submitted that it was highly implausible that someone would lend the Debtor £17 million on an unsecured basis, particularly given that the Debtor claimed to have no assets apart from a Smart car worth £1,000.

(2) The second was that the IVA proposal materially understated the sums owed to the Petitioner.

45. Both points appeared to relate to a concern on the part of the Petitioner that the Debtor was attempting to 'rig' the vote on an IVA with a view to avoiding bankruptcy, but were, as I have said, very much secondary to the Petitioner's main argument, which was that the IVA proposal was not serious and viable.

46. Mr Wolman focussed on points (1) and (2) and barely addressed me at all on the issue whether the proposal was serious and viable.

47. During the course of the hearing Mr Wolman made a number of applications, which I shall address in turn.

The first adjournment request

48. Mr Wolman first requested an adjournment to allow him time to access (and if necessary to seek permission from the Family Division to use) a recent judgment of Baker J in divorce proceedings between the Debtor and his former wife, in which Baker J had apparently commented favourably on the credibility of Mr Caudwell as a witness and on his financial acumen. In the exercise of my case management powers I rejected this adjournment request. Mr Wolman proffered no explanation for such a late application. Mr Buckley had flagged concerns regarding the Caudwell debt in his skeleton argument, sent to the Debtor's legal team some two days prior; had the Debtor wished to make arrangements for inclusion of the Baker J judgment in the bundle, he should have taken such steps on receipt of the Petitioner's skeleton argument, not part way through a half day hearing.

49. Moreover it would plainly be contrary to the overriding objective (including, in particular, CPR 1.1(2)(c),(d) and (e)) to adjourn a half day hearing for such a reason and would serve no valuable purpose in context. The Petitioner's primary argument was that the IVA proposal was not serious and viable. The authenticity or otherwise of Mr Caudwell's debt was irrelevant to this issue.

The second adjournment request

50. Mr Wolman next sought an adjournment for the purpose of allowing the Nominee time (i) to see the judgment of Baker J, (ii) to get fuller information from Mr Caudwell regarding the Caudwell debt and (iii) to prepare a supplementary Nominee Report (or updating letter) for the creditors regarding the Caudwell debt.

51. Again, in the exercise of my case management powers, I rejected this adjournment application. The statutory demand was served in 2022. The bankruptcy petition was presented the best part of a year ago. Begbies Traynors were instructed on a proposed

IVA in December 2023. There has already been ample time ahead of the hearing before me for the Debtor and for those assisting him with the IVA proposal to collate information and to check basic supporting documentation (such as transactional documents and evidence of payment) regarding the Caudwell debt had they wished to do so. For these reasons together with those addressed at paragraphs [48] to [49] above, I rejected this adjournment application.

Informal application for an Interim Order

52. Mr Wolman next applied informally for an interim order, seeking a waiver/abridgement of the requirements of rule 8.8(4) IR 2016 for that purpose. I declined this application.

53. As the timeline already outlined in this judgment demonstrates all too well, the Debtor has had more than enough time to put forward an IVA proposal and to apply for an interim order. The two loans forming the basis of the petition have been outstanding since 2018. The statutory demand was served in 2022. The petition was presented the best part of a year ago. This is the fourth hearing of the petition after several generous adjournments.

54. There was no evidence before me to explain why the IVA proposal and the interim order application had been filed so late - and why the (unissued) application (which did not bear a date or place for the hearing) and IVA proposal had been sent to the Petitioner so late - when the parties (including counsel) had all been informed of the date of the final hearing of the petition by email on 8 December 2023 and when Begbies Traynor had been instructed in connection with the proposal since 20 December 2023.

55. When invited to take me to any documents in the bundle that might meaningfully assist in explaining the delay, Mr Wolman was unable to do so. Mr Wolman did suggest that there had been a hold up in issuing the application as the incorrect issue fee had been tendered, but this of itself could not explain more than a few hours of the delay at most, as the IVA proposal was not signed by the Debtor until 5 February 2024 and the Application Notice and Nominee Report were each dated 6 February 2024.

56. Mr Wolman went on to hazard a guess that the delay was a result of the time required to 'secure the agreement of Mr Caudwell' to the IVA. This explanation was not put forward on instruction, however; and in certain respects was demonstrably untrue: Mr Caudwell had not 'agreed' to 'the' IVA, he had simply confirmed that he would be 'prepared to consider' '*an* IVA': language that suggested that he had not even had sight of the proposal by the time of the hearing, still less agreed to it.

57. In short, no satisfactory explanation for the Debtor's failure to comply with rule 8.8(4) IR 2016 was proffered, whether in evidence or on instruction. For this reason, together with the matters addressed at paragraphs [58] to [114] below, I declined to waive or abridge time for the requirements of rule 8.8(4) and declined to grant an interim order.

Stay application

58. Mr Wolman next applied informally for a stay of the bankruptcy proceedings under ss254(1)(b)/254(2) of the Insolvency Act 1986 pending determination of the application of an interim order.

59. Section 254 of the Insolvency Act 1986 provides that:

> '(1) At any time when an application under section 253 for an interim order is pending …
>
> (b) the court may forbid the levying of any distress on the debtor is property or its subsequent sale, or both, and stay any action, execution or other legal process against the property or person of the debtor.
>
> (2) Any court in which proceedings are pending against an individual may, on proof that an application under that section has been made in respect of that individual, either stay the proceedings or allow them to continue on such terms as it thinks fit.'

60. Mr Wolman rightly accepted that the court had a discretion as to whether or not to stay proceedings pending the hearing of an application for an interim order. He urged the court to exercise its discretion in favour of a stay, arguing that if the court did not grant a stay, a bankruptcy order would inevitably follow and the creditors would not get a chance to consider the proposed voluntary arrangement.

61. Having considered with some care the IVA proposal and the Nominee Report, the submissions of the parties and the wishes expressed by the supporting creditors, in the exercise of my discretion I declined a stay.

62. The result of a stay would simply be to defer the making of a bankruptcy order pending the hearing of an application for an interim order. In my judgment, such a stay would serve no useful purpose and would be contrary to CPR 1.1(2)(b),(d) and (e), as it is already readily apparent that the IVA proposal is not a serious and viable proposal.

63. In reaching this conclusion I take into account not only the history of these proceedings and the overriding objective, as addressed above, but also the principles applied by the court when considering whether or not to grant an interim order, addressed below. I also take into account the fact that refusing a stay at this stage will not, of itself, preclude the Debtor from exploring the possibility of an IVA with his creditors at a later stage, as an undischarged bankrupt, if he is able to put together an alternative IVA proposal which clears the 'serious and viable' threshold and does not unfairly prejudice any class of creditors.

Interim Orders: principles

64. Under s255(2) IA 1986, the court has a discretion whether to make an interim order. The subsection provides that the court may make an order if it thinks that it would be

appropriate to do so for the purpose of facilitating the consideration and implementation of the debtor's proposal. It is decided by established authority (see Hook v Jewson 1997 BPIR 100) that, in determining the appropriateness, or otherwise, of making an interim order, the court will consider whether the debtor's proposal is 'serious and viable'.

65. As helpfully explained by Blackburne J in Davidson v Stanley [2005] BPIR 279 at [21]:

> 'In other words, the court must be satisfied of the proposal's seriousness and bona fides, and therefore that there is substance in the application for an interim order because of the far-reaching effect which an order may have in staying proceedings by the debtor's creditors'.

66. At [42] in Davidson, Blackburne J continues:

> 'as Lloyd J pointed out in Fletcher v Vooght [2000] BPIR 435,… one of the reasons for the court having a discretion under s255 is to act as a filter to avoid what Lloyd J refers to as the unnecessary and wasteful convening of creditors' meetings if the proposal is one which is neither serious nor viable. As he points out, the consideration of a proposal by creditors involves time, effort and expense. If therefore the court's view is that the proposal is neither serious nor viable, it is not right that the creditors should be exposed to the cost and expense of a meeting.'

67. On behalf of the Debtor Mr Wolman referred me to Shah v Cooper [2003] BPIR 1018 at [71]-[73]. I think these paragraphs are best read in the context of a slightly broader extract from the judgment, from [66] onwards:

> '[66] It is common ground that 'serious and viable' is the threshold which must be crossed: per Aldous J in Cooper v Fearnley; Re a Debtor (No 103 of 1994) [1997] BPIR 20, at 21B-C. In Hook v Jewson Ltd [1997] BPIR 100, Sir Richard Scott V-C described 'serious and viable' as 'the yardstick'.
>
> [67] For an IVA proposal to be serious, it is not sufficient that it is seriously made or that it is made bona fide; it must have substance and [be] one which should seriously be considered by the creditors, or be capable of serious consideration. It should not be derisory.
>
> [68] There is no point in attempting to put forward anything like a shopping list of factors which ought to be taken into account when deciding whether or not a proposal is 'serious' as each application must turn on its own particular facts. For example, the contents of a proposal for a trading IVA involving regular contributions to the supervisor from trading income

would be very different to a proposal involving a 'one-off' payment, as is proposed here …

[69] In all cases, however, it is essential that the debtor who formulates his proposal gives 'full and frank disclosure' of all material facts and properly complies with his disclosure obligations under … the Insolvency Rules…

[70] Absent proper disclosure and proper compliance with these rules, proper consideration is incapable of being given to a proposal and it therefore cannot be said that a proposal is one which should seriously be considered by creditors.

[71] The fact that there may be doubts and questions (even if they are serious or well-founded ones) both as to the seriousness of a proposal and as to the adequacy of the disclosure made by a debtor, does not in my view, of itself mean that the proposal is not serious (and not viable). The position might perhaps be different if, on the hearing of an interim order application in such a case, the court was in a position to adjudicate upon and resolve those doubts and issues against the debtor, and could properly be called upon to do so.

[72] In this particular case, both Mr Collings and Mr Briggs agree (in my view quite properly) that it is not my function to resolve the various doubts and issues of facts which have been raised. I am not called upon to do so and, as I understand both counsel to agree that I am not able to reject either party's evidence out of hand.

[73] I accept Mr Briggs's submission in para 16 of his skeleton:

'… that it is not the Court's role on an interim order application to conduct a "mini-trial" of whether and the extent to which a debtor has failed to make proper/full disclosure of his affairs for the purpose of assessing whether an IVA is serious/viable. Insofar as there may be "suspicions" about the true extent of the debtor's affairs these will be matters for the creditors to assess in the light of the consideration offered and the terms of the proposal'

[74] For an IVA to be viable it must be realistic and capable of being implemented. In Knowles and Others v Coutts & Co [1998] BPIR 96, when considering the question of viability, Sir John Knox did so 'in the sense of practicability and a probability of finally seeing the light of day as anticipated'. He went on to say that:

'… if the proposals are merely designed to put off the evil day and are unlikely to be effective in the way in which they are

> stated to be going to operate, they deserve to be put an end to by the court at the interim order stage.'
>
> [75] For a proposal to pass the viability test, the court does not require to be satisfied that the proposal will in fact be approved, or that it will survive any challenge to its approval. These would both be unrealistic and impossible exercises….
>
> [76] Whilst it is not the function of the court when considering an IVA proposal to simply 'rubber stamp' everything a debtor says, it is equally not the court's function to usurp the function of the creditors' meeting and to pre-empt the creditors' decision by itself deciding whether an offer is adequate (so as to render a proposal 'not' serious.
>
> [77] I agree with Mr Collings that this does not mean that everything should be left to the creditors. In the first instance it is the function of the court to assess the questions of seriousness and viability, in effect to decide whether the proposal is fit to be put to the creditors. If the proposal is fit to be put to the creditors it is for them to decide whether the offer on the table is acceptable whether in financial terms or for other reasons.'

68. Mr Wolman also referred me to Knowles v Coutts & Co [1998] BPIR 96, which he relied upon in support of the proposition that it is not a good ground for refusing to make an interim order that the return to creditors will be small (though not derisory): it is for the creditors themselves to decide on its adequacy.

69. I take all such guidance into account. I turn next to consider the Nominee Report and the IVA proposal.

The IVA Proposal and Nominee Report

70. In the statement of affairs forming part of his proposal, the Debtor states that he has no unsecured assets of any certain value estimated to realise anything except his Smart car, estimated to realise £1000. He estimates his deficiency as regards creditors at £25.3m.

71. The proposal envisages a 5-year term (extendable at the discretion of the Supervisors – section 11.3) and a minimum dividend of 1p in the £. The summary at section 2 of the proposal provides for

(1) contributions totalling £335,000 over the 5-year period of the arrangement by way of quarterly contributions of £16,750 from the Debtor's net income;

(2) 30% of net proceeds from 'legal claims'; and

(3) 15% of any net income over £300,00 per annum (or 30% of any equivalent sum drawn gross to loan accounts)

72. Section 10 of the proposal addresses the reasons why the Debtor maintains that an IVA is desirable and why his creditors should approve the proposal. In this regard the Debtor refers to a comparison of outcomes in voluntary arrangement and bankruptcy appearing as appendix 2 to the proposal, which he maintains shows that a voluntary arrangement is more desirable as creditors would receive a dividend of 1p in the £ in an IVA and no dividend at all in bankruptcy.

73. It is of note that the outcome for creditors in bankruptcy is presented as a firm 'nil' at appendix 2, rather than as 'uncertain'. The possibility of recouping monies for the estate pursuant to s.284 IA 1986, for example, is not acknowledged at all in the comparison of outcomes, even as an 'uncertain', notwithstanding that at the date of the proposal, the petition had been extant for 11 months with no validation order in place. The comparison of outcomes at appendix 2 is also premised on the Debtor not working at all in bankruptcy. No explanation for this assumption is provided in the proposal or the supporting evidence. Whilst as a bankrupt the Debtor would not be able to act as a director of a company or be involved in its management, he would not be precluded from working in any other material capacity.

74. At 10.2 the Debtor continues:

> 'A Voluntary Arrangement is a more flexible and efficient procedure than bankruptcy and the administrative costs are also likely to be significantly less than in a bankruptcy. As can be seen from the Comparison Statement, the Official Receiver's fees in a bankruptcy include a case administration fee of £2775 plus a general flat fee of £6000 and these fees are not chargeable in a Voluntary Arrangement. There is a possibility that an Insolvency Practitioner would be appointed as Trustee and his potential fees would be likely to exceed those of a Supervisor.'

75. Pausing there, in the comparison of outcomes at appendix 2 of the proposal, total costs in bankruptcy are estimated at £43,775, compared to a minimum of £82,000 for Nominee's/Supervisors' fees in an IVA; the Nominee/Supervisors' fees being charged on a time cost basis, with the Supervisors' fees said to be subject to various assumptions set out in section 28.2 of the proposal: including 'that difficulties will not be encountered when agreeing creditors' claims', 'that there will be no protracted correspondence with creditors or third parties' and 'that the Joint Supervisors will not be required to undertake any detailed investigations'. There is, therefore, something of a 'disconnect' between the narrative of the proposal and the comparison of outcomes at appendix 2. Whilst this of itself would not be fatal to the proposal, it is one example (of a number) of the lack of attention to detail applied in putting the proposal together.

76. I turn next to the consider how the Debtor proposed to fund the quarterly contributions of £16,750 which he said he would pay into the voluntary arrangement.

77. At section 4.2 of the proposal, the Debtor explains:

> 'I have worked for many years as a property developer and am a director of a number of companies. Historically I have

> derived my main income as a director and sole shareholder of K10 Developments Limited which was incorporated in 2008.'

78. Pausing there, K10 Developments Limited is both cashflow and balance sheet insolvent. I shall return to this point in due course.

79. Turning back to the proposal: at section 4.3, the Debtor lists details of property development projects with which he/his companies had been involved and which had resulted in substantial losses. These comprised or included:

(1) Amberwood House Project (Dec 2010 onwards): total personal loss c.£5m;

(2) Doughty House Project (Jan 2013 onwards): total loss £4.9m;

(3) 91 Wellesley Road Project (development sold in 2015): in this case the purchaser (Leighton Denny) had issued proceedings in 2020 against the Debtor and his company K10 Developments Limited for defects in/water ingress at the property. These proceedings led to judgment and costs totalling £735,669.96 being awarded against the Debtor and K10 Developments Limited. Neither had paid. The Debtor had also failed to pay the solicitors who defended him in those proceedings, giving rise to a statutory demand for outstanding legal fees totalling £96,534.55;

(4) Culross House Project (purchased 2012 and thereafter developed; eventually repossessed by the lender in February 2023): personal loss £4.5m.

80. Immediately after this catalogue of substantial losses arising from property development projects set out at section 4.3 of his proposal, the Debtor continues at section 4.4 (with emphasis added):

> 'I am *well-known for structuring successful deals* in the property development space and *with the expectation of a renewed positive outlook within the property market, it is from income derived from this* that I intend to make contributions to my Supervisor'.

81. The Debtor adds at section 4.6 (with emphasis added):

> 'I have minimal personal assets on the basis that there is no equity in the property at 20 Stamford Brook Road … or two development projects in France and *my proposals are based on making contributions from my future earnings*. This will provide a better outcome than bankruptcy and allow me to avoid the stigma of bankruptcy'.

82. The Debtor again confirms the contingent nature of his proposed contributions into the arrangement at section 7.1 of his proposal, where he states (with emphasis added):

> 'My income *will be dependent on my ability for structuring property deals and rebuilding a property development portfolio* and I will make contributions into the Arrangement from this source.'

83. Notably, the Debtor does not list in the proposal any successful deals already struck and about to generate any income for him or his companies - or even any proposed/inchoate deals in the pipeline. In this regard I also remind myself that it is a requirement of rule 8.3(r) IR 2016 that if the debtor has any business, his proposal should contain details of 'how that business will be conducted during the IVA.'

84. At paragraph 1(n) of the Nominee Report, Mr Birne addresses the question of contribution from income as follows:

> 'The Debtor proposes that contributions will be paid quarterly from his company [K10 Developments Limited] and has explained that the reason for quarterly payments rather than monthly payments is due to the nature of the project work carried out by the company. The debtor has proposed that 15% of any excess net income over and above the baseline salary [of £300,000] is paid to the Supervisor which allows for creditors to benefit from any increase in earnings. The debtor proposes that the quarterly payments will come from a salary from K10 Developments Limited ("K10"), the debtor's main trading entity. If, he is unable to trade through this company then the debtor states that he will use one of his other companies to continue his trade. His salary will be reviewed quarterly to assess if it exceeds the baseline salary [of £300,000] set out in the proposal. In addition any dividends or drawings from any loan accounts will also be subject to review using the salary baseline [of £300,000]. As loan account drawings are gross payments any increase over baseline salary [of £300,000] will require a contribution of 30% of the sum drawn as set out in the proposal.'

85. In endorsing the proposal, Mr Birne does not appear to have looked significantly beyond mere assertion on the issue of the Debtor's current or projected income. The Form E mentioned in his Nominee Report was plainly out of date and thus not of itself a reliable source of evidence on current or projected income. The Income and Payments account forming part of the proposal was one sheet of paper, containing a set of rudimentary numbers put together by the Debtor. There is no confirmation in the proposal, the Nominee Report or the evidence generally that the figure given for the Debtor's income in the Income and Payments account has been vouched or substantiated in any meaningful way, whether by reference to past income, projected income based on deals in the offing, or by any other means. In the absence of any such evidence I consider it legitimate to conclude that it has not.

86. This is unusual in the context of a proposed trading IVA. In the Nominee Report, Mr Birne appears to take comfort from the fact that the Debtor had told him that he would earn money to pay into the IVA from K10 Developments Limited (described at para 1(n) as 'the debtor's main trading entity') or failing that, 'one of his other companies'.

87. Yet K10 Developments Limited is plainly both cash-flow and balance sheet insolvent. This is apparent from section 6.3 of the Debtor's proposal (prepared with the assistance of Begbies Traynor and reviewed by Mr Birne for the purposes of preparing his Nominee Report), where the Debtor states (with emphasis added):

> 'I am the sole director and shareholder of [K10 Developments Limited] and am owed £1,196,747. *The company is not in a position to repay this debt and the balance sheet as at 31 January 2023 showed an overall deficit of £663,940*. The company is also subject to a judgment debt from the creditor Leighton Denny amounting to £729,774 + interest. For the purpose of the Statement of Affairs I have shown the estimated to realise figure [for K10 Developments Limited] as *nil*.'

88. Mr Birne confirms at paragraph 1(p) of the Nominee Report that he has reviewed the balance sheet of K10 Developments Limited as at 31 January 2023. He also states that:

> 'The debtor's advisers confirm that there is little value in the assets shown in the balance sheet of K10 so therefore the creditors are unlikely to receive any dividend should K10 be liquidated'

89. No persuasive explanation is given in the proposal or the Nominee Report of how any of the Debtor's *other* companies might provide him with an income either. The Nominee confirms at 1(q) of his report that he has checked the list provided by the Debtor of the companies that the Debtor is a director of or shareholder in by a Companies House search. He states at 1(q):

> 'The debtor has listed all the companies that he is a director or shareholder of in the proposal and .. the list agrees with a companies house search on the debtor's name. The only company with assets shown on the last balance sheet is AHTL Roadway Limited however the shares are not held by the debtor and he advises that he has no interest in the offshore companies that holds the shares.'

90. Of the ten companies listed by the Debtor,

(1) six are described in the proposal as 'dormant' and as having 'never traded';

(2) the remaining four are categorised/commented on in the proposal as follows:

(a) AHTL Roadway Limited: 'I am a director, and it will not create an income at present'; 'I do not have an interest in the shares': I confirm that I do not receive income from this company';

(b) Bafen Limited: 'This was set up with a potential joint-venture partner this JV has now ceased. No business has happened.'

(c) Dream Management Limited: 'Currently inactive and not trading';

(d) K10 Developments Limited (the insolvent company): 'Current trading vehicle'.

91. As will be seen from the foregoing list, the only company described as a 'current trading vehicle' is K10 Developments Limited, a company which is both cashflow and balance sheet insolvent and already owes the Debtor over £1.1m which it cannot

pay. It also owes Leighton Denny a judgment debt and costs totalling £729,774 plus interest which it cannot pay. None of the Debtor's other companies are said to have any assets apart from AHTL, a company in which the Debtor has no shares and which it is said 'will not create an income'.

92. On the evidence before me, the income figure given in the income and expenditure account forming part of the proposal has no legitimate basis. No details are given of any current income-generating projects in which the Debtor is involved on which projected income might be based, however loosely. No explanation at all is given in the Nominee Report of how the income figure has been calculated, still less substantiated.

93. Ultimately, the income projection is based on little more than a series of hypotheticals; that is to say, (i) if the Debtor managed to set up another development project, or structure another property deal; (ii) if that development project or deal generated a certain amount of profit (rather than the losses encountered in previous projects listed at section 4.3 of the proposal) and (iii) if the corporate vehicle used by the Debtor for the development project or deal was not already both balance sheet and cash flow insolvent and so unable to pay him, the Debtor might hope to generate a net income after tax of (say) £14,000.

94. The promise of a further 15% (or 30%) of any gross income earned over £300,000 suffers from similar deficiencies; it too is based on a series of hypotheticals. In addition, whilst the Nominee in his report (at paragraph 1(y)) and the Debtor in his proposal (at section 10) each positively assert that creditors will have a better outcome in IVA than in bankruptcy, there is no explanation of why creditors should content themselves with 15/30% of any income over £300,000, when in bankruptcy a trustee could reasonably expect to be seeking an income payments order in respect of 100% of any income exceeding that required to meet the reasonable domestic needs of the bankrupt and his family.

95. The proposal does not set out a satisfactory basis for a trading IVA. In this regard I note that, in Re a Debtor (No 2389 of 1989) [1991] Ch 325 Ch D, the debtor similarly proposed an IVA resting largely on monthly instalments from income which he *hoped* to earn, without any adequate information regarding where the income would come from. Sir John Vinelott said this of the proposal:

> '… the benefit of the proposed arrangement rests almost wholly on the … debtor's ability to pay £1500 per month to the supervisor. There is not one scrap of evidence as to how he proposes to set himself up in business, how he would finance it, what the gross income would be and what the expenses of the business would be, or indeed the source of the earnings….
>
> I simply do not understand how, in the circumstances, it can be said … that the proposals gave a reasonable prospect that if the debtor was given a chance he would in time be able to meet his debts in full. The proposals, to my mind, are little more than a fairy story. It is not enough, in my judgement, for a debtor to say that if his hopes are realised the position under a proposed

> arrangement is likely to be better than if a bankruptcy were to ensue….'

96. The promise of 30% of the net proceeds of the various 'legal claims' which the Debtor claims to enjoy does not bear close scrutiny either. One of the legal claims listed at section 9.5 of the proposal is the *cross-claim*, which was struck out by Miles J in December 2023, long before the proposal was signed on 5 February 2024. This cross-claim plainly should not have been included in the proposal, yet the Debtor states at section 9.5 of it:

> 'I have an ongoing Part 7 claim against EFG Private Bank Limited in the Courts under reference FL 2023 000016'.

97. This is a material inaccuracy for which no satisfactory explanation has been provided. In this regard I reject Mr Wolman's attempts to explain the inclusion of the cross-claim in the proposal on the basis that the Debtor was still thinking about appealing Miles J's decision. The Debtor made no application for permission to appeal following the handing down of judgment and costs were dealt with by written submissions. Moreover there is nothing in the proposal or the evidence generally to suggest that the Debtor wishes to appeal Miles J's decision. The language of 'an ongoing Part 7 claim' employed in section 9.5 does not readily lend itself to such a construction.

98. The remaining legal claims set out at section 9.5 are woefully under particularised. So far as material, section 9.5 addresses these claims as follows:

> 'I have an assigned cross-claim against Mr Denny.
>
> I have a potential claim for a sale at an undervalue on a property sold by an LPA Receiver.
>
> I have a potential claim for professional negligence in respect of ongoing legal matters'.

99. No details or estimated values are given of any of these claims, whether in the narrative of the proposal or the statement of affairs/comparison of outcomes. In addition, whilst the Nominee in his report (at paragraph 1(y)) and the Debtor in his proposal (at section 10) each positively assert that creditors will have a better outcome in IVA than in bankruptcy, no explanation is given of why creditors should content themselves with 30% of the net proceeds of any such claims, when in bankruptcy the estate would enjoy 100% of the same.

100. Somewhat troublingly, the proposal also envisages that the Debtor will carry on borrowing on a largely unsupervised basis. Section 32.1 of the proposal states that:

> 'I do propose to arrange credit facilities during the course of the Arrangement as and when required in connection with my business activities'.

101. Contrary to the requirements of rule 8.3(s) IR 2016, the proposal includes no information on how any further debts run up by the Debtor are to be paid.

102. The proposal envisages that the Debtor would have a high degree of autonomy in relation to any credit facilities he might wish to set up. He would only be required to refer to the Joint Supervisors for permission if he (rather than any company) wished to give any security for borrowing. The only blanket prohibition was against the granting of any personal guarantees of third-party liabilities.

103. In short, the Debtor, freed from (on his case) £25m worth of debt and any legal proceedings by his existing creditors in exchange for (at best) 1p in the £, would be permitted under the terms of the proposed arrangement to run up further debts of unlimited amounts on a largely unsupervised basis for the duration of the arrangement, with no indication as to how such further debts would be repaid or how the servicing of any such debts (if they were serviced) would impact on returns within the arrangement.

104. The position of the Debtor's ex-wife, and the status of her matrimonial debts within the proposed arrangement, are not satisfactorily addressed in the Nominee Report or the proposal either.

105. At paragraph 1(k) of the Nominee Report, Mr Birne states:

> '… the debtor acknowledges that he must obtain his own legal advice on the admission and status of a matrimonial debt in a voluntary arrangement.'

106. At section 5 of his proposal, prepared with the assistance of Begbies Traynor and reviewed by Mr Birne before preparing his Nominee Report, the Debtor states (with emphasis added):

> 'It is understood that Matrimonial judgements remain due and payable by the debtor even if made bankrupt *or entering into an IVA'*

107. It is correct that matrimonial judgments will ordinarily survive bankruptcy. The suggestion that matrimonial judgments remain due and payable by a debtor even if the debtor enters into an IVA, however, is at best a highly questionable proposition and at worst simply untrue: see Re a Debtor: JP v A Debtor [1999] BPIR 206. Having read the proposal and the standard terms and conditions incorporated into it with some care, I could see nothing which would unequivocally exempt the matrimonial debts from the arrangement in this case. The proposed arrangement therefore risks significant prejudice to the Debtor's wife when compared with bankruptcy. It is plain from the Nominee Report that Mr Birne has not looked into this aspect at all, but has simply left it to the Debtor to take his own advice.

108. Given the matters addressed at [70] to [107] above, it is entirely unclear to me how Mr Birne considered himself able to state, as he did state at paragraph 1(c) of his Nominee Report (with numbering added):

> 'I confirm that I have made such enquiries as I consider necessary to satisfy myself [i] that the proposal is not manifestly unfair to creditors generally or a group or class of creditors, [ii] has a reasonable prospect of being implemented

> in the manner proposed and [iii] should be put to the Debtor's creditors'.

109. Ultimately, however, it is for this court to determine whether the proposal is serious and viable; whilst it will take into account the conclusions of the nominee, those conclusions do not bind the court. It is for the court to determine whether the proposal is fit to be put to the creditors: Shah v Cooper at [77].

110. For an IVA proposal to be serious, it must have substance and be one which is capable of serious consideration by the creditors: Shah at [67]. For an IVA proposal to be viable, it must be realistic and capable of being implemented: Shah at [74].

111. I also remind myself of the guidance given by Sir John Knox in Knowles and Others v Coutts & Co [1998] BPIR 96:

> '… if the proposals are merely designed to put off the evil day and are unlikely to be effective in the way in which they are stated to be going to operate, they deserve to be put an end to by the court ….'

112. Standing back, I ask myself whether this proposal is serious and viable. In my judgment it is plainly neither serious nor viable. The income projections are entirely speculative. To adopt with gratitude a phrase employed by Blackburne J in Davidson at [42], the income projections are 'an essay in make-believe'. The only other source of funds (the legal claims) are woefully under-particularised and, again, entirely speculative; given the Debor's past track record in litigation, realistically, they are unlikely to bear any fruit. Even if they were to bear fruit, no explanation is given in the proposal of why the creditors should be expected to accept 30%, in place of the 100% entitlement which would arise in favour of the estate in bankruptcy.

113. In my judgment this is exactly the sort of proposal that the court should filter out at the earliest opportunity. As put by Scott V-C in Hook v Jewson [1997] 1 BCLC 664 Ch D:

> 'Judges must, I think, be careful not to allow applications for interim orders simply to become a means of postponing the making of bankruptcy orders, in circumstances where there is no apparent likelihood of benefit to the creditors from such a postponement'.

114. In my judgment the court should adopt a similar approach on an application for a stay under s.254 in clear cases where it is readily apparent from the proposal and the Nominee Report that the proposal is neither serious nor viable. No good purpose would be served by staying the bankruptcy proceedings to allow a further hearing at which the application for an interim order is considered in such a case. The court has already had sight of the proposal and the Nominee Report. This is the fourth hearing of a petition presented the best part of a year ago. In my judgment the court should now act swiftly and decisively as a filter, to avoid any further waste of court time and the costs and expenses of a creditors' decision procedure. The evidence before me strongly supports the conclusion that the interests of the creditors as a whole are best

served by the making of an immediate bankruptcy order, thereby enabling a full investigation of the Debtor's affairs by an officer of the court without further delay.

115. In light of my conclusion that the proposal is neither serious nor viable, it is unnecessary for me to address the two additional 'minor' points raised by Mr Buckley and summarised at [44.1] and [44.2] above.

116. For the sake of completeness, however, I confirm that had the court concluded that the proposal was serious and viable, neither of the concerns expressed in [44.1] and [44.2] above would of themselves have precluded the granting of a stay under s254 or a later interim order. Whilst I accept that it is at first glance curious for any creditor to advance unsecured loans exceeding £17m to a debtor with no assets, and whilst the Petitioner's overall debt undoubtedly has been materially understated in the proposal, ultimately, any concerns regarding the authenticity or quantum of given debts would be matters for the creditors to explore with the nominee/chair in the run-up to or at the meeting of creditors. They would not, of themselves, stand in the way of a s254 stay or an interim order if the same was otherwise warranted.

117. On a similar note, I would add that had the court concluded that the proposal was serious and viable, it would not have been appropriate in this case for the court to 'second-guess' the voting outcome of any subsequent meeting of creditors. It follows that whilst, on the figures loosely explored at the hearing, it was far from clear that John Caudwell and Schneider Financial Solutions would have commanded 75% of the voting power, even taking their debts at face value as presented in the proposal, that of itself would not stand in the way of a s254 stay or an interim order if the same was otherwise warranted.

Conclusion

118. For the reasons which I have given, I ordered that the Debtor be adjudged bankrupt at 15.06 on 9 February 2024.

ICC Judge Barber