Neutral Citation Number: [2011] EWCA Civ 106

Case No: A2/2009/1459

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
COMPANIES COURT
HHJ DAVID COOKE QC
No. 10836 of 2008

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 9th February 2011

Before :

LORD JUSTICE WARD
LORD JUSTICE PATTEN
and
LADY JUSTICE BLACK

- -

Between :

DAVID ANTHONY RUBIN	**Respondent**
- and -	
MICHAEL JOHN COOTE	**Appellant**

- -
- -

Duncan Kynoch (instructed by **Public Access**) for the Appellant
Tiran Nersessian (instructed by **Edwin Coe LLP**) for the Respondent

Hearing date : 6th and 7th December 2010

- -

Judgment

Lord Justice Patten :

1. This is an appeal by Mr Michael Coote against an order of HHJ David Cooke (sitting as a Deputy Judge of the Chancery Division) which was made on 15th June 2009. The judge dismissed Mr Coote's application to remove the respondent, Mr Rubin, as the liquidator of Branchempire Limited ("Branchempire") and sanctioned the compromise by Mr Rubin of two sets of proceedings which were commenced by him in 2005 and 2008 against a former director of Branchempire, Mr Brian Henton, and a company (Lookmaster Limited ("Lookmaster")) which he controls.

2. Mr Coote contends that the terms of the compromise are not in the best interests of Branchempire's creditors. He says that, in reaching the compromise with Mr Henton, the liquidator has failed to make proper enquiries into the assets of Lookmaster and Mr Henton which are available to satisfy any judgment in favour of Branchempire's creditors or properly to assess the material which Mr Coote has himself been able to discover about their respective asset positions and has made available to Mr Rubin. In support of the grounds of appeal, Mr Coote has also applied for permission to adduce new evidence in the form of a valuation by Savills dated 12th October 2010 of Ingarsby Old Hall, Mr Henton's house in Leicestershire, and of office copy entries from HM Land Registry in respect of two properties (Scraptoft Hall, Scraptoft and 21 Harvey Street, Melton Mowbray) in which Mr Henton either has or had an interest. I shall come to the relevance of this evidence later in this judgment.

3. The application to remove the liquidator was based on the same complaints as in relation to the compromise but there is no appeal against that part of the judge's order.

4. Before coming to the judgment and the specific grounds of appeal it is necessary to set out in a little detail the history leading up to the application to Judge Cooke. In August 1987 Mr Coote was the tenant of a top floor flat (Flat 9) at 13-16 Embankment Gardens, London SW3. The flat was held on a long lease to 2046 which included a covenant by the landlord, Branchempire, to keep the exterior, roofs and main walls of the building in good repair.

5. On 10th August part of a decorative parapet above Mr Coote's flat collapsed and fell into the street. At the time Mr Coote's flat was for sale and he and his wife had exchanged contracts to purchase a house on Hayling Island. The completion of this purchase was dependent upon the sale of the flat and Mr Coote was therefore forced to take out an expensive bridging loan until the sale proceeds of the flat became available.

6. As a result of the problem with the roof, the local authority (Kensington and Chelsea LBC) served a dangerous structure notice in respect of the building. Despite requests to do so, Branchempire failed to carry out the necessary repairs and the flat remained unsaleable. Eventually by January 1993 Mr Coote could no longer afford to keep up the mortgage payments in respect of both the flat and the Hayling Island property and both were re-possessed and sold. In the process, his marriage broke down and he has been forced since then to live with his mother. What remained of the equity in the flat after redemption of the mortgage was paid to his wife.

7. In 1996 Mr Coote commenced proceedings against Branchempire for breach of its repairing obligations. After various unsuccessful attempts by Branchempire to have

the actions struck out, they came on for trial before HHJ Ryland in the Central London County Court on 11th May 2002. The trial was spread over 12 days and was not concluded until June 2002. The judge then circulated a draft judgment to the parties but, due to illness, it was not formally handed down until April 2003. Mr Coote was awarded damages of £339,686.49 in one action and £332,741.91 in the other, subject to giving credit in each action for monies recovered in the other.

8. In the period between the trial and the giving of judgment Mr Henton caused Branchempire to divest itself of most of its valuable assets either to Mr Henton or to Lookmaster. Judge Cooke QC described this in his judgment as "a long history of dishonest evasion of responsibility by Mr Henton and Branchempire". In summary it is alleged that:

(1) in September 1999 Mr Henton caused Branchempire to pay £700,000 to Lookmaster. The money was not repaid but instead Branchempire was issued with 700,000 B (non-voting) shares of £1 each in Lookmaster which are said to be worthless;

(2) in December 1999 Mr Henton caused Branchempire to transfer the shares in Tripex Limited (the owner of Flat 4, 12 West Eaton Place, SW1) to the Henton Retirement Trust and on the sale of the flat the Trust received £470,000;

(3) the profit of £171,318.51 on a development by Branchempire at 11 Groom Place, London SW1 which was sold in April 2002 was paid to Lookmaster;

(4) on 16th May 2002 Mr Henton caused Branchempire to pay him the sum of £30,000 for no consideration;

(5) on 30th May 2002 there was a similar payment of £34,100 to Mr Henton;

(6) on 11th July 2002 Branchempire financed the purchase by Lookmaster of a property known as The Hindles in Melton Mowbray for the sum of £341,000. It was later re-sold in July 2005 for £1.65 million and all the profit was retained by Lookmaster;

(7) on 24th September 2002 Mr Henton caused Branchempire to pay the sum of £110,385 to the Henton Retirement Trust and a further £50,000 to Lookmaster;

(8) on 11th December 2002 Branchempire sold a property at 12 William Mews, London SW1 to Lookmaster at an undervalue for £830,000 which was re-sold in September 2006 for a profit of £571,600. As part of the original transaction the property was leased back to Branchempire and three years' rent in advance (a total of £171,600) was deducted from the proceeds of sale;

(9) on 11th December 2002 two leasehold flats at 47 and 49 Roland Gardens, London SW7 were sold to Lookmaster at an undervalue for the sum of £325,000. The value of the flats was £1.2 million; and

(10) on 16th December 2002 Mr Henton caused Branchempire to pay him the sums of £23,000 and £45,000, again for no consideration.

9. On 7th August 2003 a resolution was passed for the voluntary liquidation of Branchempire and Mr Carl Jackson and Mr Michael Matthews of Tenon Recovery were appointed joint liquidators. By far and away the largest creditor was Mr Coote with a claim in respect of his judgment and costs of some £486,000. Largely as a result of pressure from Mr Coote, the creditors appointed Mr Rubin as liquidator at a meeting held on 23rd October 2003. They also agreed to his instructing solicitors in respect of any proceedings against Mr Henton on a conditional fee basis with an uplift of up to 100%.

10. Mr Rubin was required to make a report or return to the Secretary of State in relation to Mr Henton in accordance with the Insolvent Companies (Reports on Conduct of Directors) Rules 1996 and, as a result of this, Mr Henton was disqualified on an undertaking for five years. The particular misconduct on which the undertaking was based was the advance payment of rent in respect of the lease of 12 William Mews and the payments of £68,000 made on 16th December 2002.

11. Mr Rubin then issued the 2005 and 2008 applications against Lookmaster, Mr Henton and Mr Rogers (the trustee of the Henton Retirement Trust) seeking the recovery of the monies and other property referred to earlier which it was alleged had been paid or transferred either at an undervalue (IA s.238) or with an intention to defraud creditors (IA s.423) or which were preferences (IA s.239). The references in parenthesis are to the relevant provisions of the Insolvency Act 1986 under which recovery was sought. It was also alleged that Mr Henton was accountable for the loss to Branchempire on the ground that he acted in breach of his fiduciary duties as a director in procuring or permitting the transactions to take place.

12. The claims were resisted by Mr Henton and the other respondents. The proceedings had been taken on the advice of counsel (Mr Peter Griffiths) who in July 2006 had provided Mr Rubin with an Opinion about the merits of the various claims pursued in the 2005 application. He advised that the liquidator had a strong claim for the £110,385 paid into the Henton Retirement Trust; the payment of the three years' rent on William Mews in advance and the £56,500 paid on 16th December 2002; but much weaker claims in respect of the 1999 allotment of B shares and the other 2002 cash payments.

13. In July 2006 there was a mediation in respect of the 2005 proceedings which resulted in an agreement that the respondents would pay £400,000 in satisfaction of all of the liquidator's claims and would not prove in the liquidation. Mr Coote refused to approve this compromise and Mr Griffiths was asked to advise further on the liquidator's claims and to consider the points which Mr Coote had made. In a second Opinion dated 23rd August 2006 he repeated his advice that the liquidator had strong claims which, with interest, were worth about £401,000 and rejected Mr Coote's criticisms of the offer that had been made. But, in the event, the compromise was not agreed to by the creditors and the 2008 proceedings were issued which brought in the claims in respect of the Roland Gardens flats; the development at Groom Place and the two properties at West Eaton Place and The Hindles.

14. On 28th July 2008 a without prejudice meeting took place with Mr Henton at the offices of Edwin Coe LLP (the liquidator's solicitors) to discuss a possible compromise. Mr Berry of Edwin Coe sent a letter by e-mail to Mr Coote after the meeting which reported that Mr Henton had now offered £1 million in full and final

satisfaction of all claims. This would, he said, allow payment in full of all creditors and would provide for the expenses and legal fees of the liquidator, although subject to a substantial discount. It was the reduction of these fees by Mr Rubin and his lawyers that would allow Mr Coote and the other creditors to be paid in full.

15. Mr Berry went on to explain that some £75,150 paid into court by the respondents would be paid out to Mr Rubin and Mr Henton would then make this up to £500,000 in the near future. The balance of £500,000 would be paid in two instalments of £250,000 each on 1st August 2009 and 1st August 2010. This would allow a dividend of 20p in the £1 to be paid in the next few months followed by two further dividends of 40p in 2009 and 2010.

16. Mr Kynoch for Mr Coote said that his client's main concern was that he (and the other creditors) bore the entire risk of the second £500,000 not being paid. The initial £500,000 would be taken by Mr Rubin and largely used to fund the expenses of the liquidation but it would only be after a further period of two years (if at all) that he and the other creditors would be paid in full. A significant, indeed the most significant, factor in this assessment was Mr Coote's belief that Mr Henton and Lookmaster were not being candid in telling Mr Rubin that they could not afford to meet the settlement in full immediately or to increase their offer above £1 million. He estimates the value of the claims under the 2005 and 2008 applications (and therefore the amount extracted unlawfully from Branchempire) as some £3.2 million against which the respondents were offering only £1 million payable over two years.

17. The new evidence is, of course, also directed to showing that Mr Henton has understated his available assets. But before I come to that, it is necessary to trace what happened after Mr Coote's rejection of the July 2008 offer. Mr Rubin says that he continued to negotiate with Mr Henton between July and November 2008. On 11th August Edwin Coe wrote to Mr Coote informing him that Mr Henton was now prepared to pay £500,000 within 14 days of the settlement being confirmed and the remaining £500,000 within a year. But Mr Coote remained opposed to the deferment of the second half of the payment.

18. Mr Rubin then went back to counsel. On 10th September 2008 Mr Griffiths produced a third Opinion on the merits of the proposed compromise with Mr Henton and Lookmaster. As part of this exercise he confirmed his earlier views about the claims in the 2005 application and then went on to consider the new claims in the 2008 proceedings. He advised that the transfer of the Roland Gardens flats was a transaction at an undervalue and a breach of fiduciary duty by Mr Henton. But, because the liquidator was unlikely to have retained the flats for very long before disposing of them, he considered that the loss of value was probably limited to the difference in value of the flats as at 11th December 2002.

19. He advised that the liquidator also had a good claim for the loss of profit on the sale of Groom Place (£171,318.51). But the correction of the inter-company accounts necessary to reverse the credit entry in favour of Lookmaster was, he thought, problematical having regard to the difficulty in establishing some of the balancing entries. He therefore considered that the claim had only an uncertain prospect of success.

20. His view of the claim in relation to the payment of the £470,000 to the Henton Retirement Trust was that this was a poor claim. He also considered that the claim relating to The Hindles was likely to fail.

21. His advice therefore was that the compromise of all claims for £1 million was not open to criticism. The good claims totalled some £524,485. The other claims were, if proceeded with, likely to fail and would expose the liquidator to significant costs. The delay in recovering the second £500,000 of the settlement figure would be alleviated by Mr Henton's agreement to pay interest at 3% above bank base rate until payment.

22. On 11th September 2008 Edwin Coe wrote again to Mr Coote enclosing a copy of counsel's latest Opinion and inviting him to approve the compromise and so avoid the costs of an application to the Court under s.165 of the Insolvency Act 1986 for an order sanctioning the compromise. In that letter it was again stressed that the settlement figure would allow Mr Coote and the other creditors to be paid in full.

23. Mr Coote remained unwilling to approve the compromise and the s.165 application was issued on 3rd December 2008. In his evidence (dated 4th February 2009) he maintained that the compromise was not a fair one because his interests had been subjugated (as he put it) by those of Mr Rubin and his solicitors who would have first call on the £500,000 which would be payable on completion of the settlement. He went on to make the point that Mr Rubin was willing in 2006 to compromise all claims against Mr Henton and Lookmaster for an even lower sum and would have done so but for the further claims which he had discovered. These are included in the 2008 application. His witness statement provides a detailed analysis (over almost 80 pages) of the various claims pursued in the two actions with a view to rebutting the views of Mr Griffiths that only limited recovery is likely. He concludes by saying that he would like the opportunity of pursuing the actions with a different liquidator.

24. Mr Rubin was therefore concerned to demonstrate that the offer by Mr Henton to pay £1 million in satisfaction of all claims was a reasonable one having regard to the assets at his disposal. As exhibits to his sixth witness statement he produced affidavits sworn by Ms Penelope-Ann Zygmant, a director of Lookmaster, and by Mr Henton which deal with the net worth of Lookmaster and Mr Henton respectively. The statement of affairs in respect of Lookmaster shows net realisable assets as of 19th March 2009 in the sum of £1.3 million. The statement of affairs produced by Mr Henton estimates his net realisable assets to be worth some £656,313.

25. Mr Rubin says in his witness statement that he has been told (and believes) that there are no assets in the Henton Retirement Trust; that a sale by Lookmaster of its assets would result in a further charge to corporation tax of some £588,000; and that in pursuing the alternative course of continuing the 2005 and 2008 applications to trial further substantial costs would be involved. He estimates these to be in the region of £150,000.

26. Mr Coote does not accept the figures contained in the two statements of affairs. He regards the evidence produced by Ms Zygmant and Mr Henton as unreliable and self-serving. It was produced, he submits, in response to a request from Mr Rubin for material "to help support our view that the offer is more than reasonable". This request was made to Ms Zygmant in October 2008 and chased up in January 2009

when Mr Rubin told her in an e-mail that he had to be able to demonstrate that the offer was commercially viable as well as a justifiable response to the merits of the claims. There is an e-mail to his solicitors in which he refers to Ms Zygmant as being worried that if more is disclosed to Mr Coote, she and Mr Henton will be plagued by him for the next three years. He therefore agreed to accept what he refers to as a "no-detail broad brush statement".

27. The tone of some of these exchanges is unfortunate but one needs to be realistic. Liquidators often have to deal with defaulting directors with a view to securing a reasonable return for the company's creditors. The apparent cosiness between Mr Rubin and Ms Zygmant and his apparent keenness to justify the settlement does not mean that the deal he negotiated was inadequate or biased towards Mr Henton. The offer of £1 million would have discharged the company's liabilities to Mr Coote in full. The only disadvantage to him was not the amount on offer but the delay in its payment. The asset positions of Mr Henton and Lookmaster are therefore only relevant insofar as the existence of further assets might have enabled Mr Rubin to press successfully for payment in full much sooner.

28. The judge approved the settlement on 15th June 2009 at the end of a 3-day hearing. He accepted that Mr Rubin had properly assessed the value of the claims and the assets available to meet them. He acknowledged Mr Coote's efforts to identify the claims pursued by the liquidator. But he rejected Mr Coote's submission that if the existing compromise were to be rejected it would lead to a higher offer (of at least £1.3 million) which would enable Mr Coote to be paid in full.

29. The judge's assessment of whether the proposed terms were in the best commercial interests of Branchempire and its creditors turned on a number of different factors. He acknowledged that he was not bound by the views of either the liquidator or the creditors as to the extent of the maintainable claims against Mr Henton and Lookmaster or the prospects of recovery and had to approach the exercise of his discretion to approve the compromise on an objective basis. He referred to the judgment of this Court in *Re Greenhaven Motors Limited* [1999] 1 BCLC 635 where Chadwick LJ said (at p. 642) that:

> "In deciding whether or not to sanction a proposed compromise the court must consider whether the interests of those, whether creditors or contributories, who have a real interest in the assets of a company in liquidation are likely to be best served (i) by permitting the company to enter into that compromise with all the terms that it contains; or (ii) by not permitting the company to enter into that compromise. It is not for the court to speculate whether the terms of the proposed compromise were the best that could have been obtained; or whether the proposed compromise would have been better if it did not contain all the terms that it does contain. Unless it is satisfied that, if the company is not permitted to enter into the compromise on the terms which the liquidator has negotiated, there will then be better terms or some other compromise on offer, the decision is between the proposed compromise and no compromise at all.

> In reaching that decision, the court may have to weigh the different interests of creditors and contributories and, perhaps, the different interests of preferential and non-preferential creditors. It will not give weight to the wishes of those who will be unaffected whichever way the decision goes; for example, the interests of contributories who have no realistic prospect of receiving a distribution in any foreseeable circumstances, or the wishes of preferential or secure creditors who will be paid in full in any event. Subject to that, the court will give weight to the wishes of creditors and contributories whose interests it has to consider, for the reason that creditors and contributories, if uninfluenced by extraneous considerations, are likely to be good judges of where their own best interests lie. For the same reason the court will give weight to the views of the liquidator, who may, and normally will, be in the best position to take an informed and objective view. But, as I have said, at the end of the day it is for the court to decide whether or not to sanction the compromise.

30. His summary of the approach to be taken to the consequences of not approving the compromise and to balancing the views of the liquidator against those of the creditors is set out in the following paragraphs from his judgment:

> "17. Insofar as it is said that the court should not speculate on what alternative terms might have been negotiated, in my judgment, Lord Justice Chadwick's remarks do not mean that the court must have no regard to what the alternative may be if the compromise is not approved. If the compromise is not approved the court, of course, has to have regard to what will then happen. In some cases, the alternative may be that there is another offer which can be evaluated and assessed as being in the best commercial interests of the company. This was the case in *Edennote* where there were two rival bidders for the claims in question. In other cases, where there is no such rival bidder, the choice then available to the liquidator is either to abandon or pursue the claim. If he pursues the claim, the court must have regard to where that may lead and, indeed, cannot ignore the prospect that it may be settled by subsequent negotiations; just as much as it may be ultimately determined by a judgment in litigation if no settlement is achieved.
>
> 18. In looking at that alternative, the court must have some regard to the apparent merits of the claim and to the risk and cost of pursuing it, whether by litigation or negotiation or both and the resources available to do so. It must also have regard (and this is not in dispute between the parties today) to the assets available to meet the claim if it is successful in whole or in part.
>
> 19. In forming a view of the merits of the claim or considering the merits of the claim, the court does not, however, conduct a

> mini-trial of the issues. It is not in a position to do so. It has available only the material which is produced to it at this stage and that is an additional reason why the court will place weight on the assessment of the liquidator – particularly if he has been advised in forming that view and his evaluation of it is not obviously flawed or negated or inadequate by reason of some factor which is in evidence on the sanction application. It is clear that the liquidator's views are not binding on the court. It is not a matter of appeal in any sense from the liquidator. It is a decision for the court itself."

31. The judge then went on to summarise the differences in view between the liquidator and Mr Coote which I referred to earlier. The liquidator's position before the judge was that as of September 2008 the settlement figure would have been sufficient to pay Mr Coote in full the amount of his unsecured claim. We were told by Mr Nersessian on instructions that this remained the position up to the issue of the s.165 application: i.e. that Mr Rubin was still willing as of then to reduce his costs in order to produce a 100% return for Mr Coote on receipt of the second tranche of the £1 million from Mr Henton. Mr Kynoch has queried this but we have no reason to doubt what we were told.

32. But by the date of the hearing before the judge things had changed. The costs of the liquidator had increased to some £847,000 and Mr Rubin was no longer prepared to reduce his costs to accommodate Mr Coote. Whether those costs are approved in full is a matter for another day but the judge was obviously right to base his assessment of the effect of the compromise on the assumption that costs up to that sum might be payable to the liquidator. It is also common ground that no distinction is to be made between pre and post-liquidation debts for the purpose of determining whether the compromise is in the commercial best interests of the creditors. Both have equal weight.

33. The judge turned first to consider the evidence about the net assets of Mr Henton and Lookmaster. He records in his judgment that Mr Rubin has not himself investigated the assets set out in the two statements of affairs or more generally. He has relied on those statements supported by some letters from estate agents about the value of the properties which are listed. These are not formal valuations but were intended to provide indicative values confirming the contents of the statements.

34. Mr Coote provided the judge in his own evidence with a detailed analysis of the transactions under review and the amounts extracted from Branchempire by Mr Henton. His case before the judge was that Mr Henton was essentially dishonest and was adept at hiding his assets. This was amply demonstrated by his conduct leading up to the judgment in the County Court proceedings against Branchempire.

35. The judge accepted the premise but not the conclusions. He said that he approached the evidence contained in the statements of affairs with a considerable degree of scepticism but noted that there was no real evidence that either Mr Henton or Lookmaster still retained assets corresponding to the value of the property transfers made at the expense of Branchempire or what the value of the properties they held actually was. An investigation into the availability of such assets would generate additional costs.

36. He then considered the merits of the various claims made in the 2005 and 2008 applications and referred to the advice obtained from Mr Griffiths. As mentioned earlier, Mr Coote provided the judge in his witness statement with a detailed analysis of those claims and what might be recovered under them. But Mr Kynoch has realistically accepted that the liquidator was entitled to rely on the advice which he received and that it is not appropriate or possible for this Court to critically review the advice which was given. It is not in any case submitted that it was obviously wrong in any material respects.

37. One point taken before the judge and renewed on this appeal involves a further application in the Companies Court against Mr Henton and Lookmaster which was issued on 31st March 2009. The judge was told by Mr Nersessian and accepted that the new claim was merely a duplication of existing claims and would not have increased the total recovery if successfully pursued to judgment. The 2009 claim includes a claim for £864,444.79 for breach of fiduciary duty in respect of the debits and credits entered in Lookmaster's inter-company account with Branchempire. These included the credit to Lookmaster of £673,118.95 in connection with the issue to Branchempire of the 700,000 B shares and the debits and credits in respect of the sale of the Groom Place development. But for these entries Lookmaster would have owed Branchempire £864,441.79.

38. Mr Kynoch makes the point that Mr Griffiths had advised that he was far from convinced that a claim for breach of fiduciary duty lay against Mr Henton in respect of these matters and queries why recovery of these sums was now being claimed under that cause of action as an alternative to the claim under ss. 423 and 238 IA 1986. But this query does not undermine the judge's view that the 2009 claim duplicated the 2005 claim in that it covered the same loss.

39. The 2009 application also includes a claim for loss of profit (£591,600) on the William Mews transaction as opposed merely to a claim for the advance payment of rent. Mr Kynoch submitted that this was not included in the 2005 claim. But that, I think, is incorrect. In paragraph 8 of the 2005 claim the liquidator seeks a vesting order in his favour in respect of William Mews or an order restoring the position to what it would have been but for the transfer. If granted this would restore the value of the property to the company.

40. Mr Kynoch also asks rhetorically why the liquidator should have included this and the fiduciary duty claim in the 2009 proceedings if they added nothing to the strength of the liquidator's hand. But the point is made that the 2009 proceedings were simply a form of insurance against limitation should it have been necessary to pursue the litigation in the event of the court refusing to sanction the compromise. There is nothing in the material which, in my view, should have caused the judge to find that the pessimistic view of the chances of success expressed by Mr Griffiths no longer remained a perfectly tenable view.

41. The judge was therefore entitled to take the view that the liquidator had properly evaluated the claims and the assets available to meet them. Even had Mr Rubin concluded that the asset disclosure in the statements of affairs was arguably incomplete it would still have been necessary for him to weigh up against the background of Mr Griffiths' unchanged advice whether the prospects of success in the various applications justified the expenditure of further resources (at the potential expense of

Mr Coote and the general creditors) in the hope of achieving a better result in litigation or, at the very least, a higher offer than the £1 million.

42. Mr Coote's challenge to the compromise and the judge's approval of it rests on these grounds. His argument is essentially that he has lost the opportunity of an immediate 100% return as a creditor by the liquidator's acceptance of £1 million paid over a period of a year. The grounds of appeal (bolstered by the application to adduce the new evidence) concentrate on the liquidator's failure to wait for a response to the 2009 claim; his failure to press Mr Henton to make an improved offer in the light of that claim; and his failure properly to assess and make enquiries in respect of the true asset position of Mr Henton and Lookmaster.

43. Much of this is premised on the 2009 claim extending the scale of the liquidator's potential recovery which the judge was right to reject for the reasons I have explained. I cannot see why Mr Henton should have regarded the 2009 claim as adding significantly to the liquidator's chances of success in the litigation against him. It was at best an addition to the causes of action already relied upon in respect of the same relief. The only tenable argument is that Mr Henton might be more likely to settle at a higher figure if in truth he or Lookmaster have other significant assets not disclosed in the statements of affairs which they would be anxious to protect. The judge addressed this possibility in paragraph 56 of his judgment:

> "56. I have to consider whether it is in the best commercial interest of the company and its creditors to accept that view and compromise the claims, or to go on. The benefit which Mr Coote hopes to accrue from going on would, of course, be a better outcome either by way of negotiation or result at trial. But neither of those outcomes, in my view, is inevitable or even clear. Mr Kynoch has produced some figures showing that, if the offer were increased to £1.3m that would be sufficient to pay Mr Coote even now in full. There is, in my judgment, no basis for assuming that a further offer would be forthcoming so as to produce a figure of £1.3m. If it is the case that the total value of Mr Henton's net assets, including Lookmaster, is £1.3m it is, to say the least, far from obvious that he would be prepared to hand over the entirety of his assets to satisfy these claims and walk away with nothing. Any such offer, therefore, requires that Mr Henton has other assets and is prepared to pay more than he has presently has in order to protect them. It seems to me that, on the evidence available, that is, at best, an uncertain proposition."

44. On the basis of the material before the judge this conclusion is, I think, unassailable. Mr Rubin had been advised by competent counsel that the good claims were within the region of £500,000 and that the balance of the claims have an uncertain prospect of success. There was no alternative offer of compromise to consider; and there was no clear evidence that Mr Henton does have other significant uncharged assets available to fund a better offer or a judgment in excess of £1 million. The £1 million settlement has been financed in part from bank borrowings. Added to this any resumption of the litigation would generate significant extra costs. Under the terms of the proposed order made by the judge, the liquidator could resume the litigation if the

£1 million was not paid in full and keep what he had received as an interim payment. Given that no trial of the various applications could have occurred before summer 2010, Mr Rubin and the creditors would therefore lose nothing by waiting to see if the full amount of the settlement was paid by then.

45. The judge therefore concluded that a compromise which offered a total of £1 million even spread over a year was one which was in the best commercial interests of the creditors. The entirety of that sum has now been paid and Mr Coote would have secured a 100% return had he been prepared to accept the compromise when it was offered to him in 2008. The erosion in that position raised by the significant increase in the liquidator's costs and his unwillingness to forego the recovery of them in full was, the judge said, entirely due to Mr Coote's refusal to accept a realistic and beneficial outcome to the litigation. The consequent deterioration in his position as a creditor was not a circumstance for which the liquidator can be criticised.

46. I agree with that assessment. Mr Kynoch has not, in my view, demonstrated any misdirection on the part of the judge as to the relevant factors to be taken into account in deciding whether to approve the compromise. Nor can it be said that his decision to do so was so unreasonable as to lie outside the boundaries of his legitimate discretion. The grounds of appeal based on the 2009 claim also fail for the reasons I have given. Faced with a compromise which when made gave Mr Coote 100% of his claim, the judge's conclusion was all but inevitable.

47. Mr Coote's response to the judgment was to take further steps to attempt to prove that Mr Henton and Lookmaster were in possession of other valuable assets which the liquidator had therefore failed to consider before seeking approval of the compromise. He has obtained from Savills a valuation report dated 12th October 2010 in respect of Ingarsby Old Hall and office copy entries relating to the sale and purchase of Scraptoft Hall and 21 Harvey Street. The Savills' valuation is said to show that the Ingarsby Old Hall Estate was worth £7.42 million in March 2009 and not £6 million as stated by Mr Henton. The Land Registry entries are relied on to show that he received a net profit of £1.425 million from the Scraptoft Hall transaction. His ownership of 21 Harvey Street is said to show that the statement of affairs is incomplete and unreliable.

48. In addition, in September 2010 Mr Coote issued an application in the Companies Court against Mr Henton and Lookmaster for an order requiring them to file and serve a statement of their means as of 31st August 2010 and to give disclosure of various categories of documents. These include bank statements and loan documentation up to August 2010. As Mr Coote explained in his evidence in support, the application was made in the light of the liquidator's failure or refusal to press for disclosure of this information which was relevant to his appeal against the sanction order made by Judge Cooke. The application was dismissed by Ms Alison Foster QC (sitting as a Deputy Judge of the Chancery Division) on 24th November 2010 largely on jurisdictional grounds but it is said that Mr Henton would in fact be willing to disclose the material to the liquidator for him to consider, although this had not taken place by the time of the hearing of this appeal.

49. There has been no response in evidence by the liquidator to the application to adduce new evidence on this appeal but in the disclosure application Mr Henton did file evidence in which he strongly disputes the allegation that he has concealed material

assets. He says that the sale price of Scraptoft Hall was £2.26 million not £2.65 million; that the property was acquired with the benefit of a mortgage loan of £1.225 million; and that after expenses and the discharge of borrowings the profit on the sale to his partnership with Ms Zygmant was £597,000. His share of this sum is included in the £471,000 cash deposit disclosed in the statement of affairs.

50. Mr Henton accepts that he had exchanged contracts to buy 17 and 21 Harvey Street prior to the preparation of the statement of affairs but had not purchased or paid for them. They do not therefore affect the value of his net assets that was disclosed.

51. In a second witness statement Mr Henton confirms that he is highly geared, had to borrow most of the money necessary to fund the settlement; and that Ingarsby Old Hall Estate was only worth £6 million in March 2009 when it was professionally valued for the purpose of a Northern Rock mortgage.

52. This is not a comprehensive account of the issues canvassed in the evidence in the disclosure application. But it suffices to demonstrate that there are serious issues between Mr Coote and Mr Henton about the asset position and their value which cannot be resolved in the context of an application to approve a compromise; still less on this appeal. This evidence is therefore only material to the issues considered by the judge if it can be said to demonstrate that the compromise would not be in the commercial best interests of the creditors without at least an investigation by the liquidator of these issues.

53. In my judgment we should refuse to admit the new evidence. Even had the judge been shown this material it would at most have led him to conclude that there was an arguable but strongly contested case for saying that Mr Henton and Lookmaster might have understated their net asset position. It would not have enabled the judge positively to conclude that was the case or to put a figure on the scale of the understatement. Secondly, even had he concluded that further investigation might disclose significant extra assets, that would not of itself have affected the advice given by Mr Griffiths about the prospects of success in the litigation. It would at most have enabled the liquidator to seek a higher settlement figure. But there is nothing to indicate that Mr Henton would have agreed to pay more.

54. The new evidence does not therefore falsify the judge's view that the £1 million settlement figure was an acceptable offer given the chances of success in the litigation and the additional costs which further investigation and further litigation would involve. It also has no impact on the fact that Mr Coote would have had a dividend of 100p in the £1 had he accepted the offer when it was made.

55. I would therefore dismiss both the application to adduce further evidence and the appeal.

Lady Justice Black :

56. I agree.

Lord Justice Ward :

57. I also agree.