

Neutral Citation Number: [2026] EWHC 3046 (BP)

Appeal Ref: CH-2025-000167 and Claim No: CR-2025-006711

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY DIVISION
APPEALS LIST

ON APPEAL FROM THE INSOLVENCY AND COMPANIES LIST ICC
JUDGE AGNELLO KC

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

Date: 24 November 2026

- -

IN THE MATTER OF NOVALPINA CAPITAL LLP (in liquidation)
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Between :

STEFAN KOWSKI

Appellant

- and –

(1) NOAL SCSP (a Luxembourg private equity fund) (formerly called Novalpina Capital Partners 1 SCSp)
(2) OEGH HOLDINGS SARL
(3) NOAL LUXCO SARL

Respondents

- -

IN THE MATTER OF SHAPESHIFT GLOBAL LIMITED (In Members' Voluntary Liquidation)
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

B E T W E E N:

RYAN MICHAEL DAVIES
(As Liquidator of Shapeshift Global Limited)

Applicant

And

BSV CLAIMS LIMITED

Respondent

- -

Before :

MR JUSTICE RAJAH

- -

Felicity Toube KC, Donald Lilly KC, Tim Matthewson and **Charlotte Ward** (instructed by **Stephenson Harwood LLP**) for the **Appellant** in *Re Novalpina Capital LLP*
Stephen Robins KC and **Jack Watson KC** (instructed by **McDermott Will & Schulte UK LLP, Quinn Emanuel Urquhart & Sullivan LLP**) for the Respondents in *Re Novalpina Capital LLP*
Matthew Weaver KC (instructed by **Clyde & Co LLP)** for the **Liquidator** in *Re Shapeshift Global Ltd*
Thomas Robinson KC (instructed by **Velitor Law**) for the **Respondent** in *Re Shapeshift Global Ltd*

Hearing dates: 30 June 2026 – 3 July 2026 and 6 July 2026

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APPROVED JUDGMENT

Mr Justice Rajah :

Introduction

1. This is the hearing of an appeal from the decision of ICC Judge Agnello KC in *Noal SCSp v Novalpina Capital LLP* [2025] EWHC 1392 concerning the liquidation of Novalpina Capital LLP ("**Novalpina**") and the hearing of an application in the liquidation of Shapeshift Global Limited ("**Shapeshift**"). The Novalpina appeal and the Shapeshift application are concerned with the applicable legal test for conversion of a members' voluntary winding up ("**MVL**") into a creditors' voluntary winding up ("**CVL**"). On 30 January 2026 I directed that they should be heard together if possible.

2. In both cases a party with a disputed debt which is the subject of litigation maintains that it is a creditor of the company in MVL, that its debt should be taken into account in deciding whether the liquidation is a solvent or insolvent liquidation, and that as a consequence the MVL should be converted into a CVL. The Novalpina member and the Shapeshift liquidator say that the purpose of these alleged creditors is to gain an advantage in the litigation they are conducting against the companies.

3. An MVL must be converted into a CVL if the liquidator forms the opinion "*that the company will be unable to pay its debts in full"* within the period not exceeding 12 months stated in its directors' declaration of solvency; section 95 of the Insolvency Act 1986 ("**IA 1986**"). The central issue in the appeal is when a liquidator of a company in an MVL should form the opinion that the company is "*unable to pay its debts*" within the requisite period, particularly when faced with a disputed claim. The judge below in the Novalpina proceedings held that where a disputed claim remained unresolved beyond the period specified in the directors' declaration of solvency, the company could no longer be treated as able to pay its debts within the specified period and therefore had to proceed by way of CVL. The judge below rejected the contention that the statutory test in section 95 is not satisfied where the company is able to make adequate provision for any liabilities that are likely on the balance of probabilities to ultimately be established, even though the underlying dispute has not yet been finally resolved.

4. The Novalpina decision is the first time the courts have considered the circumstances in which an MVL must be converted to a CVL. It has given rise to significant interest and debate as to its ramifications amongst those who practise in this field. ICAS, ICAEW and the IPA (the regulatory bodies for many insolvency practitioners) have issued joint guidance to their members on conversion from MVLs to CVLs in light of the Novalpina decision and pending this appeal. The Novalpina decision has prompted the Shapeshift application in which the liquidator of Shapeshift seeks directions as to whether the Shapeshift MVL should be converted into a CVL.

5. The principal submissions on the law were advanced by Ms Toube KC and Mr Robins KC in the Novalpina appeal and by Mr Weaver KC and Mr Robinson KC in the Shapeshift application. Mr Weaver has supported Ms Toube's submissions that Novalpina was wrongly decided and has adopted and supplemented her submissions. Mr Robinson has done the same in respect of Mr Robins' submissions. Mr Lilly KC and Mr Watson KC have addressed everything else in the Novalpina appeal including whether the creditor's disputed claim in the Novalpina appeal met any relevant merits threshold.

6. I am grateful to all counsel for their assistance.

The statutory framework

Voluntary and compulsory winding up

7. Part IV of IA 1986 in the First Group of Parts, sets out the provisions relating to the '*Winding Up of Companies Registered under the Companies Acts*'. The winding up may be either voluntary or by the court; section 73(2) IA 1986.

8. A winding up by the court is a "compulsory winding up" triggered by an order of the court.

Members' and creditors' voluntary winding up

9. A voluntary winding up may be either a members' voluntary winding up (an MVL) or a creditors' voluntary winding up (a CVL). A voluntary winding up is commenced by a resolution (usually a special resolution) passed by the company in general meeting; section 84 IA 1986. What makes a voluntary winding up an MVL rather than a CVL is a statutory declaration of solvency by the directors of the company pursuant to section 89(1) of IA 1986. Section 90 IA 1986 provides that: "*A winding up in the case of which a directors' statutory declaration under section 89 has been made is a "members' voluntary winding up" and a winding up in the case of which such a declaration has not been made is a "creditors' voluntary winding up*".

The statutory declaration of solvency

10. An MVL is a solvent liquidation whereas a CVL is an insolvent liquidation. A key difference between an MVL and a CVL is who has the economic interest in the liquidation and who controls the process. With an MVL the members are in control. The members may appoint the liquidator, sanction the continuance of the powers of the directors, and remove and replace the liquidators. By contrast, in a CVL, the creditors have the primary economic interest in the liquidation because they will not be paid in full. They are therefore given control over these matters.

11. Voluntary winding up was created by the Joint Stock Companies Act 1856. The conferral of control to creditors in an insolvent voluntary winding up was the recommendation of the Greene Report (Company Law Amendment Committee Report of 1925-26) on the basis that members had "*no real interest*" in an insolvent winding up. The recommendation was that control by members of a voluntary liquidation should be restricted to solvent voluntary liquidations. The Greene Report suggested that "*as a practical test of solvency*" there should be a statutory declaration by the directors. Section 67 of the Companies Act 1928 provided that creditors should have the right to nominate the liquidator unless the directors made a declaration of solvency that "*they have made a full inquiry into the affairs of the company, and having done so they have formed the opinion that the company will be able to pay its debts in full within a period not exceeding twelve months from the commencement of the liquidation*".

12. The requirement for a statutory declaration of solvency is now to be found in section 89(1) of IA 1986 which provides:

> "*Where it is proposed to wind up a company voluntarily, the directors (or, in the case of a company having more than two directors, the majority of them) may at a directors' meeting make a statutory declaration to the effect that they have made a full inquiry into the company's affairs and that, having done so, they have formed the opinion that the company will be able to pay its debts in full, together with interest at the official rate (as defined in section 251), within such period, not exceeding 12 months from the commencement of the winding up, as may be specified in the declaration".*

13. Section 89(2)(a) of IA 1986 requires such a declaration to be made no more than 5 weeks before the passing of the resolution for winding up and section 89(2)(b) of IA 1986 requires a director's declaration of solvency to include a statement of the company's assets and liabilities as at the latest practicable date before the making of the declaration.

14. Section 89(4) of IA 1986 states that a director will commit an offence if he makes *"a declaration under this section without having reasonable grounds for the opinion that the company will be able to pay its debts in full*".

15. Section 89(5) provides:

> "*If the company is wound up in pursuance of a resolution passed within 5 weeks after the making of the declaration, and its debts (together with interest at the official rate) are not paid or provided for in full within the period specified, it is to be presumed (unless the contrary is shown) that the director did not have reasonable grounds for his opinion*."

Effect of company's insolvency on MVL

16. The effect of a company's insolvency when it is in an MVL is that the MVL is converted into a CVL. Under the heading "*Effect of company's insolvency*", section 95 of IA 1986 makes provision for the notification to creditors of a statement of the affairs of the company and confers on creditors the power to nominate a liquidator. Section 96 of IA 1986 provides for the MVL to be converted into a CVL from the date on which the creditors nominate a liquidator (or the process to so nominate concludes without a nomination).

17. The trigger for section 95 beginning the process of conversion of an MVL into a CVL is to be found in section 95(1) which provides:

> *"(1) This section applies where the liquidator is of the opinion that the company will be unable to pay its debts in full (together with interest at the official rate) within the period stated in the directors' declaration under section 89."*

18. In this judgment I often refer to the period stated in the directors' declaration as 12 months or the 12 month period. That is a convenient shorthand by reference to the maximum period which section 89 permits. The actual period specified could be a shorter one.

19. An MVL can nevertheless last for more than 12 months. Section 92A IA 1986 and rule 18.7 Insolvency (England and Wales) Rules 2016 ("**IR 2016**") provide that the liquidator must send a progress report to the members of the company 12 months after the liquidator's appointment (i.e. 12 months after the commencement of the MVL) and every 12 months thereafter until the liquidator has delivered a proposed final account to the members pursuant to rule 5.9 IR 2016. There is a similar duty on a liquidator to send 12 monthly progress reports in a CVL, but in a CVL the reports are sent to both members and creditors; section 104A IA 1986 and rule 18.7 IR 2016.

20. It is also clear that an MVL does not affect a creditor's right to seek a compulsory winding up by the court; section 116 IA 1986. The grounds for making a compulsory winding up are set out in section 122 IA 1986 and include that the company is unable to pay its debts. On an application for a compulsory winding up order in England and Wales a company is *deemed* unable to pay its debts if any of the conditions in section 123 IA 1986 are satisfied. In summary those are that (1) the company has not satisfied a statutory demand that has been served on it, (2) execution of a court judgment or order against it has been returned unsatisfied, (3) it is unable to pay its debts as they fall due or, (4) it is "balance sheet insolvent" (i.e. the value of its assets is less than the value of its liabilities).

Part 14 IR 2016

21. It is necessary to set out some of the provisions of Part 14 of IR 2016. Part 14 relates to claims by, and distributions to, creditors in (amongst other processes) a voluntary winding up. Part 14 plays an important part in the Judge's reasoning in the Novalpina decision and in the submissions on this appeal and application. Part 14 is relevant to this appeal in three main ways. It defines what constitutes a debt for the purposes of the winding up and therefore who is considered a creditor in the winding up. It also provides a framework for a liquidator to decide what is a debt, and what happens if someone is dissatisfied with that decision. Finally, for the purposes of this appeal, it provides for a liquidator to estimate the value to be placed upon a debt of uncertain value.

> ***"Application of Part 14 and interpretation***
>
> ***14.1***.—
>
> *(1) ...*
>
> *(2) The definitions in this rule apply to decision procedures in respect of a ... winding up ... except as otherwise stated.*
>
> *(3) "Debt", in relation to decision procedures in respect of ... winding up ..., means (subject to the next paragraph) any of the following—*
>
> *(a) any debt or liability to which the company is subject at the relevant date;*
> *(b) any debt or liability to which the company may become subject after the relevant date by reason of any obligation incurred before that date;*
> *(c) any interest provable as mentioned in rule 14.23;*
>
> *...*

"dividend" , in relation to a members' voluntary winding up, includes a distribution; "provable debt" has the meaning given in rule 14.2; and

"relevant date" means—

...

(c) in the case of a winding up which was not immediately preceded by an administration, the date on which the company entered liquidation,

...

(4) For the purposes of any provision of the Act or these Rules about ... winding up ... any liability in tort is a debt provable in ... the winding up ... if either—

(a)the cause of action has accrued at the relevant date; or

(b) all the elements necessary to establish the cause of action exist at that date except for actionable damage.

(5) For the purposes of references in any provision of the Act or these Rules about ... winding up ... to a debt or liability, it is immaterial whether the debt or liability is present or future, whether it is certain or contingent, or whether its amount is fixed or liquidated, or is capable of being ascertained by fixed rules or as a matter of opinion; and references in any such provision to owing a debt are to be read accordingly.

(6) In any provision of the Act or these Rules ... winding up ... except in so far as the context otherwise requires, "liability" means (subject to paragraph (4)) a liability to pay money or money's worth, including any liability under an enactment, a liability for breach of trust, any liability in contract, tort or bailment, and any liability arising out of an obligation to make restitution.'

Provable debts

14.2*(1) All claims by creditors except as provided in this rule, are provable as debts against the company or bankrupt, whether they are present or future, certain or contingent, ascertained or sounding only in damages.*

...

Proving a debt

14.3.*—(1) A creditor wishing to recover a debt must submit a proof to the office-holder unless—*

(a) this rule or an order of the court provides otherwise; or

(b) it is a members' voluntary winding up in which case the creditor is not required to submit a proof unless the liquidator requires one to be submitted.

...

Admission and rejection of proofs for dividend

14.7*.—(1) The office-holder may admit or reject a proof for dividend (in whole or in part).*

(2) If the office-holder rejects a proof in whole or in part, the office-holder must deliver to the creditor a statement of the office-holder's reasons for doing so, as soon as reasonably practicable.

Appeal against decision on proof

14.8*.—(1) If a creditor is dissatisfied with the office-holder's decision under rule 14.7 in relation to the creditor's own proof (including a decision whether the debt is preferential), the creditor may apply to the court for the decision to be reversed or varied.*

(2) The application must be made within 21 days of the creditor receiving the statement delivered under rule 14.7(2).

(3) A member, a contributory, any other creditor or, in a bankruptcy, the bankrupt, if dissatisfied with the office-holder's decision admitting, or rejecting the whole or any part of, a proof or agreeing to revalue a creditor's security under rule 14.15, may make such an application within 21 days of becoming aware of the office-holder's decision.
...

Moratorium, administration and winding up: estimate of value of debt

14.14.—(1) In the case of a decision procedure ... in a winding up, the office-holder must estimate the value of a debt that does not have a certain value because it is subject to a contingency or for any other reason.

(2) The office-holder may revise such an estimate by reference to a change of circumstances or to information becoming available to the office-holder.

(3) The office-holder must inform the creditor of the office-holder's estimate and any revision.

(4) Where the value of a debt is estimated under this rule or by the court under section 168(3) or (5), the amount provable in the case of that debt is that of the estimate for the time being."

Background facts – Novalpina

22. Novalpina is an LLP incorporated in England and Wales. Its designated members are Mr Stefan Kowski (the Appellant) and Novalpina Capital Group S.à.r.l. (which is in liquidation in Luxembourg).

23. The First Respondent is a Luxembourg private equity fund ('**the Fund'**). The Fund was set up in 2017 by Mr Stefan Kowski, Mr Bastian Lueken and Mr Stephen Peel. The Third Respondent ('**Luxco'**), is owned by the Fund. The Second Respondent, ("**OEGH"**) is a wholly owned subsidiary of Luxco.

24. From 2017, Novalpina was an investment advisor in relation to the Fund. In around April 2021, as an investment, the Fund acquired a group of companies that operated a gambling business ('**Maxbet'**) through two of OEGH's subsidiaries. Novalpina and Novalpina Capital Investment Management LLP (now dissolved) advised upon the acquisition as investment advisors.

25. Novalpina Capital Partners 1 GP Sarl ("**Novalpina GP"**) was the general partner of the Fund until 27 August 2021. Treo GP replaced Novalpina GP as general partner. Novalpina GP has brought proceedings against the Fund in relation to its removal and litigation has broken out on a number of fronts.

26. Novalpina was placed into MVL on 10 May 2023 by a resolution passed by its designated members. The Declaration of Solvency signed by Mr Kowski records assets of £334,912 and liabilities of £148,358. The liquidators appointed were Stephen Goderski and Peter Hart of PKF Littlejohn Advisory Limited. Mr Hart resigned on 30 August 2024.

27. In October 2023, the Respondents commenced proceedings in Luxembourg against Novalpina seeking damages for negligence in advising on the acquisition by the Fund of Maxbet. This first Maxbet claim was withdrawn by notice dated July 2024. A second Maxbet claim was issued by the Respondents in Luxembourg and served in July 2024 (**Maxbet 2**). The Maxbet 2 claim is a fraud claim alleging that Novalpina and Mr Kowski are jointly and severally liable for deceiving the Respondents and their associated special purpose vehicles into purchasing Maxbet. The central allegation is that the ultimate beneficial owner was warranted in the Maxbet acquisition to be a Mr Sadovskii and that Novalpina and Mr Kowski deliberately concealed information that suggested that Maxbet's true ultimate beneficial owner was actually someone else - a Mr Mirilashvili. Maxbet 2 is being defended by Mr Kowski and Novalpina. Novalpina's defence to Maxbet 2 is being funded by Mr Kowski as it is clear that Novalpina has insufficient assets to pay for advice or the costs of defending the claim.

28. The first Maxbet claim was notified to Novalpina's joint liquidators in December 2023. Proofs of debt were lodged by the Respondents totalling about €247m. The Respondents withdrew those proofs in July 2024 and sent proofs of debt in respect of Maxbet 2 for up to €287m to the liquidator of Novalpina on 27 July 2024. The solvency or insolvency of Novalpina therefore depends upon whether (and, if so, how) the disputed Maxbet 2 claim is to be taken into account.

29. One of the joint liquidators resigned at the end of August 2024. The other was removed and replaced by Mr Anthony Murphy in September 2024. Mr Murphy obtained (a) a written legal opinion from a Luxembourg law firm on the merits of the Maxbet 2 claim, which concluded that the chances of the claim succeeding were "*under 10%*" and (b) legal advice on English law from Matthew Weaver KC. He relied on these two separate pieces of advice to place a value of zero on the Maxbet 2 claim and to form the opinion that Novalpina was not insolvent and that it was not appropriate to convert the MVL to a CVL under section 95 of IA 1986.

30. He offered to adjudicate on a proof of debt in relation to Maxbet 2 so that the Respondents could appeal his adjudication under the IR 2016, but the Respondents objected to this course.

31. By application dated 19 September 2024, as amended by Order dated 15 November 2024, the Respondents sought, *inter alia*, the removal of Mr Murphy and appointment of Robert Horton pursuant to section 108 IA 1986, a direction pursuant to section 112 IA 1986 to the liquidator of Novalpina that he should forthwith convert the MVL to a CVL pursuant to section 95 and/or a declaration that Novalpina is insolvent and that the liquidation should forthwith be converted to a CVL under sections 95 and 96 IA 1986.

32. On 15 November 2024, Chief ICC Judge Briggs directed that there should be a trial of five preliminary issues ("**PI Trial**"): (1) whether Novalpina was insolvent when it went into MVL on 10 May 2023; (2) whether Novalpina was insolvent for the purposes of section 95 by 2 September 2024 when Mr Goderski was removed as liquidator; (3) whether Novalpina was insolvent for the purposes of section 95 at the date of the directions hearing on 15 November 2024; (4) should the MVL be converted to a CVL under sections 95 and 96 IA 1986; (5) if the answer to (4) is yes, who should be appointed as liquidator and/or who should nominate the liquidator.

33. Chief ICC Judge Briggs' order also provided for Mr Horton to be appointed to act as an additional liquidator, which appointment took effect on 3 December 2024.

34. The PI Trial was heard before ICC Judge Agnello KC ("**the Judge**") over 5 days on 11-14 February 2025 and 3 April 2025. The Judge held in a judgment dated 6 June 2025 ("**the Judgment**") and declared in her order dated 9 June 2025 ("**the Order**") that Novalpina was "insolvent" for the purposes of the test in section 89 at the time it was placed into MVL on 10 May 2023, and that Novalpina was also "insolvent" for the purposes of the test in section 95 on 2 September 2024 and 15 November 2024. The Judge held and ordered that the consequence of those determinations and declarations was that the MVL should be, and was to be, converted into a CVL forthwith, pursuant to section 95. The Judge also held and declared that the Respondents were entitled to nominate the liquidator of Novalpina in CVL. She further ordered that Mr Murphy be removed as a joint liquidator of Novalpina, pursuant to section 108(2) IA 1986. Novalpina has therefore been in CVL since then, with Mr Horton acting as sole liquidator.

35. Mr Kowski appeals the Order.

Background facts – Shapeshift

36. Prior to its MVL, Shapeshift traded as a cryptocurrency exchange.

37. The Respondent ("**BSV**") is a special purpose vehicle incorporated specifically to act as the representative in proceedings in the Competition Appeals Tribunal ("**the CAT Proceedings**" and "**the CAT**"). BSV is pursuing collective proceedings on behalf of UK-based holders of a cryptocurrency known as Bitcoin Satoshi Vision. The claim is brought against Shapeshift and other defendants. The claim was issued on 29 July 2022 and

alleges that the Binance, Bittylicious, Kraken and Shapeshift cryptocurrency exchanges colluded to de-list Bitcoin Satoshi Vision cryptocurrency in 2019, thereby causing loss to holders of that cryptocurrency.

38. On 7 August 2022, Shapeshift's director, Erik Voorhees, swore a declaration of solvency. It was accompanied by a statement of assets and liabilities as at 3 August 2022 showing that Shapeshift had £627,711 of assets but no debts The declaration included the confirmation from Mr Voorhees that he had "*formed the opinion that this company will be able to pay its debts in full together with interest at the official rate within a period of 12 months, from the commencement of the winding up.*" The Company entered MVL and Mr Davies, the Applicant, was appointed liquidator on 10 August 2022.

39. On 11 August 2022 (the day after Shapeshift entered into MVL), BSV served the CAT Proceedings on Shapeshift at its then registered office. There was no pre-action correspondence but there is a dispute as to whether Mr Voorhees already knew of BSV's issued claim (I simply note that dispute as I do not need to resolve it).

40. BSV sought to be admitted as a creditor. On 14 November 2022, BSV lodged a proof of debt for £9.9bn. BSV opted for Mr Davies to adjudicate upon its proof rather than await the outcome of the CAT Proceedings. With the benefit of specialist competition law advice (in respect of which privilege is claimed), Mr Davies adjudicated upon BSV's proof and rejected it in full on 24 March 2023.

41. By application notice dated 17 April 2023, BSV appealed Mr Davies' decision pursuant to rule 14.8 of the Insolvency (England and Wales) Rules 2016 ("**the Rule 14.8 Application**"). By consent, the Rule 14.8 Application is stayed pending determination of the CAT Proceedings. The consent order in respect of the Rule 14.8 Application allowed either party to apply to Court to lift the stay on 30 days' written notice to the other party, but no such application/written notice has been made or given.

42. The CAT Proceedings continue. On 26 July 2024 the CAT made a Collective Proceedings Order pursuant to section 47B of the Competition Act 1998 and authorised BSV to act as representative for the class of persons whose claims were eligible for inclusion in the proceedings. BSV's claim has narrowed following a successful strike out application by another defendant in the CAT Proceedings and BSV now estimates the value of its claim as £122m to £140m.

43. There are no other creditors (or alleged creditors) of Shapeshift.

44. On 6 June 2025 judgment in Novalpina was handed down. It is this decision that prompted the Shapeshift application which was issued on 26 September 2025 with no respondent. BSV was joined as sole Respondent on its application by court order on 20 October 2025.

45. In the Shapeshift application, Mr Davies seeks directions under section 112 IA 1986 in light of the Novalpina decision as to:

    45.1 whether Shapeshift's MVL should be converted to a CVL; and
    45.2 in the event of a conversion into CVL:

45.3 an order that the creditors should not be invited to nominate a liquidator in the CVL; or alternatively
45.4 the value for which BSV should be admitted to vote on any such nomination, with Mr Davies' position being that BSV's claim should be valued at nil.

The Judgment

46. In her judgment on 6 June 2025, ICC Judge Agnello KC identified the preliminary issues as requiring the determination of two main issues:

> *"(1) What is the test applicable in relation to the conversion of a MVL into a CVL pursuant to section 95 IA 1986 – does this require the debts to be paid in the 12-month period specified in section 89 IA 1986 or is it a balance sheet insolvency test; and*
>
> *(2) Is the Applicants' claim a debt in accordance with the IA 1986 and the Insolvency Rules 2016 ('the IR') and how is it to be treated in relation to the test for conversion from MVL to CVL.*"

47. On the question of the applicable test the Judge rejected the submissions for Mr Kowski that the test was one of balance sheet insolvency concluding that sections 89 and 95 created a different test for insolvency to that in section 123 IA 1986. At paragraph 46 she said:

> *"Section 89(1) creates, in my judgment, a very clear and precise test for the statutory declaration, being can the director form the opinion that the company will be able to pay its debts in full, together with interest at the official rate within such period not exceeding 12 months from the commencement of the winding up (as is specified in the declaration). If the director can form this opinion, then he can make the statutory declaration."*

48. At paragraph 47 she said that the section 95 test was the same:

> *"Section 95 expressly refers to what I have called the section 89 test, namely, will the company be able to pay its debts in full including interest thereon within the 12 month period (or the lessor specified period not exceeding the 12 month period)."*

49. The Judge concluded that it was not sufficient to "*provide fo*r" debts within 12 months as those words do not appear in section 89(1) or 95. She said that there was a clear distinction to be drawn between the criminal offence under section 89(4) and the presumption under section 89(5): the latter refers to debts being "*provided fo*r" because it was unrealistic to expect them all to have been paid within the first five weeks of an MVL.

50. The test at section 89 was not a cash flow test, nor was it a balance sheet test because, the Judge said:

> 50.1. a company might be balance sheet solvent, but holding illiquid assets so that it could not realise them quickly enough to pay creditors in full within 12 months; and

50.2. conversely a company might be cash flow solvent at the precise time of the statutory declaration, but unable to pay contingent or prospective claims within 12 months because they might not fall due for a period of time.

51. The Judge acknowledged that an MVL can last for more than 12 months, but only, she concluded, if debts and interest had been paid in full within 12 months. She went on later in the judgment to make clear that any section 95 opinion had to be formed by the liquidator before or on the expiry of the 12 month period saying at paragraph 65:

"A diligent liquidator would carry out his section 95 obligation and would ask himself the question before the expiry of the 12-month period and convert the MVL into a CVL if he reached the opinion that the debts could not be paid. Alternatively, such a liquidator could wait until the actual expiry of the 12-month period to see, for example, if further realisations became available prior to the expiry of the 12-month period thereby enabling the debts to be paid. If they were not so paid in the 12-month period, then the liquidator must take steps to convert the MVL into a CVL."

52. She summarised her principal conclusions on this issue at paragraph 54:

"In my judgment, giving a purposive construction to the provisions, sections 89 and 95 require the payment of the debts in full before the expiry of the 12 month period. The intention was not to create a type of liquidation for companies who are balance sheet solvent. The legislative intention behind section 89 IA 86 is to create an alternative type of liquidation for those companies who are able to pay their debts within a specified period not exceeding 12 months… The purpose behind section 95 IA 86 is to require the conversion of the MVL into a CVL when at the end of the 12-month period or at an earlier specified time, it is clear that the debts have not been paid and cannot be paid prior to the expiry of the 12-month period. The liquidator asks himself whether the company will be able to pay its debts in full by the end of the 12 month period."

53. The Judge then considered (at [67] to [73]) the question of whether the Novalpina respondents' debt had been properly valued or rejected. She held that there was no provision in the Rules for the informal adjudication which Mr Murphy asserted that he had carried out. He should, she decided, have applied Part 14 IR 2016 which "*contain the provisions relating to creditors proving their debts, including the provisions relating to the adjudication of proofs of debts and the appeal process carried out by the court*" at [68].

54. Having set out the provisions of Part 14 of IR 2016 the Judge turned to the classification and treatment of the Novalpina respondents' debt. Having reviewed the authorities cited to her she eventually accepted their contention that they had a prospective or contingent claim because it was subject to litigation ("*In a case where the outcome of proceedings is awaited, in my judgment, the claim is a contingent liability*" – [114]). It ought to have been valued by reference to the contingency in accordance with IR 14.14 (and at a value well in excess of £1, which would have been sufficient to mean that Novalpina could not pay the debt within 12 months, or at all).

55. The Judge then considered what the position would be if, contrary to her conclusions, the Novalpina respondents' claim were not a contingent claim but instead what she

categorised as "*a disputed debt or a disputed actual debt*" . She decided that the statutory scheme for a MVL and its conversion into a CVL does not include a requirement for a creditor to establish its claim as a creditor. In summary she held as follows:

55.1. If any of Novalpina's liquidators had properly adjudicated the Novalpina respondents' claims, then whenever the claims had been notified and adjudicated, that adjudication, and any appeal from that adjudication, would not have been completed within 12 months of the commencement of the MVL (paras [120]-[124]).

55.2. If the adjudication process (including any appeals from a rejection) had not been completed within 12 months from the commencement of the MVL then the liquidator would be obliged to convert to a CVL (paras [125]-[132]).

55.3. Therefore, the Judge concluded, the Novalpina respondents' claim had not been paid within 12 months and it was necessary to convert Novalpina's MVL into a CVL.

Grounds of appeal and Respondents' Notice

56. The Novalpina appellant says the Judge was wrong to make these findings, declarations and orders, for the reasons set out in his Grounds of Appeal. Grounds 1 to 3 set out the reasons why he says the Judge was wrong to find that Novalpina was "insolvent" under sections 89 and 95 of the IA 1986 and that therefore the MVL should be converted to a CVL. Ground 4 identifies why (if, contrary to Mr Kowski's case, the appeal on Grounds 1 to 3 fails) the Judge was wrong to grant (or fail to grant) certain consequential relief in a consequentials judgment dated 9 June 2025. The Respondents' notice seeks to uphold the decision of the Judge for additional or different reasons. I identify below the determinative issues raised by the Grounds of Appeal and Respondents' notice.

Ground 1A - Company unable to pay its debts within 12 months

57. Although the Judge accepted that an MVL can last for more than 12 months, she held that sections 89 and 95 require conversion to a CVL where all debts have not in fact been (or will not be) paid in full within 12 months of entry into an MVL. Ms Toube and Mr Weaver on behalf of Mr Kowski and Mr Davies respectively say this is wrong in law. They contend that a company is able to pay its debts in full within the 12 month period if it is able to pay or provide for its debts in full within that period. I accept that submission for the following reasons.

The terms of sections 89 and 95

58. Sections 89 and 95 IA 1986 do not state that all debts must actually be paid within a 12-month period. The test is whether, in the opinion of the directors (section 89) or the liquidator (section 95), the company "will be able to pay its debts in full"/ "will be unable to pay its debts in full" within a 12-month period. The question is what it means to be able to pay debts in full.

59. Sections 89(4) and 89(5) refer not only to the payment of debts, but also to debts being provided for. Section 89(4) provides that it is an offence for a director to make a declaration of solvency without having reasonable grounds for forming the section 89 opinion. For convenience the terms of section 89(5) are set out again here:

> "*If the company is wound up in pursuance of a resolution passed within 5 weeks after the making of the declaration, and its debts (together with interest at the official rate) are not paid* or provided for *in full within the period specified, it is to be presumed (unless the contrary is shown) that the director did not have reasonable grounds for his opinion*." (emphasis added)

60. The Judge thought that the presumption in section 89(5) only applies where the company is placed into insolvent liquidation (i.e. CVL) within the first 5 weeks of the MVL, and that the words "*or provided for*" are included in section 89(5) because a different test applies during the first 5 weeks. This is a misreading of the statute. Section 89(5) does not only apply where the company is placed into insolvent liquidation within the first 5 weeks of the MVL. The reference to 5 weeks in section 89(5) is to the prior step of the company having entered MVL by resolution for winding up within 5 weeks of the section 89 declaration by the directors pursuant to section 89(2)(a). The reference in section 89(5) to debts not being paid or provided for "*within the period specified*" is to the period not exceeding 12 months "*specified*" in the section 89 declaration under section 89(1). The Respondents did not seek to uphold the Judge's interpretation of section 89(5).

61. The Respondents instead point out that the words "*or provided for"* simply do not feature in section 95. There is no equivalent of section 89(4) and (5) in section 95 presumably because a liquidator is an officeholder and it would not be appropriate for there to be a threat of criminal sanction for a failure to do his duty. In my judgment the question of whether a company is able to pay its debts or unable to pay its debts must have the same meaning in section 89 as in section 95. The two provisions are intended to complement each other and provide a coherent scheme for deciding when a voluntary liquidation should be an MVL and when it should be a CVL. The use of the words "or provided for" are therefore as significant in the interpretation of section 95 as they are for section 89.

62. The statute itself therefore contemplates that provision for payment is an alternative to actual payment.

63. Sections 89(1) and 95(1) envisage a prospective opinion before the 12 month period has expired as to what the position will be at the end of that period whereas section 89(5) is retrospectively testing the accuracy of that opinion at the end of the 12 month period by reference to what has actually happened. That is consistent with an objectively inferred intention of the legislature in section 89(1) and 95(1) that a company which can pay or provide for its debts within the 12 month period is a company which is "able to pay its debts" within that period and is solvent.

64. Mr Robins KC posited that the proper inference of Parliament's intention in section 89(5) is that Parliament thought that it would be unfair for a director to be exposed to a criminal offence if the company had enough money set aside to discharge its debts but the liquidator had not got round to paying them yet. This is not a plausible explanation for the wording of section 89(5). Section 89(5) creates a rebuttable presumption. The director can rebut the presumption by showing that he or she had reasonable grounds for forming the opinion that the company was "able to pay its debts" within the 12 month period. As I observed in argument, in Mr Robins' scenario that the company was able to pay its

debts within 12 months but had not done so because of the liquidator's delay, there would be no need for any special provision in section 89(5), as the director's declaration of solvency would be vindicated and the presumption rebutted. Viewed objectively, it is far more likely that Parliament did not consider that a company which could pay or provide for its debts in full was an insolvent company, and that the mischief to which section 89(4) is directed, namely a careless, reckless or deliberately false declaration of solvency by the directors, was not engaged.

65. The scheme of the legislation is that MVLs are solvent liquidations and CVLs are insolvent liquidations. A company in liquidation which is able to pay or provide for all its debts is in a solvent liquidation in which the economic interest remains with the members. The reason for transferring power to creditors is that the liquidator has formed the view that the company is insolvent (which is how the Cork Report described the test for conversion of an MVL into a CVL at paragraph 674) and the economic interest in the liquidation therefore lies with the creditors. The reason for transferring power to creditors does not arise if creditors will be paid in full. Requiring a company which is able to pay or provide for all its debts to enter an insolvency process would be contrary to the scheme of the legislation and wrong in principle.

The Cohen Report

66. I have also found it helpful to consider for context the Cohen Report *(Report of the Committee on Company Law Amendment* (1945) CM 6659) where one can see the genesis of section 95. The Cohen Report recommended the creation of a new statutory provision: "*If the liquidator is at any time of the opinion that the company will not be able to pay its debts in full within the said period, or if the winding-up continues for more than one year, and the debts of the company have not been paid or provided for in full within one yea[r,] he shall forthwith summon a meeting of the creditors…*" [emphasis added]. It is clear that the report envisaged that the "*will not be able to pay its debts in full*" test did not require actual payment within 12 months, as after 12 months the debts only needed to be "*paid or provided for*".

67. This proposed statutory provision was intended to implement a recommendation at paragraph 144(b) of the Report that the liquidator in a members' voluntary winding-up should be bound to summon a meeting of the creditors at any time when he thinks the director's declaration of solvency is unlikely to be fulfilled and "*in any event, at the expiration of one year from the date of the commencement of the winding-up if the debts of the company have not been paid within that period*". In other words the authors of the report envisaged that debts would only not have been "*paid within that period*" if they had not been "*paid or provided for*". The payment of debts and the provision for debts appears to have been treated historically as synonymous.

68. These points on the Cohen report are not undermined by the fact that only the first part of this recommendation was reflected in section 288 of the Companies Act 1948, adopting the wording of "*will not be able to pay its debts in full*". This provision eventually became section 95 where the consequences of the company's insolvency changed to require a conversion to CVL, but the trigger (i.e. the liquidator's opinion that the company will be unable to pay its debts in full within 12 months) remained the same. The legislation did not enact the part of the recommendation in the Cohen Report that

required a meeting of creditors to take place if the winding up "*continues for more than one year*". That latter recommendation was reflected only with the requirement to have a meeting of members (section 289 of the Companies Act 1948), which more recently became a requirement to send a progress report to members (section 92A IA 1986). It was logical for this to be a meeting of the members rather than a meeting of the creditors (and to send the progress report to members rather than creditors) because if the liquidator had not formed a section 288/ section 95 opinion by the end of the 12-month period, it would follow that the debts were either paid or provided for (i.e. there were no creditors whose opinions were of any relevance).

Danka and Tombs

69. Ms Toube KC relied on *Re Danka Business Systems* [2013] Ch 506 ("***Danka***") and *Tombs v Moulinex SA* [2004] 2 BCLC 397 ("***Tombs***") as caselaw showing that debts did not need to actually be paid within the 12 month period.

70. In *Danka* the applicants had a contingent claim for an indemnity against tax liabilities. They proved for their debts but asked the liquidators to defer taking any further steps in the liquidation until all of the tax liabilities had been determined. The liquidators rejected that request and proceeded to determine and value the contingent claims. The applicants applied for directions that the liquidators should make a retention until their contingent claims had crystallised and also challenged the liquidators' valuation of the contingent claims. The application was issued more than 12 months after entry into an MVL, and the application was not heard by the Court of Appeal until 4 years after the entry into an MVL. Ms Toube KC points out that no one suggested that the MVL should have converted to a CVL by reason of this fact but as the Respondents observe the point was not taken. The questions in issue, namely whether the liquidator had the power to "wait and see" whether the contingent liabilities crystallised and in what amount, and if so whether the liquidator should be compelled to do so, had to be determined whether the company was in an MVL or a CVL. The question of whether the liquidation should have been a CVL rather than a MVL was irrelevant to the issues the court had to determine.

71. However the case does illustrate the understanding in the industry and the legal profession that debts did not have to be actually paid within 12 months. The same point can fairly be made of *Tombs* where a liquidator of a solvent company in an MVL with a significant surplus of c £4.3m sought directions to authorise a retention to pay for annual insurance for 10 years against a known exposure to contingent claims by unknown persons and, subject to that retention, to distribute the surplus to members. Bernard Livesey QC, sitting as a Deputy High Court Judge, gave that authorisation. Quite clearly, therefore, those contingent liabilities were not discharged within 12 months of entry into the MVL.

72. Mr Robins KC also says that it is significant that both section 89 and 95 incorporate a specific period of 12 months. I accept that the period is significant. The statutory provisions require that the company is *able* to discharge all its debts in full within that period, but I do not accept that this means it must actually pay those debts. The evidence from the Insolvency Service is that the vast majority of MVLs are concluded with any debts actually paid in full within that period. However as *Danka* and *Tombs* show, in the more complicated MVLs there may be debts which cannot be paid within that period. This may be because they are uncertain, or disputed, or contingent, or perhaps simply

just not due yet. In that situation the company is still able to pay those debts if it can within 12 months provide for their payment.

The test for "unable to pay its debts"

73. Ms Toube and Mr Weaver contended that the liquidator must form the opinion that the company is insolvent on a basis that is the same as (or closely analogous to) the test for balance sheet insolvency under section 123(2) IA 1986, as explained by the Supreme Court in *BN Corporate Trustee Services Ltd v Eurosail-UK 2007-3BL plc* [2013] 1 WLR 1408 ("***Eurosail**")* at [37], [42] and [48]. Ms Toube's alternative submission was that the relevant test is to apply the statutory definition of "*unable to pay its debts*" as defined in s.123 IA 1986 at the end of the 12-month period (or other period stated in the directors' declaration under s.89). On this analysis, both the cash flow (s.123(1)(e)) and balance sheet (s.123(2)) insolvency tests are applicable at the end of the specified period.

74. I do not consider either of these alternatives to be correct. While there is something to be said for a consistent approach to the meaning of "*unable to pay its debts*" throughout the legislation, in my judgment that is not possible having regard to the wording of the relevant provisions. Firstly, section 123 is a deeming provision for the purposes of section 122 only. Secondly, there is no principled reason for borrowing the cash flow and balance sheet tests from section 123 but not the rest of it. Thirdly, section 123 contains bespoke time periods which are simply not consistent with the exercise required by section 95(1). The latter requires the liquidator to form an opinion as to whether the company is unable to pay (or provide for) its debts in full within 12 months. That is so whether or not the debts are already overdue or will not be capable of being paid when they fall due before the end of the 12 month period (s. 123(1)(e)), whether a statutory demand has been served and not satisfied in respect of the debt (s.123(1)(a)), or whether a judgment or order for one or more debts has not been satisfied by enforcement (s.123(1)(b)). It is only if the liquidator is satisfied that the company will be unable to pay or provide for all of its debts within 12 months that section 95 is engaged. If the company is able to pay or provide for all its debts at the end of 12 months then no doubt it will also be balance sheet solvent as at that date, but that is a minimum requirement rather than the test.

75. As I have already said, the question of whether a company is able to pay its debts or unable to pay its debts must have the same meaning in section 89 as in section 95. The proper approach to a director's solvency declaration for the purposes of section 643 Companies Act 2006 was set out by Rose J (as she then was) in *BAT Industries plc v Sequana SA* [2016] EWHC 1686 (Ch) [2017] Bus LR 82 at [312] and [326] to [327] which I have already referred to above. That approach was applied to section 89 by Penelope Reed KC sitting as a Deputy High Court Judge in *Sogexia S.a.r.l. v R Raphael and sons plc* [2020] 7 WLUK 501 at [19]. The test to be applied in respect of a director's solvency statement does not:

> "*require the directors of a company to go through every contingent or prospective liability facing the company, work out what is the worst that can happen, attempt to put a value on the liability in that scenario and then measure the company's assets against that figure…*

> *…the opinion that the directors must form is not whether, if calamity were to strike on some or all fronts, the company might be unable to pay its debts nor is it whether the court would have jurisdiction to wind up the company under section 123 of the Insolvency Act on a petition issued on the day the solvency statement was signed. The test is not a technical one but a straightforward one applying the words of the section. The directors must look at the situation of the company at the date of the statement and, taking into account contingent or prospective liabilities, form an opinion as to whether the company is able to pay its debts."*

76. In my judgment section 95 requires the liquidator to adopt the same straightforward approach of applying the words of the section and forming an opinion as to whether the company is able to pay or provide for its debts within the relevant period.

77. There is no inconsistency in there being a different test for insolvency for a compulsory winding up and for conversion of an MVL to a CVL. There is no moratorium on the enforcement of debts during a voluntary liquidation. A voluntary liquidation does not bar the right of a creditor to have the company wound up by the court; see section 116 IA 1986. A creditor is entitled to seek a compulsory winding up of a company in an MVL on one of the grounds in section 123 even if the liquidator has not formed the section 95 opinion that the company will be unable to pay that creditor (and pay or provide for all other creditors) within 12 months.

Consequences

78. Having concluded that a company is able to pay its debts if it can pay or provide for them within the specified period, several subsidiary questions arise. What is the effect of a disputed debt whose existence remains unresolved after 12 months? How may the liquidator determine whether such a debt exists? What standard applies when deciding whether the debt exists? These questions are the subject of Grounds 1B, 1C and 1E of the Grounds of Appeal to which I now turn.

Ground 1B - Disputed debts which cannot be determined within 12 months

79. In paragraph 121 of the judgment the Judge said:

> *"In the current case, the liquidator (Mr Goderski) did not seek to adjudicate upon the Applicants' proofs of debt prior to the expiry of the 12-month period. In my judgment, even if that process had been commenced, it is unlikely that the adjudication process could have been commenced and dealt with, including the likely appeal process, before the expiry of the 12- month period."*

Then, in paragraph 125 of the Judgment she concluded:

> "*The debt remains a provable debt and needs to be taken into account. It has not been paid before the expiry of the 12-month period. In so far as the adjudication process has yet to be completed by the end of the 12-month process, then the liquidator cannot reach the view that the debts can be paid before the expiry of the 12 months process. This follows from the test set out in sections 89 and 95 IA 1986. The debt cannot be paid in the 12-month period if it cannot be adjudicated upon within that period… If the value*

of a debt cannot be determined in the 12-month specified period, then it cannot be paid in that period."

80. In other words, the Judge held that if the existence or value of a debt is not determined, whether through the formal proof of debt process or otherwise, within 12 months of entry into an MVL then it is deemed that the debt is unable to be paid. The Appellant/Applicant say this is wrong in law.

The 12-month period

81. It can be seen that the conclusion in paragraph 125 is underpinned by the Judge's conclusion that all debts must actually be paid within 12 months. If, as I have concluded, Ground 1A is successful then the Judge's reasoning on this issue is undermined. If a company is able to pay its debts for the purposes of section 89 and 95 within 12 months if it can provide for its debts within that period, then the fact that adjudication may take longer than 12 months is not fatal.

82. Moreover, the language of section 95 requires the liquidator to form a positive opinion that the company is unable to pay its debts in full. The liquidator cannot form this positive view if the liquidator is unaware of the existence of the debt or the liquidator has not been satisfied that the debt exists to the appropriate standard. If the debt is not a genuine debt then it is not a debt of the company and the company is not unable to pay its debts just because a claim is asserted.

Is a disputed debt a provable debt?

83. As Ms Toube and Mr Weaver point out, paragraph 125 of the Judgment decides that it should be deemed that a debt cannot be paid where the debt that has not yet been adjudicated is of a type that is capable of being a "provable debt" under rule 14.2 IR 2016. Rule 14.2 IR 2016 only establishes what <u>type</u> of debt can be proved in insolvency (as opposed to the types that cannot). It does not deem the <u>existence</u> of such debts. If adjudication establishes that the provable debt was not in fact a debt of the company then the company is not unable to pay <u>its</u> debts, and was not unable to pay <u>its</u> debts when the claim was wrongly asserted. The Respondents do not seek to defend the Judge's conclusion on the effect of Rule 14.2.

<u>Ground 1C: the liquidator's procedure for determining validity of a debt.</u>

84. The Judge held that Mr Kowski (and Mr Murphy) could not rely upon Mr Murphy's assessment of the validity of the Maxbet 2 Claim because a liquidator has no power to assess the validity or otherwise of alleged debts other than by following the formal procedure for proving debts as set out in Part 14 IR 2016 and she concluded that Mr Murphy had impermissibly carried out "*some summary non-statutory procedure*".

85. Ms Toube makes a number of powerful points as to why the judgment is not correct in this regard.

86. First, s.95 applies "*where the liquidator is of the opinion that the company will be unable to pay its debts in full*" (emphasis added). The statute is looking at the subjective opinion of the liquidator and not the process by which he may have come to it. The statute does not state that the liquidator shall only form that opinion by following the adjudication procedure in Part 14 IR 2016.

87. Secondly, a creditor in an MVL is not obliged even to submit a proof of debt unless the liquidator calls for the submission of proofs; see rule 14.3(1)(b) IR 2016. Such proofs are required for a different purpose to that envisaged in section 95. The purpose of calling for such proofs is ordinarily in anticipation of distribution. Rule 14.7 IR 2016 relates to the admission and rejection of proofs for dividend. The formal adjudication process in Part 14 IR 2016 is part of a process pursuant to which creditors will receive (or not receive) distributions in a liquidation. There is no reason other than the practical one of dealing with disputes (as to which see below) for incorporating that process into the formation of a section 95 opinion as to whether a company is unable to pay its debts.

88. Thirdly, a liquidator who has formed the relevant opinion must state "*an estimate of the deficiency with respect to unsecured debts or the surplus available after paying unsecured debts*" (rule 6.4(1)(d)(viii) IR 2016). This requires the liquidator to undertake an assessment of the validity and value of the claimed debts for the purpose of coming to a view on the company's likely ultimate financial position. By necessity, therefore, he must do so by some "*informal*" process.

89. Fourthly, section 89 requires the directors to assess the existence and value of debts to determine whether they can make a declaration of solvency. No proofs will be filed with directors (there is no proving process) and directors have no power to adjudicate on debts under IR 2016. Instead they can (and must) assess debts without a formal adjudication. As a matter of statutory construction, sections 89 and 95 must be interpreted consistently. Under section 95 liquidators are entitled to carry out the same form of assessment as would directors under section 89. Neither is restricted to adjudicating formally upon filed proofs.

90. Fifthly, paragraphs 68 and 71 of the Judgment are incorrect to suggest that *Danka* demonstrates the application of Part 14 IR 2016 to the adjudication of debts under s.95. In *Danka* the surplus exceeded US$66 million and there was no question of insolvency under s.95. The case was about the decision of the liquidators to determine and value contingent claims for dividend (and not for s.95 purposes) and the liquidator correctly followed the formal adjudication process.

91. I accept these submissions. In my judgment section 95 simply requires the liquidator to form a positive opinion that the company is unable to pay or provide for its debts within the period of 12 months from commencement of the MVL.

92. Ms Toube submits that the validity of a liquidator's opinion formed under section 95 can only be challenged on the grounds that it is perverse. I do not accept that submission is correct in all cases.

93. The Court has very wide powers on an application for directions under section 112 IA 1986. The caselaw which has developed shows that, while the court retains the jurisdiction to intervene, the court will usually only interfere with an administrative

discretion or commercial decision made by a liquidator if it was (i) undertaken or made in bad faith or (ii) "*so utterly unreasonable and absurd that no reasonable person would have done it*"; see *Re Edennote Ltd* [1996] BCC 718 at 722. Where, however a liquidator's decision involves a non-commercial, probably legal, question, it may be reviewed by the court without applying the filter of perversity; see *Re Baglan Operations Ltd* [2022] BCC 884 at [43]-[45]. I have already referred earlier in this judgment to *BAT Industries plc v Sequana* [2017] Bus LR 82. In that case Rose J also decided at [322] that a director's opinion for the purposes of section 643 Companies Act must be formed having regard to the correct legal test. The implication is that an opinion formed without regard to the correct legal test is not an opinion for the purposes of the relevant statute at all and this appears to have been the conclusion in *LRH v Trew* [2018] EWHC 600(Ch) at [184] and [186]. The same must be true for a liquidator's opinion formed for the purposes of section 95 IA 1986.

94. From this review of the authorities I conclude that an opinion (one way or the other) for the purposes of section 95 is not necessarily a purely commercial or business judgment to which the "perversity test" applies. There may be some cases in which it is simply a question of commercial judgment, for example, as to whether the company's assets can be realised in the requisite period and whether they will prove to be sufficient. In others, and notably where as here there is a disputed debt, the decision will require the correct application of law. If in forming or not forming an opinion under section 95 the liquidator has misdirected him or herself as to the correct law the perversity test does not apply. What that means in the context of disputed debts is considered further below at [104].

95. Separately from section 112 IA 1986, a creditor who is dissatisfied with the liquidator's opinion that a debt or part of a debt is not a debt of the company can submit a proof and require adjudication by the liquidator. That will provide a route of appeal to the Court pursuant to rule 14.8 where the Court can decide on the evidence before it and on the balance of probabilities whether the debt or part of it is a debt of the company. Such an appeal is not a review of the liquidator's decision – the Court determines the issue afresh and for itself. It would not be reasonable to refuse to adjudicate on a proof so as to prevent an appeal. It is difficult to imagine many circumstances where it would be reasonable for a liquidator to refuse to adjudicate on a proof, if asked, and that decision could itself be challenged on an application under section 112 IA 1986.

96. So long as the liquidator retains the view that the disputed debt is not a debt of the company or to the extent that it is, the company is able to pay or provide for it within 12 months, the fact that it is subject to an appeal under IR 14.8 does not affect the continuation of the MVL.

Ground 1E: the standard of proof

97. At paragraphs 140, 142 and 143 of the Judgment, the Judge concludes that the statutory scheme for conversion of an MVL to a CVL does not require a creditor to establish its claim on the balance of probabilities (or to any standard of proof). Her reasoning appears from paragraph 140 where she said:

> *"The short answer to this point is that the statutory scheme for a MVL and its conversion into a CVL does not include such a requirement for a creditor to establish its claim as a creditor. None is set out in the statutory scheme relating to MVLs.*

Novalpina is already in liquidation which is a process which leads to the same end (dissolution) regardless of whether it is a MVL or CVL. The conversion arises because the company has not been able to pay its debts before the expiry of the 12-month period. That is not the insolvency test set out in sections 122 and 123 IA. It is not the test applied in relation to administration applications."

98. As with a number of other decisions of the Judge, her reasoning was underpinned by her conclusion, which is the subject of Ground 1A, that all debts must be paid within 12 months. As I have said above, in my judgment she fell into error in that conclusion, and Ground 1A has succeeded.

99. The Respondents nevertheless say that the Judge was right to decide that there is no requirement for them to prove the Maxbet 2 claim to the liquidator to any standard of proof. They say that the Maxbet 2 claim is an unascertained and unliquidated claim which does not bear a certain value and the liquidator's only role is to place a present value on an uncertain future claim under rule 14.14. This is a new argument which had not been addressed to the Judge below and which was not raised in their Respondents' Notice. I nevertheless gave permission for it to be raised. Alternatively, they rely on the ground raised by their Respondents' Notice that if there is a threshold to cross to establish that they have a debt then a claim ought to be treated as a debt of the company if it has a "*real prospect of success*" or is "*not plain and obvious their claims are bad"* and the Judge should have found that they met this standard.

100. In my judgment, the applicable standard is the balance of probabilities. My reasons are as follows.

In principle

101. It is helpful to consider some in principle propositions in relation to a voluntary liquidation.

102. A voluntary liquidation can be solvent or insolvent. The trigger for conversion of an MVL (a solvent process) to a CVL (an insolvent process) arises if there comes a point where "*the liquidator is of the opinion that the company will be unable to pay <u>its</u> debts in full"* within the 12 month period (emphasis added). Obviously this provision is directed at an inability on the part of the company to discharge <u>its</u> obligations to <u>its</u> creditors. Equally obviously, a company is under no obligation to pay a debt it does not owe, and its inability to pay a debt it does not owe within the 12 month period does not mean it is unable to pay the debts it does owe in full within that period. It follows that section 95 requires the liquidator to form an opinion as to (a) what the debts of the company are and (b) whether it will be unable to pay those debts in full within the 12 month period.

103. It follows that a liquidator must form an opinion as to whether an asserted debt of the company is actually a debt of the company. Even if one takes rule 14.14 on its own, it envisages a value being placed on "*a debt*". The liquidator must therefore be satisfied that the company has "*a debt*" before rule 14.14 is engaged. That requires the liquidator to be satisfied that the debt is one which the company "is subject at the relevant date" (i.e. an actual debt within rule 14.1(3)(a)) or is one which the company "may become subject after the relevant date by reason of any obligation incurred before that date" (i.e. a contingent liability within rule 14.1(3)(b)). I therefore reject the Respondents'

contention that there is no requirement for them to prove the Maxbet 2 Claim to the liquidator to any standard of proof.

104. What then is the appropriate standard of proof? Section 95 says no more about how a liquidator is to form an opinion as to whether an asserted debt of the company is actually a debt of the company. Approaching the matter from principle, it seems to me that the following points are important. The liquidator is an officeholder exercising a quasi-judicial function. Once formed, the liquidator's opinion can be challenged on an application under section 112 IA 1986. To the extent that the liquidator is exercising a discretion or commercial judgment it has been said that the Court will only interfere on *Re Edennote* principles (i.e. "*so utterly unreasonable and absurd that no reasonable person would have done it*"). The question of whether or not a debt is a debt of the company is not, however, a matter of discretion or commercial judgment. It is something which must be determined on the evidence and in accordance with the law. Under English law, to establish a debt is currently owed by another, the alleged creditor is required to prove the debt and its quantum to the decision maker on the balance of probabilities. That is the applicable law to which a liquidator must direct him or herself in forming an opinion as to whether an alleged actual debt exists. In relation to a contingent liability the alleged creditor must establish on the balance of probabilities the existence of an obligation incurred by the company before the relevant date which may give rise to a liability after that date before the liquidator is required by rule 14.14 to place a value on that contingent liability.

The scheme of insolvency law

105. The Respondents say that if they must do more than simply assert a debt, then a claim ought to be treated as a debt of the company if it has a "*real prospect of success*" or is "*not plain and obvious their claims are bad"*. The former might in legal proceedings be the touchstone as to whether a claim has sufficient merit to avoid summary disposal, but it sheds little light on the question the eventual decision maker must answer – whether on the balance of probabilities the creditor has proved either that the debt is currently owed by the company or is an existing contingent liability. The latter appears to be the test for being allowed to vote pending determination of an objection; as to which see below. If the Respondents' submission were accepted it would elevate wrongful claims which are nevertheless arguable into actual debts for the purposes of determining the solvency of a company. That in my judgment is wrong in principle and contrary to the scheme of insolvency law.

106. Under that scheme, a creditor seeking to place a company into an insolvency process must prove the debt relied upon on the balance of probabilities. For example:

    106.1. A party alleging balance sheet insolvency bears the burden of doing so: *Eurosail* at [37].

    106.2. The Court will refuse to make a winding up order on a winding up petition that is founded on a disputed debt, where the dispute is substantial and raised on *bona fide* grounds. The Court will grant an injunction restraining presentation of a winding up petition in relation to a disputed debt under its jurisdiction to prevent an abuse of process. The rule is founded on the policy that a winding up petition cannot be used to pressure a debtor into paying a debt that is disputed on substantial grounds. Where

there is a genuine dispute there should be a trial of the claim. The threshold for a company to establish that a debt is *bona fide* disputed on substantial grounds is not a high one.

106.3. An administration order will only be made if the applicant proves on the balance of probabilities that the company is insolvent or likely to become insolvent: *Re Berkshire Homes* [2018] Bus LR 1744 at [38].

107. Even when a company is in an insolvency process, an appeal under rule 14.8 IR against a liquidator's adjudication on a proof is a rehearing at which the creditor must prove the debt on the balance of probabilities; see *Lynch v Cadwallader and Aldermore Bank Plc* [2021] BPIR 854 at §82. See also *McCarthy v Tann* [2015] BPIR 1224 at [7] to [13], following *Re a Company no 004539 of 1993* [1995] BCC 116 at 120 per Blackburne J. It would be anomalous if a person could put a company into an insolvency process on the basis that they have a "debt" for the purposes of section 95, when that person could not prove that they were a creditor for the very same "debt" in the insolvency.

108. The parties have not identified any instance in the scheme of English insolvency law in which a debt that is disputed and unproven on the balance of probabilities, or indeed to any extent, confers upon the claimant positive rights, including effective priority over members.

109. A lesser standard may suffice for deciding that a person with a disputed claim has standing to take a particular step, such as to vote or to apply for an administration order. The test for voting in a decision procedure under rule 15.33(3) IR 2016 was explained in *Re a Debtor (No 222)* [1992] BCLC 137 at 144: "*the chairman must look at the claim; if it is plain or obvious that it is good he admits it, if it is plain or obvious that it is bad he rejects it, if there is a question, a doubt, he shall admit it but mark it as objected*". That is effectively an interim decision. On an appeal under rule 15.35 IR 2016 the Court will determine whether the debt is due on the balance of probabilities, with the burden of proving the debt again on the creditor; *Karapetian v Duffy [2022] BPIR 1241* at [28].

110. Similarly, a person with a "*good arguable case*" that a debt of a sufficient amount is owing to him has standing to make an administration application, but the question of whether the company is insolvent needs to be determined on the balance of probabilities as does the question of whether the purported debt is an actual debt which should be taken into account in assessing solvency; see *Hammonds v Pro-Fit USA Ltd* [2007] EWHC 1998 (Ch) at [53] – [55].

111. No principled reason has been identified as to why a conversion from an MVL to a CVL should be the only exception to the scheme of English insolvency law that to place a company into an insolvency process an unsecured creditor needs to prove that the company is insolvent on the balance of probabilities.

Ground 2 – categorisation of a tortious claim as a contingent liability or an actual (but disputed) debt.

112. The terms of rule 14.1 are set out above. It will be recalled that rule 14.1(3) defines a debt in relation to winding up as

> "*(a) any debt or liability to which the company is subject at the relevant date; (b) any debt or liability to which the company may become subject after the relevant date by reason of any obligation incurred before that date; (c) any interest provable as mentioned in rule 14.23".*

113. Rule 14.1(4) provides*: "For the purposes of any provision of the Act or these Rules about ... winding up ..., any liability in tort is a debt provable in ... the winding up ..., if either—*

> *(a) the cause of action has accrued at the relevant date; or*
>
> *(b) all the elements necessary to establish the cause of action exist at that date except for actionable damage".*

114. Rule 14.1(5) provides that *"For the purposes of references in any provision of the Act or these Rules about ... winding up ... to a debt or liability, it is immaterial whether the debt or liability is present or future, whether it is certain or contingent, or whether its amount is fixed or liquidated, or is capable of being ascertained by fixed rules or as a matter of opinion; and references in any such provision to owing a debt are to be read accordingly."*

115. The relevant date in both the cases before me is the date the company went into liquidation.

116. The parties have referred to a debt within rule 14.1(3)(a) as an "actual debt" and I shall do the same. There does not seem to be any dispute that all present debts of a company (i.e. debts which are presently due and owing at the relevant date) are actual debts whether their quantum is ascertained or unascertained. Debts which will fall due in the future and which arise from an existing obligation are also actual debts whether their quantum is ascertained or unascertained. Such future debts are a liability to which the company "is subject at the relevant date".

117. It is common ground that the main category of debts which fall within rule 14.1(3)(b) are contingent debts. Contingent debts are a type of future debt. For the purposes of rule 14.1(3)(b) they have the following hallmarks:

> 117.1. They are not currently due and owing nor will they necessarily fall due in the future;
>
> 117.2. The debt will only arise on the happening of a future event which may or may not happen (see *Integral Memory plc v Watts* [2021] EWHC 342 at [32]);
>
> 117.3. Contingent debts can be ascertained – e.g. by a liquidated damages clause or fixed sum term life assurance;
>
> 117.4. Contingent debts can be unascertained – e.g. a claim for damages for a future breach of an existing contract or a future unfair dismissal; – see Norris J in *Re Nortel Networks* [2010] BCC 706 at paragraphs 25(b) and (c);

117.5. Only contingent debts arising from existing obligations fall within rule 14.1.

118. The question the Judge had to decide was whether a claim for an unascertained amount based on a cause of action said to have arisen before the relevant date but subject to the outcome of disputed litigation was a contingent liability. This was a significant question because it was common ground that a liquidator must place a value on a contingent debt pursuant to rule 14.14.

119. Under English law a cause of action is a legal right which arises on a particular combination of facts and which entitles the claimant to a remedy against the wrongdoer; see *Diamandis v Wills* [2015] EWHC 312 at [48(1)]. One of the means of enforcing that legal right is to bring court proceedings and seek a judgment, but that is merely the procedure for enforcing that right in the event of a dispute or refusal to pay; see *Coburn v Colledge* [1897] 1 QB 702 at 706. Judicial adjudication in favour of the claimant on an accrued cause of action does not create the legal right. It vindicates and declares the legal right which arose when the cause of action accrued. Liability is not therefore contingent on judicial determination. Statements to this effect can be found in *Integral Memory* at [32], *Hunt v Singh* [2023] BPIR 1351 at [47] and *Re McLean, ex parte Friends Provident Life Office* (1992) 108 ALR 360 at 370-1. An accrued cause of action gives rise to an actual liability at the date it accrues. It does not matter that the liability is disputed. If the cause of action has accrued at the relevant time, it also does not matter that damages are unascertained. It is a liability to which the company is subject at the relevant date; see *T&N Ltd* [2006] 1 WLR 1728 at 117 (quoted below).

120. Tort claims have caused particular difficulties in insolvency law. Under English law a cause of action in tort is not fully constituted until compensatable loss has occurred. In *Re T&N Ltd* [2006] 1 WLR 1728 David Richards J (as he then was) had to determine (amongst other things) whether future asbestos claims by employees and others who had been exposed to asbestos dust by a company were provable debts in the company's liquidation.

121. In his judgment he traced the history of tort claims becoming provable debts in a winding up. Until the early 19th century such debts were not provable because the legal policy was against either debts which were difficult to quantify or debts arising from the wrongdoing of the insolvent person being provable. Tort claims engaged both aspects of that policy.

122. By the time *T&N* was decided, however, the equivalent of rule 14(4)(a) had been enacted so that a liability in tort was a provable debt if the cause of action had accrued by the date of the winding up. In *T&N* it was common ground that the claims of the victims of tort who had not yet suffered compensatable loss were contingent liabilities. David Richards J found that these contingent liabilities did not fall within what is now rule 14.1(3)(b) as no cause of action had accrued. This is said to be the reason for the subsequent introduction by the legislature of what is now rule 14.1(4)(b).

123. In his judgment he rejected an argument by Mr Trower QC (as he then was) that causes of actions which had accrued (whether in contract or tort) at the relevant date, but where damages were unliquidated at the relevant date, also fell within rule 14.1(3)(b). He concluded that they fell within what is now rule 14.1(3)(a):

"[116] Another issue raised on r 13.12(1)(a)[1] was whether claims for unliquidated damages existing at the liquidation date fell within it. So, for example, if a breach of contract had occurred before the liquidation date or if there were an accrued cause of action in tort, would any claim which could be made for unliquidated damages at that date be within para (a), rather than para (b). Most submissions, including those of Mr Mortimore, were made on the basis that they were within para (a). However, Mr Trower submitted that para (a) was limited in its scope to debts and liabilities which were ascertained at the liquidation date and payable then or at a certain date in the future. He contrasted the language of para (a) ('is subject at the [liquidation date]') with para (b) ('may become subject after that date'). This contrast suggested that para (a) was restricted to those debts and liabilities which were unquestionably payable by the company. That would extend to debts which were definitely payable at a future date, because the uncertain language of para (b) ('may become subject') would not be applicable to them. However, he submitted, nothing was payable in respect of an existing claim for unliquidated damages until judgment or agreement and it might be that nothing would be found to be payable.

[117] As a matter of impression from the terms of r 13.12(1) there is force in this submission. It gains support from a consideration of the way express provision has been made for liabilities in tort in r 13.12(2)[2]. Mr Snowden in his skeleton argument made the point that the draftsman appears to have assumed that unliquidated claims in tort, whether the cause in action had accrued or not, fell within r 13.12(1)(b). However, I would conclude that an existing but unliquidated claim for damages comes within r 13.12(1)(a). Referring to r 13.12(3)[3], it is immaterial whether the amount of debt or liability is 'fixed or liquidated, or is capable of being ascertained by fixed rules or as a matter of opinion'. A debtor can properly be said to be 'subject to' an existing but unliquidated liability even though it is not payable until liquidated by judgment or agreement. Unlike a contingent liability, it is not a liability to which the company only 'may become subject'."

124. It is therefore clear that where a creditor's claim is based on an accrued cause of action (whether in tort or contract) as at the relevant date then the claim is for an actual liability to which the company is subject at that date within r14.1(3)(a). The liability either exists at the relevant date or it does not and will never exist. This is so whether it is ascertained

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[1] This is now rule 14.1 (3)(a). The old rule 13.12(1) provided as follows:
13.12.—(1) "Debt", in relation to the winding up of a company, means (subject to the next paragraph) any of the following—(a) any debt or liability to which the company is subject at the date on which it goes into liquidation; (b) any debt or liability to which the company may become subject after that date by reason of any obligation incurred before that date; and (c) any interest provable as mentioned in Rule 4.93(1).

[2] This is now rule 14.1(4)(a). The old rule 13.12 (2) provided as follows:
(2) [Liability in tort] In determining for the purposes of any provision of the Act or the Rules about winding up, whether any liability in tort is a debt provable in the winding up, the company is deemed to become subject to that liability by reason of an obligation incurred at the time when the cause of action accrued.

[3] This is now rule 14.1(5). The old rule 13.12(3) provided as follows:
(3) [Debt or liability] For the purposes of references in any provision of the Act or the Rules about winding up to a debt or liability, it is immaterial whether the debt or liability is present or future, whether it is certain or contingent, or whether its amount is fixed or liquidated, or is capable of being ascertained by fixed rules or as a matter of opinion; and references in any such provision to owing a debt are to be read accordingly.

or unascertained, disputed or admitted, subject to litigation or not. It is not a contingent liability within r 14.1(3)(b).

125. The Judge based her conclusion that the Maxbet 2 Claim was a contingent liability on two authorities: *Re Nortel Networks* [2010] BCC 706 ("***Nortel Networks (HC)***") and *In re Nortel GmbH (in administration)* [2014] AC 209 ("***Nortel (SC)***"). *Nortel Networks (HC)* was not cited to her on this point and she heard no submissions on it. These authorities do not support the findings in the Judgment:

125.1. In *Nortel Networks (HC)*, Norris J needed to characterise a series of claims arising from the termination of employment contracts by administrators which he did at paragraph 25 of his judgment. The Judge placed weight on the fact that each of the claims identified in sub-paragraphs [25(b)] (termination of an employment contract by the administrators in breach of notice requirement) and [25(c)] (unfair dismissal by the administrators) (cited at [98] of the Judgment) were disputed and were found by Norris J to be contingent claims. The Judge found support here for her conclusion that disputed claims were contingent upon the finding of a tribunal or court. That, however, is not a fair interpretation of Norris J's judgment. In neither example had the cause of action been constituted at the date of entry into administration (the relevant date). The alleged breaches (relating to the dismissal of employees by administrators of a company) occurred after the relevant date. Therefore, whilst there was an obligation prior to the administration, the liability only came into existence upon the dismissal of employees after the relevant date. They were therefore categorised as contingent claims by Norris J because the cause of action had not accrued by the relevant date, and not as the Judge said, because liability was contingent upon a finding of a tribunal or court.

125.2. In *Nortel (SC)*, the issue was the provability in administration of a debt under a possible future contribution notice ("**CN**") issued under the Pensions Act 2004. The obligation existed at the time of entry into administration (by virtue of the pre-existing group relationship), but the liability did not exist unless and until the Pensions Regulator issued a financial support direction ("**FSD**") (which had not been issued until after the company went into administration) followed by a CN. Therefore, the liability in *Nortel (SC)* was a contingent liability because although no liability existed at the time of entry into administration, the Company was already "*vulnerable to the specific liability in question*" by virtue of being bound by the statutory scheme. The position in *Nortel (SC)* was therefore the same as a potential future costs liability in proceedings in England, which is a contingent liability that might arise once litigation has commenced as a result of participating in the system which is governed by the rules of court (see [89] and [136]). Such contingent liabilities are to be contrasted with a complete cause of action which is an existing liability because it is a matter of right.

126. The Judge said that it would make no sense that a costs liability is a contingent liability but the disputed claim in the same proceedings is not. Again the Judge heard no submissions on this point. The reason for the difference in treatment is because a possible future costs liability is not an existing liability. It may or may not come into being depending on future events as governed by the rules of court. There is no existing cause of action. The question of whether the costs liability will or will not arise at all depends upon the Court exercising its discretion; see *Nortel (SC)* at [89]. In contrast, the actual

claim (if valid) is an existing liability that is a matter of right. As Norris J held in *Nortel Networks (HC)* at [34]: "*The exercise of judicial discretion is a process entirely distinct from judicial adjudication*" and then cited from *Re T&N Ltd* [2006] 1 WLR 1728 in respect of a claim in negligence: "*There is no element of discretion as regards such claims. If the ingredients of the tort of negligence… are established, the claimants are entitled to damages. They do not depend on an exercise of discretion by the court.*"

127. Neither case was therefore support for the proposition which the Judge derived from them at paragraph 114 of the judgment that "*In a case where the outcome of proceedings is awaited, in my judgment, the claim is a contingent liability*".

The Respondents' submissions

128. The Novalpina respondents do not seek to uphold the Judge's reasoning. They no longer contend that the Maxbet 2 claim is a contingent debt because the outcome of proceedings is awaited. Instead, Mr Robins advanced in his skeleton argument on appeal a new argument which had not been addressed to the Judge below and which was not raised in their Respondents' Notice. I nevertheless gave permission for it to be raised.

129. Mr Robins' new and closely reasoned submission traced the history of the legislative provisions defining provable debts in insolvency proceedings and the caselaw on them, and in particular a case called *Re Newman* (1876) 3 Ch D 494 (CA). His submission was that if one followed this history it becomes clear that a tort claim, even where the cause of action has accrued prior to the relevant date, is one which falls within rule 14.1(3)(b) and is not an "actual" debt within 14.1(3)(a) because it has not been liquidated by judgment or agreement. This is the argument advanced by Mr Trower QC (as he then was) and rejected by David Richards J in *Re T&N*. Mr Robins self-effacingly blames Mr Trower's "hapless junior" (i.e. Mr Robins who was that then junior counsel) for failing to identify the case of *Re Newman* which was not cited to the judge in *Re T&N*. He submits that *Re T&N* is therefore *per incuriam* and wrongly decided.

130. Mr Robins submits that the Court of Appeal held in *Re Newman* that an accrued but unliquidated cause of action in tort did not fall within section 31 of the Bankruptcy Act 1869 and was therefore not provable in a bankruptcy. Section 31 contains provisions which are recognisable as what is now rule 14.1(3)(a) and (b), although the scheme of the provision is very different. As is clear from the opening words of section 31 tort claims which had not been liquidated by judgment or agreement prior to the bankruptcy (the relevant date) were not provable.

> *"31. Description of debts provable in bankruptcy.*
> *Demands in the nature of unliquidated damages arising otherwise than by reason of a contract or promise shall not be provable in bankruptcy, and no person having notice of any act of bankruptcy available for adjudication against the bankrupt shall prove for any debt or liability contracted by the bankrupt subsequently to the date of his so having notice.*
> *Save as aforesaid, all debts and liabilities, present or future, certain or contingent, to which the bankrupt is subject at the date of the order of adjudication, or to which he may become subject during the continuance of the bankruptcy by reason of any*

> *obligation incurred previously to the date of the order of adjudication, shall be deemed to be debts provable in bankruptcy, and may be proved in the prescribed manner before the trustee in the bankruptcy.*
> *An estimate shall be made according to the rules of the Court for the time being in force, so far as the same may be applicable, and where they are not applicable at the discretion of the trustee, of the value of any debt or liability provable as aforesaid, which by reason of its being subject to any contingency or contingencies, or for any other reason, does not bear a certain value.*
> …"[emphasis added]

131. In *Re Newman*, the bankrupt's creditor had obtained a verdict for damages of £50 in her tort claim against the bankrupt before the bankruptcy but judgment was not signed until after the bankruptcy. The question for the Court of Appeal was whether this was a provable debt. In submissions on behalf of the creditor, it was contended that the verdict created "*an obligation incurred previously to the date of the order of adjudication*" for the purposes of the second paragraph of section 31. The law report records Mellish LJ's intervention during submissions to make two points. Firstly, that section 31 does not apply to actions in tort, as damages in such an action fall within the introductory words of the section. Secondly, that unless section 31 had changed the old law, a verdict was not sufficient to give rise to a provable debt and under the old law there was no right to prove unless judgment had been signed.

132. Two short judgments were given by James LJ and Mellish LJ with whom Baggallay JA concurred. The salient parts of those judgments are set out below. James LJ said:

> "*The first clause of sect. 31 contains clear negative words, and was, I think, meant to preserve the old law with regard to the proof in bankruptcy of damages for a tort. Certainly, under the old law damages in an action of tort were not a provable debt in bankruptcy until judgment had been signed. The old law as to that remains, in my opinion, now exactly as it was. Unless judgment has been signed damages for a tort are not included in the second clause of the section commencing with the words "save as afore-said;" and when judgment for such damages is signed after the adjudication the amount of the judgment is not a debt or liability to which the bankrupt is subject at the date of the adjudication, or to which he has become subject afterwards by reason of any obligation incurred previously to the adjudication."*

Mellish LJ said:

> "*I am of the same opinion. It was clear law before the present Bankruptcy Act that there could be no proof for damages in an action of tort until judgment had been signed, and I am of opinion that the first clause of sect. 31 was intended to preserve the law in this respect as it was."*

133. Mr Robins seeks to draw two propositions from James LJ's judgment. First, since the claim had not been liquidated by judgment or agreement prior to the order of adjudication, it was not a debt or liability "*to which the bankrupt is subject at the date of the order of adjudication*" ("***Re Newman Limb A***"). Secondly, since an accrued cause of action in tort was not an "*obligation*" for these purposes, there was no possibility of any debt or liability "*to which he may become subject during the continuance of the bankruptcy by reason of any obligation incurred previously to the date of the order of*

adjudication" ("**Re Newman Limb B**"). Mr Robins contends that Re Newman Limb A has never been abrogated or overturned and it is authority for the further proposition that the Maxbet 2 claim cannot fall within rule 14.1(3)(a) because it was not liquidated by judgment or agreement before the commencement of Novalpina's winding up.

134. I do not accept that *Re Newman* is authority for any of these three propositions. As I have explained, at the time *Re Newman* was decided a tortious claim for damages was not a provable debt because of the introductory words of section 31. The second paragraph of section 31 was subject to those introductory words. The significance in that case of a judgment being signed was that the debt ceased to be a claim for tortious damages and became a claim for a judgment sum. The latter could fall within the second paragraph of section 31. All that *Re Newman* decides is that until judgment is signed a tortious claim for damages was excluded by the introductory words of section 31. It sheds no light on how such a claim would be treated under the second paragraph if the introductory words had not excluded them. It sheds no light on whether under the current law an existing but unliquidated claim for damages comes under rule 14.1(3)(a) or (b).

135. *Re T&N* is therefore not *per incuriam*, and is authority which, while I am not bound by it, I should follow unless there is good reason not to. I can see no good reason not to follow it.

The Respondents' Notice

136. It follows from the analysis above that, subject to the remaining grounds raised by the Respondents' Notice, the appeal must succeed, the MVL should be restored and a new liquidator chosen by the members put in place (Mr Murphy intends to retire shortly).

137. It also follows that the preliminary issues which the court directed to be tried by the Judge were not focussed on the right issues. The correct issue to be determined was whether the liquidator's opinion that the company was able to pay or provide for its debts in full within 12 months was impeachable on a review under the court's jurisdiction to do so pursuant to section 112 IA 1986 and whether he should be allowed to adjudicate on a proof of debt under rule 14.7. The Respondents invite the Court to uphold the judgment on the basis that the Judge should have found that the Maxbet 2 claim was proved on the balance of probabilities. I decline to do so, as although that is arguably encompassed by the preliminary issues as ordered, it is not the correct issue which should have been referred to the Judge to determine, and she did not do so. I will hear from the parties as to what further directions are required, but subject to those submissions it seems to me that the way forward is for a proof to be submitted and adjudicated upon by the new liquidator. If that decision is appealed the court considering the appeal can decide whether to stay the appeal pending the outcome of the Luxembourg proceedings.

138. The Respondents' Notice also seeks to uphold the Judge's order on the basis of her findings that Novalpina was unable to pay its liquidation expenses. Mr Kowski has personally funded the liquidation expenses. I accept the Appellant's submissions that liquidation expenses are not a debt within rule 14.1(3) and that Mr Murphy having rejected the Maxbet 2 claim there were no debts of the company which the company was unable to pay for the purposes of section 95.

139. The Respondents' Notice seeking to justify Mr Murphy's removal on the ground that he was conflicted, not objective or partisan is academic in circumstances where Mr Murphy is about to retire and does not wish to be restored to office as liquidator.

140. Also academic in light of the analysis above is the Respondents' application on the last day of the hearing to adduce evidence as to a confidential sale of Maxbet. I refuse the application on the basis that the evidence would not have had a material effect on the decision below or on the appeal.

Conclusion on Novalpina appeal

141. The Novalpina appeal succeeds. In my judgment the correct principles are these.

141.1. The test for conversion of an MVL into a CVL in section 95 IA 1986 is that the liquidator has formed the opinion that the company will be unable to pay, or make provision for, its debts in full (together with interest at the official rate) within the period stated in the directors' declaration under section 89. This test does not require debts to be actually paid in full within the stated period, if they are provided for in that period. The cash flow (section 123(1)(e) IA 1986) and balance sheet (section 123(2) IA 1986) insolvency tests are not the same as the section 95 test.

141.2. In forming an opinion the liquidator must correctly direct him or herself that an alleged creditor is required under English law to prove the debt and its quantum to the decision maker on the balance of probabilities. In relation to a contingent liability the alleged creditor must establish on the balance of probabilities the existence of an obligation incurred by the company before the relevant date which may give rise to a liability after that date before the liquidator is required by rule 14.14 to place a value on that contingent liability.

141.3. A disputed claim based on a cause of action said to have arisen before the relevant date is not a contingent liability for the purposes of rule 14.1(3)(b), contingent upon the outcome of disputed litigation, and is not a debt subject to a contingency for the purposes of rule 14.14. The liquidator is not required to place a value on the disputed claim under rule 14.14 even if it may be described as an unascertained and unliquidated claim which does not bear a certain value.

141.4. A creditor who is dissatisfied with the liquidator's opinion that a debt or part of a debt is not a debt of the company has at least two options. (1) The creditor can submit a proof and require adjudication by the liquidator. That will provide a route of appeal to the Court pursuant to rule 14.8 where the Court can decide on the balance of probabilities whether the debt or part of it is a debt of the company. (2) The creditor can ask the Court to review the liquidator's decisions on an application under section 112 IA 1986. If the liquidator has misdirected him or herself as to the correct law the perversity test does not apply.

141.5. So long as the liquidator retains the view that the disputed debt is not a debt of the company or to the extent that it is, the company is able to pay or provide for it within 12 months, the fact that it is subject to an appeal under IR 14.8 does not affect the continuation of the MVL.

Shapeshift

142. I turn then to Mr Davies' application in *Shapeshift* for directions under section 112 IA 1986 in light of the Novalpina decision. This must now be considered in light of my conclusion that Novalpina was wrongly decided.

143. In addition to the points he made or adopted in connection with the Novalpina appeal, Mr Weaver has made an additional submission which is relevant to Shapeshift but not Novalpina that the Judge's conclusions in Novalpina concerning the effect of an appeal against rejection of the proof were *obiter dicta* and wrong. In Shapeshift the liquidator has rejected BSV's proof and there has been an appeal which has been stayed. There was no rejection of the proof in Novalpina and so what the Judge said about the effect of such a rejection and subsequent appeal was not strictly necessary for her decision. Mr Weaver submits that, whatever the outcome of the Novalpina appeal, the effect of the insolvency rules and the caselaw is that unless and until a liquidator's decision to reject a proof is reversed or varied by the court on an appeal under rule 14.8 there is no debt for the purposes of section 95. As I have already confirmed that the Judge's conclusions as to the effect of a rejection and subsequent appeal on the continuation of an MVL were wrong it is not necessary to consider this submission any further.

144. Mr Robinson has also sought to advance submissions which are relevant in Shapeshift but not Novalpina. Mr Robinson submits that Shapeshift had a contingent liability to BSV, based on the CAT Proceedings, as at the commencement of the MVL. At the date of the commencement of the MVL, he submits that BSV had a claim which was contingent on a collective proceedings order ("**CPO**") being made, on BSV being appointed the representative and on the ultimate determination by the CAT. It is necessary therefore to consider briefly the nature of collective proceedings under section 47B of the Competition Act 1998.

145. The CAT Proceedings assert a pre Brexit breach of Article 101 Treaty on the Functioning of the European Union and a breach of the closely mirroring provision in section 2 of the Competition Act 1998 which prohibits concerted practices if they have the object or effect of distorting competition in the UK ("**the Chapter 1 prohibition**").

146. Mr Robinson's oral submissions only addressed the claims under the Competition Act 1998 and I will do the same. Section 47A CA 1998 permits a person to make a claim for a breach of the Chapter 1 prohibition in proceedings before the CAT. Section 47A therefore creates a statutory tort which is ordinarily constituted by breach and actionable loss; see *Merricks v Mastercard* [2020] UKSC 51 at [95].

147. Section 47B permits two or more section 47A claims to be combined in collective proceedings. Collective proceedings may include claims which have not been made under section 47A (such as Article 101 TFEU). Collective proceedings may be continued only if the CAT makes a CPO pursuant to section 47B(4). A CPO must authorise the person who brought the proceedings to act as the representative ("**the Class Representative**") but only if it is just and reasonable for that person to so act and the CPO must identify the class of persons whose claims are eligible for inclusion in the proceedings; Section 47B(7).

148. The CAT Proceedings bring claims on behalf of holders of the BSV Cryptocurrency who suffered loss when it was delisted in 2019 as a result of alleged anti-competitive behaviour by the Defendants to the CAT Proceedings. BSV itself has no claim under either section 47A or Art 101 TFEU. It was not a holder of the BSV cryptocurrency and has not suffered relevant loss or damage. BSV itself was not incorporated until 2022 and brings the CAT Proceedings as the Class Representative pursuant to the CPO. Mr Robinson's references to "BSV's claim" are a misnomer and apt to mislead. It has no claim of its own.

149. Any causes of action of the individual class members in the CAT proceedings were fully constituted by 2019 at the latest when the delisting of the BSV cryptocurrency took place. By then any alleged breach of the statutory tort or Article 101 had occurred, as had any loss from the delisting of the BSV Cryptocurrency. On the face of it these are therefore actual disputed liabilities and not contingent liabilities, and a liquidator is not required to place a value on the disputed claims in the CAT proceedings under rule 14.14.

150. Mr Robinson's submission that "BSV's claim" was contingent on a CPO being made and it being appointed a Class Representative is therefore flawed for a number of reasons. BSV has no relevant claim. It has no cause of action of its own. The claims in the CAT proceedings are the claims of the class members (the holders of the BSV Cryptocurrency when it was delisted). Their claims were not contingent upon the appointment of a Class Representative. They were not contingent on the appointment of BSV as Class Representative. The individual members were entitled and able to bring their own individual claims in respect of the causes of action asserted in the CAT Proceedings without any CPO or Class Representative. The fact that BSV's appointment as Class Representative was contingent on a CPO being made is irrelevant. That is merely the procedural mechanism by which the CA 1998 permits the class members' accrued causes of action to be advanced. For the reasons given above in the Novalpina appeal such accrued causes of action before the commencement of the liquidation are actual but disputed liabilities. Section 47B does not convert the accrued causes of action in the CAT Proceedings into contingent liabilities.

151. That section 47B does not create a new or different cause of action seems to me to be clear from a plain reading of the statute and I so find. This was also the conclusion of the Competition Appeal Tribunal in *Gibson v Pride Mobility Products Ltd (Gibson)* [2017] CAT 9 at [35]-[36] which was not cited in argument.

152. Mr Robinson also relied on the fact that CAT Proceedings seek aggregate damages. Pursuant to section 47C CA 1998 the CAT may award aggregate damages "*without undertaking an assessment of the amount of damages recoverable in respect of the claim of each represented person*". The Supreme Court observed in *Merricks v Mastercard* that section 47C removed the ordinary requirement for the separate assessment of each class member's loss and allowed the court to quantify the loss suffered by the class as a whole; see e.g. Lord Sales at [93]. Lord Sales observed at [95]- [97], [120] that an award of aggregate damages under section 47C dispensed with the legal requirement that each claimant prove actionable loss, which is ordinarily a necessary element of their cause of action. I do not accept Mr Robinson's submission that section 47C creates a new and different cause of action. It is merely a statutory dispensation of the requirement to prove an element of each class member's cause of action. Still less do I accept that section 47C

confers some right on BSV to an award of aggregate damages which is separate and distinct from the causes of action of the underlying class members. Section 47C merely permits the quantification of the loss suffered by the class as a whole rather than individually. I do not accept that section 47C has the effect of making the accrued causes of action in the CAT Proceedings contingent liabilities rather than actual but disputed liabilities.

Conclusion on Shapeshift

153. Mr Davies has rejected BSV's proof of debt. He has formed the opinion that Shapeshift has no debts and therefore that he has not formed the opinion that Shapeshift is unable to pay or provide for its debts within 12 months. In light of the conclusion that the analysis in Novalpina was not correct Mr Davies has not made the errors of law Mr Robinson relied on. There are no grounds for interfering with his rejection of BSV's proof on a review under the court's supervisory jurisdiction. The MVL continues until BSV's claim is established on appeal or in the CAT proceedings, even if that exceeds 12 months. There is no basis for requiring the liquidator to convert the MVL into a CVL. The alternative relief sought by the liquidator as to the identity of the liquidator if the MVL was directed to be converted to a CVL does not arise.