[2020] IEHC 664

THE HIGH COURT

2020/366 COS

IN THE MATTER OF ARCTIC AVIATION ASSETS DESIGNATED ACTIVITY COMPANY

AND

IN THE MATTER OF NORWEGIAN AIR INTERNATIONAL LIMITED

AND

IN THE MATTER OF DRAMMENSFJORDEN LEASING LIMITED

AND

IN THE MATTER OF TORSKEFJORDEN LEASING LIMITED

AND

IN THE MATTER OF LYSAKERFJORDEN LEASING LIMITED

AND

IN THE MATTER OF PART 10 OF THE COMPANIES ACT, 2014

AND

IN THE MATTER OF NORWEGIAN AIR SHUTTLE ASA,

AS A RELATED COMPANY WITHIN THE MEANING OF SECTION 517 AND SECTION 2 (10) OF THE COMPANIES ACT, 2014

Judgment of Mr. Justice Quinn delivered on the 16th day of December, 2020.

1. Among the industries hardest hit by the COVID-19 pandemic has been the aviation sector. Norwegian is a case in point. It has met serious challenges before now and has restructured. Radical measures were implemented in 2019 and again in 2020. But still more is required.

2. This petition concerns six companies in the Norwegian Group. They include the parent company, aircraft operating companies and a group of companies through which the Group structures its aircraft sourcing and financing. The survival of those companies is central to the survival of the Group as a whole.

3. Five companies in the Group ("the petitioners") have petitioned this court for the appointment of an examiner pursuant to section 509 of the Companies Act, 2014 ("the Act").

4. The petitioners are:

    Arctic Aviation Assets Designated Activity Company ("AAA");

    Norwegian Air International Limited ("NAI");

    Drammensfjorden Leasing Limited ("DLL");

    Torskefjorden Leasing Limited ("TLL");

    Lysakerfjorden Leasing Limited ("LLL").

5. The petitioners have also applied for the appointment of an examiner to Norwegian Air Shuttle ASA ("NAS") which is the ultimate shareholder of the Norwegian group of

companies and is the direct parent company of AAA and NAI. This application is made on the basis that NAS is a related company pursuant to s. 517 of the Act.

6. The petitioners each have their registered office and centre of main interests in the State, performing their operations from Dublin Airport. (See para. 71 – 79).

7. NAS has its registered office in Oslo, Norway and performs its head office functions at that location.

8. On 7 December, 2020, I heard the petition and delivered my ruling appointing an examiner to the petitioners and NAS. This judgment outlines the reasons for that ruling.

9. Firstly, I shall outline the background to the Companies and the events which led to this petition. Secondly, I consider the jurisdiction of this court in relation to the petitioners under the EU Insolvency Regulation and in relation to NAS under Irish company law, and associated recognition questions. Thirdly, I shall consider the evidence advanced as to the prospects of the survival of the Companies as a going concern and my conclusions.

10. In this judgment, the term "petitioners" refers to the five companies which have presented this petition. The term "Companies" refers to the petitioners and NAS. The terms "Norwegian" or "the Group" refer to the companies and all other companies in the Norwegian group registered in the State and elsewhere and includes companies which are not the subject of these or other insolvency or restructuring proceedings.

The Companies

11. Two of the companies are airline operators, namely NAS and NAI, NAS also being the ultimate parent company of the Group.

12. The other four companies, AAA and its subsidiaries; TLL, DLL and LLL perform a centralised asset management function for the Group as a whole. Their activity is aircraft management, trading, leasing and financing. They act as a "captive lessor" leasing aircraft to the Group airlines, including NAI and NAS. AAA manages the Group's new aircraft orders, sources aircraft financing, manages aircraft leased from external lessors and markets and trades aircraft to certain third parties.

13. AAA has 36 Irish incorporated subsidiary companies. Many of these facilitate the financing, trading and leasing of individual aircraft. DLL, TLL and LLL each perform this function for larger numbers of aircraft, 20, 24, and 28 respectively. AAA and its subsidiaries are referred as the "Asset Management Platform" or "the Platform". AAA manages the Platform from its leased office at Dublin Airport, where it employs 7 full-time employees. AAA also acts as an intergroup lender to its subsidiaries in connection with aircraft leasing and financing activities and as guarantor of financing and leasing arrangements for both the subsidiaries and for the parent, NAS.

14. A total of 140 aircraft were leased by the Group at the time of presentation of the petition, although only a much smaller number were operating at that time. The debt and leasing obligations associated with the fleet are approximately $5.19 billion.

15. In January 2012, NAS contracted to purchase from Boeing 110 Boeing 737-8 Max, 92 of which remain undelivered. In November 2014, that contract was novated to AAA. NAS guaranteed the obligations of AAA thereunder. In October 2015, AAA contracted to purchase a further 19 Boeing 787-9 aircraft, 5 of which remain undelivered. These contract are referred to as OEM Purchase Contracts.

16. In June 2012, NAS contracted to purchase from Airbus 100 Airbus aircraft. On 1 December, 2014, that contract was novated to AAA, and NAS guaranteed the obligations thereunder.

NAI

17. NAI was established in Dublin in 2013 and operates flights within Europe. As of the end of 2019 NAI operated from bases in Denmark, Finland, Spain, Ireland and the UK. Its central base is at Dublin Airport. Prior to the onset of the COVID-19 pandemic it employed 41 employees in its own right. 29 people are still employed by it.

18. The establishment of NAI in 2013 was an important milestone for the Group as it was the Group's first EU licenced airline. This positioned the Group to avail of access to traffic rights through bilateral agreements between the EU and third countries.

19. NAI is a direct subsidiary of NAS.

NAS

20. NAS is listed on the Oslo Børs (the Oslo stock exchange). It is the sole shareholder of AAA and NAI and the holding company for the entire group. It performs group management and corporate functions which include an internal treasury function operating "cash pooling" for the Group. All income generated from ticket sales in the Group is collected and held by NAS. As and when required funds are transferred by NAS to other Group companies including those companies which form part of the Asset Management Platform, to enable them to meet their ongoing obligations.

21. NAS holds an air operator's certificate ("AOC") and functions as an international airline. It leases its fleet of 41 aircraft from the subsidiaries of AAA, which include DLL, LLL, TLL, and other group companies which are not the subject of this petition. These leases are managed in Ireland by AAA. AAA also manages new aircraft orders for NAS, and sources aircraft financing.

22. NAS is the guarantor of the obligations of the Asset Management Platform to third party aircraft lessors and financiers.

23. The Group comprises 65 companies. The protection of this court is sought only in respect of the petitioners and NAS which are regarded as crucial to the future survival of other parts of the Group.

24. The companies in the Platform are entirely reliant on NAS and its airline operating subsidiaries for their income streams. It is said that if NAS were to enter liquidation, it is likely that each of the petitioners would also enter liquidation.

25. Similarly, it is said that a liquidation of the Platform companies would cause severe disruption to NAS, in circumstances where NAS requires access to the fleet of aircraft to service its routes. That access is currently achieved through the Platform.

Recent trading

26. The reported trading results for the Group for the years 2017, 2018 and 2019 show increases in revenue up to 31 December, 2019. Total revenues of the Group to the end of December 2019 reached approximately €4 bn, of which approximately €3.2 bn was derived from ticket sales. The balance is derived from ancillary passenger revenue freight, "*third party products*", and other revenue.

27. The two most significant events which have contributed to the current status of the Group are:

    (1) The impact of the global grounding of Boeing 737 Max in 2019.

    (2) The COVID-19 pandemic.

28. On 12 March, 2019, eight of the Group's Boeing 737 Max aircraft were grounded by global aviation regulators due to two fatal accidents (on flights of different airlines) involving this aircraft type, one on 29 October, 2018, and a second on 10 March, 2019.

29. The Group also encountered serious operational and maintenance problems with a different Boeing aircraft, the 787 Dreamliner.

30. In February 2020, the Group had been targeting a net profit for 2020. Within a matter of weeks from identifying these targets, the impact from the COVID-19 pandemic emerged and the Group's focus shifted immediately from anticipated growth to survival.

31. The effect of the pandemic on the Group can be summarised as follows:

    a) It lost most of its revenues. Demand for bookings fell by 99% in the second quarter of 2020.

    b) From January 2020 to the presentation of the petition on 18 November, 2020, the Group carried 6.3 million passengers compared to 28.62 million for the same period in 2019, a fall in passenger numbers of 78%.

    c) Revenue for the Group in the third quarter of 2020 was approximately €119 m compared to €1.13 bn for the same period in 2019, a decrease of 91%. The year to date revenues have fallen by 76%; and,

    d) Operating losses for the Group in the year to date amount to €593 m, compared to a total loss of €149 m for the full year 2019.

32. In April and May 2020, the Group embarked on a restructuring plan entailing the conversion of debt and leasing commitments to equity, adjusting lease rentals to market by reference to the value of aircraft, the introduction of a "*power by the hour*"

arrangement, whereby leasing payments would reflect the actual utilisation of aircraft, and a postponement of operations outside Norway until the COVID-19 pandemic eased.

33. Through these measures, the Group converted debt of approximately €1.2 bn to equity and raised approximately €37 m in new cash and equity through a public offering. These achievements fulfilled conditions necessary to avail of a Norwegian Government State Aid package consisting of loan guarantees worth approximately €278 m.

34. Further savings were achieved in restructuring negotiations with lessors and this process is ongoing.

35. The petitioners say that the 2020 restructuring provided the Group with sufficient liquidity and financial headroom to maintain its current "hibernation mode" until the end of the first quarter 2021, provided the companies achieve the protection of this court.

36. On 9 November, 2020, the Norwegian Government announced that it would not at that point in time be providing any further financial support to the Group.

37. In the final quarter of 2020 already the Group has furloughed additional employees, leaving 600 persons currently employed by the Group and only six aircraft currently in use.

Creditor actions and litigation

ACG

38. On 20 July, 2020, Aviation Capital Group ("ACG") through two special purpose subsidiaries filed a claim in the Commercial Court of England and Wales for the payment of back rent in respect of rent payments for the lease of aircraft. The proceedings were issued against DLL as lessee and NAS as guarantor. On 6 November, 2020, the Court granted summary judgment on this claim for sums totalling $6.287 m, and ordered that these payments should be made on or before 4 pm on 18 December, 2020.

Wings Capital

39. Wings Capital has issued claims and default notices in respect of amounts totalling $2.2 m, again against DLL as lessee and NAS as guarantor.

Lease agreements

40. A number of the lessors to the Companies have served termination notices reserving their rights generally.

Boeing

41. Boeing holds significant advance payments in relation to undelivered aircraft pursuant to OEM purchase contracts entered into originally in January 2012 and 2015.

42. In June 2020, NAS and AAA filed a complaint against Boeing in the State of Illinois alleging breach of contract, breach of good faith and fair dealing, fraudulent inducement, claiming damages, and seeking rescission of the OEM purchase contracts and of service contracts.

Insolvency

43. The petitioners estimate that without further restructuring the Companies will no longer have sufficient working capital during the first quarter of 2021. The Group has a cash burn rate of approximately $10 m per month.

44. I shall return to other information concerning the balance sheets of the Companies (para. 48 – 53). As far as immediate cash flow status is concerned, the petitioners say the following: -

    (a) NAS has total debts to parties outside of the Group of approximately $1.4 bn, and is not in a position to meet all of these liabilities.

    (b) DLL, LLL and TLL have accumulated arrears to third parties totalling approximately $22 m, $18.4 m and $1.3 m respectively and do not have the cash with which to meet these debts.

    (c) AAA is dependent on NAS for the payment of salaries and other operating expenses and in the absence of any further loan or investment from NAS has "*no visible means of making these payments*".

    (d) NAI has outstanding debts to vendors totalling approximately $65 m and no cash to meet those debts.

Independent Expert's Report ("IER")

45. As required by s. 511 of the Act, the petition is accompanied by a report in relation to the Companies prepared by an Independent Expert, Mr. Ken Fennell of Deloitte, Dublin.

46. Mr. Fennell has analysed the trading history of the Companies and the reported financial results for the periods 2017, 2018 and 2019, and to 30 September, 2020.

47. In respect of each of the Companies the subject of the petition, Mr. Fennell has compared the potential out turn of a winding up with the going concern statement of affairs. He reports that the potential out turn on a going concern basis is significantly more favourable for all stakeholders than would arise on a winding up.

48. In the case of NAS, Mr. Fennell reports that on a going concern basis the company has a positive net asset position of $2.4 bn, by contrast with a deficit on a winding up of $7.1 bn. He states that the net asset figure of $2.45 bn has as its "*primary driver*" investment in subsidiaries and intercompany receivables of just below $1.7 bn. He reports that the underlying value of these investments and receivables in the current circumstances is significantly impaired. Uncertainty regarding viability of the petitioners in the absence of an overall group restructuring is such that the Group will run out of working capital in January 2021 and be unable to meet its ongoing obligations as they fall due.

49. In the case of NAI, Mr. Fennell has identified a net asset position on a going concern basis of $41 m against a deficit on a winding up of $267.8 m.

50. As regards the net asset position of NAI, he says that the "primary driver" is an entry for intercompany balances of $170 m from other Group entities, several of which are petitioners. Uncertainty regarding viability of those entities in the absence of a restructuring is such as to anticipate the company running out of working capital in January 2021.

51. The figures estimated for NAI are subject also to a contingent claim of the Revenue Commissioners in the amount of $28.5 m.

52. For AAA, Mr. Fennell identifies a going concern net asset position of $1.38 bn, against a deficit on a winding up of $77.7 m. Again, however, the net asset position has its "primary driver" in the investment value of subsidiaries, which is significantly impaired.

53. For each of DLL, TLL, and LLL a corresponding contrast appears. The going concern statements of affairs for these three companies show net asset positions respectively of $41.9 m, $602.7m and $50.7m. In each of these, the positive position is largely driven by a value attributable to "right of use" assets. This is an accounting treatment of leased aircraft which depreciate over the term of the lease. Mr. Fennell says that this value is not realisable by the relevant companies, regardless of the value of the aircraft. The effect of this analysis for those three companies is to eliminate entirely the net asset position shown on the "going concern statement of affairs". The deficit he identifies on a winding up basis for these companies respectively is $256 m, $9.8 m and $147.5 m.

54. Mr. Fennell states that within the Group of petitioner companies there is a reliance upon the success of NAS and NAI. He states that the prospect of survival as a going concern of the petitioners and the remainder of the Group is directly linked to the survival of NAS and/or NAI.

55. Mr. Fennell identified the features of a restructuring plan which he believes will be necessary to secure the survival of the companies as follows: -

(a) Adjustment of aircraft leasing payments to market value;

(b) Seeking longer term "*power by the hour*" deals to conserve cash while aircraft remain parked due to COVID-19;

(c) Extension of existing power by hour agreements beyond the first quarter of 2021;

(d) Adjustment to the companies' future orders of aircraft in line with future operating requirements;

(e) Deferrals and restructured payments for loans secured by aircraft that are necessary for the operation;

(f) In addition to the restructuring of the overall cost base, he says that the operating group will need to raise additional capital;

(g) With regard to subsidiaries of AAA which are not subject to the petition, he says that the company will need to reach consensual agreement to modify their financial arrangements, in default of which the relevant companies could themselves be liquidated.

56. Mr. Fennell says: -

> *"It is expected that the process of restructuring the overall operating fleet, and raising new capital, will be interdependent as both fleet creditors and potential new capital providers will want to know that the other is committed to the business going forward".*

57. Mr. Fennell concludes that the Companies have a reasonable prospect of survival as a going concern if the following conditions are satisfied: -

(1) The Companies are granted a period of protection by the High Court;

(2) The relevant Companies' lessors provide the necessary support throughout the protection period and that management proposals with regard to long term restructure of the operational fleet can be implemented;

(3) That the petitioning group is able to secure additional working capital in the form of fresh capital investment;

(4) That the Companies restructure their long term obligations under aircraft acquisition contracts, including arrangements for advance payments;

(5) The High Court confirms proposals for a scheme of arrangement.

58. Mr. Fennell has stressed that although he believes the Companies have a reasonable prospect of survival, it is beyond the scope of his report at this time to provide a detailed assessment of the long term commercial impact on trading of the COVID-19 pandemic. He states however that: -

> *"The current assumption that the petitioning group, as a consequence of international restrictions, will not be conducting flying operations until market conditions attain some degree of normality is a realistic and prudent assumption".*

59. In section 11 of his Report, Mr. Fennell has, as required by s. 511 (3)(j) of the Act, examined the funding requirements of the Companies to trade during the statutory period of court protection and the sources of that funding. Notwithstanding the severe predictions regarding the cashflow projections for early 2021, he states that the petitioning group will rely on existing working capital and can access the cash pooling arrangements provided by NAS. He says that through a combination of forecasted revenues and access to the cash pooling arrangements, the Companies will be in a position to meet their payment obligations as projected during the protection period, and any additional liabilities or costs arising.

Issues arising from the IER

60. At the hearing of the petition two points of important clarification in connection with the report of the Independent Expert were drawn to the court's attention.

61. One relates to the treatment in the IER of prepayments in respect of aircraft purchase agreements with Airbus S.A.S. The second relates to the treatment of refunds due to passengers from cancelled flights.

Airbus

62. The agreements for the purchase of aircraft with Boeing and with Airbus provide for payment of agreed purchase prices in advance in a number of stages, with a final balance becoming due for payment on delivery of the aircraft. In the case of Airbus, typically 30% of the total price is paid by this method prior to delivery of the aircraft. These stage payments are referred to as Pre-Delivery Payments ("PDP") and are made pursuant to an agreed schedule set out in the purchase agreement.

63. An affidavit of Mr. Benoit De Saint-Exupery of Airbus was opened at the hearing. Mr. De Saint-Exupery states that once a PDP has been made under a purchase agreement, the PDP becomes an asset of and the property of Airbus save in certain very limited circumstances which he says do not arise on the facts. Mr. De Saint-Exupery is concerned that references are made in the going concern statements of affairs appended to the IER to PDPs totalling $505.2 m. He says that PDP's totalling $46 m have been made by AAA to Airbus in respect of aircraft not yet delivered under purchase agreements and that the inclusion of PDP's as an asset of the relevant companies is incorrect.

64. Mr. De Saint-Exupery says that under the provisions of the purchase agreements, the seller, namely Airbus, is entitled to hold and use any pre-delivery payments as absolute owner. The purchase agreements provide that in the event of a termination of the agreement following any default by the buyer, which includes any default arising by reason of the filing of insolvency or similar proceedings, Airbus remains entitled to retain all pre-delivery payments.

65. Mr. De Saint-Exupery also refers to the fact that AAA is due to make a PDP of $1.99 m to Airbus in January 2021 and he observes that the cash flows exhibited in the appendix to the IER make no provision for the making of this payment.

66. In a letter exhibited at the hearing, dated 6 December, 2020, the Independent Expert refers to the affidavit of Mr. De Saint-Exupery and clarifies that he has not in the course of preparing his report sought to determine the treatment of pre-delivery payments made by the company within his report. He says that having considered the point made by Mr. De Saint-Exupery, this does not alter the opinion expressed by him as to the prospect of the survival of the company as a going concern.

67. It will remain to be seen during the course of the examinership what, if any, restructuring of the Airbus and other purchase agreements will be possible. That will be a matter for the examiner and the Companies. Although the amounts referred to are not small, I

accept the clarification provided by Mr. Fennell in his letter of 6 December, 2020, for the purpose of this stage of the proceedings.

Passenger refunds

68. In an affidavit of Mr. Brendan Colgan, partner at Matheson Solicitors for the petitioners, sworn on 7 December, 2020, reference is made to a liability of NAS of approximately €22.6 m owing to passengers in respect of outstanding refunds for flights cancelled prior to the presentation of the petition. Mr. Colgan states that due to an oversight this liability was not reflected in the financial information which was provided to Mr. Fennell at the time of the preparation of his report.

69. In his letter of clarification of 6 December, 2020, Mr. Fennell refers to this information which has now been brought to his attention. He confirms also that this amount should have been included in the liabilities of NAS. He confirms that the inclusion of such an amount does not impact on the opinions provided in his Report.

70. Even in the context of a Group having liabilities of the scale described earlier in this judgment, an amount of €22.6 m is not small. Nonetheless, I am satisfied with the clarification given by Mr. Fennell and his confirmation that this amount ought to have been included in the liabilities of NAS. This and any other such matters as may emerge will need to be taken into account by the examiner in the formulation of his proposals.

EU Insolvency Regulation

71. Article 4 of Regulation (EU) 2015/848 of 20 May, 2015, on insolvency proceedings (recast) ("the Regulation") requires that I examine whether this court has jurisdiction to open these proceedings pursuant to Article 3. (Annex A to the Regulation lists the form of proceedings which in each Member State constitute insolvency proceedings for the purpose of the Regulation. For Ireland, this list includes examinership.)

72. Article 3.1 of the Regulation provides that the courts of the Member State within the territory of which the centre of main interests is situated have jurisdiction to open "*main insolvency proceedings*".

73. The centre of main interests is described in Article 3.1 as "*the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties."*

74. In the case of a company, the place of the registered office is presumed to be the centre of its main interests. This presumption is stated to be subject to two qualifications:

(a) It applies only in the absence of proof to the contrary,

(b) It applies only if the registered office has not been moved to another Member State within a period of 3 months prior to the request for the opening of the insolvency proceedings, which in this case is the date of presentation of the petition.

75. Each of the petitioners was incorporated in the State and has its registered office in the State. No evidence has been presented contrary to the presumption that the centre of main interests is also within the State.

76. NAI holds an airline operator's certificate ("AOC") granted by the Irish Aviation Authority and an air carrier operating licence ("ACOL") granted by the Commission for Aviation Regulation.

77. NAI is tax resident and domiciled in Ireland. Its operations are administered from an office at Dublin Airport and its principal activity is the provision of scheduled and chartered airline services to support the operations and expansion of the group. Prior to the COVID-19 pandemic, it employed 41 persons directly. It currently employs 29 persons.

78. AAA and its subsidiaries DLL, TLL and LLL, perform the function of financing, trading and leasing of aircraft from their offices at Dublin Airport. AAA employs 7 full-time employees at that location.

79. The evidence before the court is that each of the petitioners conducts the majority of its business within the State, and that this is as perceived by third parties transacting business with them. The majority of their directors are resident in the State and their board meetings are held in Dublin. I am satisfied that each of the petitioners has its centre of main interests within the State. Therefore, these proceedings are main proceedings within the meaning of Article 3.1 of the Regulation.

Related company – NAS

80. NAS was incorporated in Norway and has its headquarters in Norway. There is no suggestion or evidence that it has its "*centre of main interests*" elsewhere.

81. The Regulation applies only to an entity which has its centre of main interests in a Member State. Norway is not a Member State. Therefore, the Regulation does not apply to NAS. Accordingly, I am required to consider the jurisdiction of this court to appoint an examiner to NAS by reference to national law, namely the Companies Act 2014.

82. Section 517 of the Act provides that:

> *"where the court appoints an examiner to a company, it may, at the same or any time thereafter, make an order—*
>
> *(a) appointing the examiner to be examiner for the purposes of this Act to a related company; or*
>
> *(b) conferring on the examiner, in relation to such company, all or any of the functions conferred on him or her in relation to the first-mentioned company.*

(2) In deciding whether to make an order under subsection (1), the court shall have regard to whether the making of the order would be likely to facilitate the survival

of the company, or of the related company, or both, and the whole or any part of its or their undertaking, as a going concern.

(3) However, the court shall not, in any case, make such an order unless it is satisfied that there is a reasonable prospect of the survival of the related company, and the whole or any part of its undertaking, as a going concern."

83. I shall return later to the application in this case of the tests in subsections (2) and (3). In the first instance the court must be satisfied that NAS falls within the definition of a *"related company"* for the purpose of s. 517.

84. S. 2(10) of the Act defines related companies to include a company which is a "*holding company or subsidiary*" of a company. As the direct holding company for AAA and NAI, NAS is therefore a company related to all of the petitioners.

85. S. 2(11) of the Act provides that for the purpose of ss. 10 the term "*company*" includes "*any body that is capable of being wound up under this Act*".

86. Part 22 of the Act governs unregistered companies. In Chapter 3 of that Part, s. 1328 provides for the winding up of unregistered companies as follows: -

"Subject to the provisions of this Chapter, any unregistered company may be wound up under Part 11 (the winding up provisions) and all the provisions of Part 11 relating to winding up shall apply to an unregistered company with the exceptions and additions mentioned in this section".

87. The jurisdiction of this Court to make an order under the provisions of the predecessor of s. 1328 for the winding up of a non-Irish company, was considered by Laffoy J. in *Re Harley Medical Group (Ireland) Ltd* [2013] 2 IR 596.

88. In that case, Laffoy J. found that the company had its centre of main interests in the State and therefore the Regulation applied ('pre-recast'). She also considered the jurisdiction under s. 345 of the Companies Act 1963 (the predecessor of s.1328) and jurisprudence regarding that jurisdiction. Laffoy J. quoted from Courtney, *The Law of Companies*, where he summarised that jurisprudence: -

"In Stocznia Gdanska SA v. Latreefers Inc. [(No. 2) [2000] TLR 182; [2001] 2 BCLC 116] the English Court of Appeal endorsed the finding of Lloyd J. that, as the law has evolved, there are three core requirements before a court will exercise its discretion to order the winding up of an unregistered company:

(1) there must be a sufficient connection with England and Wales which may, but does not necessarily have to, consist of assets within the jurisdiction;

(2) there must be a reasonable possibility, if a winding up order is made, of benefit to those applying for the winding up order;

(3) *one or more persons interested in the distribution of the assets of the company must be persons over whom the court can exercise jurisdiction."*

89. The application before me in relation to NAS is of course not for a winding up. Nonetheless, the test of a "*sufficient connection*" endorsed by Laffoy J. is the starting point as to the jurisdiction now under s. 517 to appoint an examiner to NAS as a related company.

90. The principles identified by the Court of Appeal in *Latreefers* were considered by the High Court of England and Wales in *Re Drax Holdings Ltd* [2003] EWHC 2743 (Ch), [2004] 1 WLR 1049 ("*Drax*"), and in *Re Rodenstock* [2011] EWHC 1104 (CH).

91. In Drax, Lawrence Collins J. concluded that the application of the three conditions informed the exercise of the court's discretion and did not each necessarily go to the jurisdiction of the court. In *Drax*, the company had no assets within England. The trust deed which governed its raising of finance contained an English law clause and a non-exclusive submission to the jurisdiction of the English courts. The court held that the absence of assets within England was not a bar to the jurisdiction of the court, and was satisfied that the proposed scheme of arrangement would bind the creditors subject to the English jurisdiction.

92. Similarly, in *Rodenstock*, the essence of the finding of a "*sufficient connection*" was the combination of the choice of law clause and submission to the jurisdiction of the English court found in the facilities agreements governing the relationship between the company and its bondholders intended to be bound by the proposed scheme of arrangement.

93. Whilst these authorities are informative, it seems to me that the connections of NAS to the State, summarised in para. 99 below, are at the very least as meaningful, if not more so, than the connection derived from choice of law and jurisdiction clauses.

94. I was referred also to the judgment of Megarry J. in *Re Compania Merabello San Nicholas* SA [1973] 1 Ch 75. In that case, the court made a winding up order in respect of a foreign company in circumstances where the only asset of the company in England was its claim against a mutual insurance association.

95. Megarry J. summarised what he described as the essentials of the relevant law related to the existence of jurisdiction to make a winding up order in respect of a foreign company as follows: -

"(1) There is no need to establish that the company ever had a place of business here.

(2) There is no need to establish that the company ever carried on business here, unless perhaps the petition is based on the company carrying on or having carried on business.

(3) A proper connection with the jurisdiction must be established by sufficient evidence to show (a) that the company has some asset or assets within the jurisdiction, and

(b) that there are one or more persons concerned in the proper distribution of the assets over whom the jurisdiction is exercisable.

(4) It suffices if the assets of the company within the jurisdiction are of any nature; they need not be 'commercial' assets, or assets which indicate that the company formerly carried on business here.

(5) The assets need not be assets which will be distributable to creditors by the liquidator in the winding-up: it suffices if by the making of the winding-up order they will be of benefit to a creditor or creditors in some other way.

(6) If it is shown that there is no reasonable possibility of benefit accruing to creditors from making the winding-up order, the jurisdiction is excluded.".

96. Whilst that judgment related to the jurisdiction to make a winding up order, and appeared, unlike the later judgments, to include the presence of assets as a requirement, the conditions identified by Megarry J. are of assistance in this case in applying the principles referred to by Laffoy J. in *Re Harley Medical Group.*

97. NAS fulfils two core functions within the Group. Firstly, it is the parent company of the entire Group. Secondly, it is an airline operating company, holding an AOC from its regulator in Norway.

98. In its capacity as the holding company, NAS performs group management and group corporate functions. This includes the receipt of income generated from ticket sales in the Group, following which funds are distributed as required through cash pooling.

99. The only assets directly held by NAS in this jurisdiction are its shares in subsidiaries. However, its connection to the State is not limited to the holding of shares, and may be summarised as follows: -

(1) NAS has a longstanding connection with the State, through its commercial relationships with third party Irish lessors of aircraft owned, financed or registered in Ireland, and its operation of flights to and from Ireland. Many of those lessors have substantial operations in Ireland.

(2) The connection of NAS with Ireland was strengthened from 2013 onwards when it implemented a strategic reorganisation which included the establishment of (i) a subsidiary airline, NAI, to operate from Dublin; and (ii) the NAS Asset Management Platform utilising AAA and its subsidiaries;

(3) NAS's direct subsidiary, AAA is the holding company for the Irish aircraft leasing and financing platform through which NAS finances and leases its fleet of aircraft. The commercial terms of the leasing and financing arrangements are in part predicated on the utilisation of the Irish leasing structure and benefits it is said to provide for financiers and lessors.

(4) NAS has guaranteed a large proportion of the lease obligations of the NAS Asset Management Platform.

(5) The Asset Management Platform provides flexibility to transition aircraft between the airlines within the Group.

(6) The Group's aircraft purchase contracts (with Boeing and Airbus) are managed and negotiated from Ireland by AAA and guaranteed by NAS.

(7) IP rights to the NAS brand/trademark are held by Norwegian Bank Limited, an Irish incorporated sister company of AAA which is also 100% controlled by NAS.

100. It was pointed out that until the restrictions introduced in response to the COVID-19 pandemic, NAS operated a service between Dublin and Oslo, which is currently suspended. The fact of flying aircraft into Dublin is part of the connection, but could never of itself be a basis for satisfying the sufficient connection test.

101. Whilst much of the above activity is performed through the subsidiary companies incorporated in Ireland, it is clear that the commercial operations of the Group taken together with the range of legal transactions entered into by both NAS and its subsidiaries are so closely linked and interdependent that NAS has a real and deep connection to the State, and meets the test of a sufficient connection endorsed by Laffoy J. in *Re Harley Medical Group*. Accordingly, NAS is liable to be wound up under Part 22 of the Act and is a related company for the purpose of s. 517.

Recognition of these proceedings in Norway

102. The principles in *Re Latreefers Inc* as approved by Laffoy J. in *Harley*, include a consideration as to whether an order or judgment of the Court will bind the parties intended to be affected. This Court needs to be satisfied that its orders will not be in vain.

103. The petitioners exhibited an opinion of Norwegian counsel, BAHR AS.

104. BAHR express the opinion that "*a successful examinership process in Ireland will be capable of recognition and, thus, have direct and beneficial effects on the solvency and future viability of NAS*". BAHR stated that, to their knowledge, there has been no previous case before the courts in Norway where the question of recognition of a foreign scheme of arrangement has been decided. However, they point out that most of NAS's major creditors' claims are based on written agreements which provide that they are governed by the law of jurisdictions other than Norway. They advise that, under Norwegian law, the consequence of a foreign choice of law and legal venue in such agreements is that a claim to enforce those rights cannot be heard in the Norwegian Courts, but would respect the choice of law and legal venue provisions.

105. BAHR conclude: -

> *"…as an Irish examinership and scheme of arrangement is capable of recognition by the English courts and English judgments are capable of recognition in Norway, NAS*

creditors should not be able to pursue their claims towards NAS in Norway due to the Irish examinership scheme of arrangement."

106. BAHR further opine that, if necessary, NAS could open separate reconstruction proceedings in Norway "*to fend off dissenting creditors seeking to bypass the moratorium on claims resulting from the Irish examinership*". They say that in such a case, the "*reconstructor in Norway*" would probably coordinate his process with the Irish examinership.

107. Mr. Colgan's affidavit states that the board of NAS propose to apply to court in Norway to have NAS placed in a restructuring process there, entitled a "*Rekonstruksjonsforhandling*", in which the "reconstructor" would perform a role similar to an examiner. He says that whilst this process would continue in parallel with the examinership, it is envisaged that the examinership would be the primary process with regard to NAS. Once the Irish examinership concludes and if proposals for a scheme of arrangement are sanctioned by this Court, an order would be sought if necessary to give effect to those proposals as part of the Norwegian process.

Recognition in England

108. The advice of Norwegian counsel presented to this Court is dependent upon the proposition that an English Court would recognise the examinership. The petitioners have exhibited a letter of advice dated 18 November, 2020, from the petitioners' counsel Hogan Lovells, London, and an opinion of Mr. Daniel Bayfield, Queen's Counsel.

109. Hogan Lovells identify two possible grounds upon which an English Court would recognise an examinership of NAS. Firstly, they refer to s. 426 of the Insolvency Act, 1986 and, secondly, to common law.

110. Section 426 (4) of the Insolvency Act, 1986 provides: -

> *"The courts having jurisdiction in relation to insolvency law in any part of the United Kingdom shall assist the courts having the corresponding jurisdiction in any other part of the United Kingdom or any relevant country or territory."*

This section can be activated by a letter of request.

111. Hogan Lovells confirmed that Ireland is a "*relevant country or territory*" designated by Statutory Instrument for the purpose of s. 426.

112. As regards common law, Hogan Lovells advise that the mere fact that the insolvency regime in another jurisdiction is "*not on all fours with English law is of itself insufficient to deny recognition*". They conclude as follows: -

> *"The fact that Ireland like England is a common law jurisdiction with a well-regarded judicial system means that recognition at common law is more likely than not. Further support for such a conclusion lies in the similarities between the Irish*

examinership process and scheme of arrangement to the English administration procedure and its "rescue" objectives."

113. Mr. Bayfield describes the jurisdiction under s. 426. He considers the general principle of comity and advises that the English Court would apply flexibility when determining the appropriate approach.

114. Mr. Bayfield examines Parts 9 and 10 of the Companies Act 2014. He says that examinership under Part 10 can only be commenced where the company is unable to pay its debts or is likely to become unable to pay its debts, and therefore:

> *"…carries the hallmark of an insolvency proceeding and the insolvency proceeding which most closely resembles examinership in England and Wales is the administration regime under Part II of the Insolvency Act, 1986, which can only be commenced if a near identical insolvency is satisfied."*

115. He concludes that: -

> *"…the English Court would be likely (if requested to do so) to recognise the examinership and any scheme confirmed by the High Court as part of the examinership, impose a stay corresponding to the stay under s. 520(4) of the Act of 2014 and order that creditors be bound by and take no steps inconsistent with the terms of the scheme of arrangement."*

116. Hogan Lovells and Mr. Bayfield both refer to *Re Business City Express Ltd* [1997] 2 BCLC 510, a pre-Insolvency Regulation case. In that case, Rattee J. granted an application under s. 426 for recognition of a scheme of arrangement following confirmation of the scheme by this Court (Kelly J. (as he then was)).

117. Rattee J. considered the provisions of the Companies (Amendment) Act, 1990 (the predecessor of Part 10 of the Act of 2014) and the process which led to the confirmation of the scheme of arrangement, namely, the formulation of proposals for a scheme of arrangement by the examiner, the consideration and approval of those proposals at statutory meetings of members and creditors, and the sanction by the court. He described the Irish examiner as "*roughly (but only roughly) equivalent to an English administrator*".

Conclusion as regards recognition

118. Although *Re Business City Express* related to recognition of a scheme of arrangement confirmed in examinership proceedings, it is the clearest authority on recognition in England and Wales of orders made in an examinership, outwith the Regulation. Having regard to the opinions of English law and Norwegian law, I am satisfied that the purpose of these proceedings, in particular the protection afforded by s.520 and a scheme pursuant to s.541, can be achieved as regards the creditors and counterparties of the Companies, including NAS.

Appointment of examiner

119. The jurisdiction to appoint an examiner in relation to the petitioners is governed by s. 509 of the Companies Act, 2014. In the first instance, it must appear to the court that: -

(a) the company is, or is likely to be unable to pay its debts;

(b) no resolution subsists for the winding up of the company; and,

(c) no order has been made for the winding up of the company.

120. I have already considered the information provided in the petition and in IER from which it is clear that each of the petitioners is unable to pay its debts and that no resolution has been passed for the winding up of the company or order made for its winding up. This test having been met, the appointment of an examiner is a discretionary matter for the court.

121. Section 509(2) provides the first "threshold" to consider in the exercise of discretion as follows: -

> *"The court shall not make an order under this section unless it is satisfied that there is a reasonable prospect of the survival of the company and the whole or any part of its undertaking as a going concern".*

122. Section 517 extends the application of this test to a petition to appoint an examiner to a related company: -

> *"(2) In deciding whether to make an order under subsection (1), the court shall have regard to whether the making of the order would be likely to facilitate the survival of the company, or of the related company, or both, and the whole or any part of its or their undertaking, as a going concern.*
>
> *(3) However, the court shall not, in any case, make such an order unless it is satisfied that there is a reasonable prospect of the survival of the related company, and the whole or any part of its undertaking, as a going concern."*

123. Although the test of "reasonable prospect of survival" must be applied to each company, the affairs and fortunes of the petitioners and of NAS are so closely interlinked that it is appropriate to consider them together.

124. In *Re Vantive Holdings* [2009] IESC 68, Murray C.J., at page 19, identified a two-stage process. He focussed firstly on the requirement to establish that the company is capable of surviving as a going concern and thereafter on the wider discretion as to whether to make the appointment.

125. In *Re Gallium* [2009] 2 ILRM, Fennelly J. considered the test extensively, noting that there is an onus of proof on the petitioner to establish that there is a reasonable prospect of the survival of the company and all or part of its undertaking as a going concern. He continued, at para. 46: -

"…the statutory requirement is to show that "there is a reasonable prospect of the survival of the company..."A petitioner does not, by getting over that threshold, acquire a right to have an order made. I still think it is fair to say that the section confers a "wide discretion" on the court, or alternatively, that the court should take account of all the circumstances. The establishment of a reasonable prospect of the survival merely triggers the power, which remains discretionary. The view of Lardner J, as expressed In re Atlantic Magnetics could be described as pragmatic: he asked whether it "seems worthwhile to order an investigation by the examiner into the Company's affairs." The court has the power to appoint an examiner if satisfied that there is a reasonable prospect of survival of the company.

47. The entire purpose of examinership is to make it possible to rescue companies in difficulty. The protection period is there to facilitate examination of the prospects of rescue. However, that protection may prejudice the interests of some creditors. The court will weigh the existence and degree of any such prejudice in the balance. It will have regard to the report of the independent accountant.

48. The Court has to take account of all relevant interests. The independent accountant must consider whether examinership would be "be more advantageous to the members as a whole and the creditors as a whole than a winding-up of the company..."This does not limit the range of interests to be taken into account by the court under section 2. [the predecessor of s. 509] The interests of employees cannot be excluded. In the case of an insolvent company, it is natural that the creditors will have the greatest interest in the future, if any, of the company. The court will take a balanced approach, as suggested by the reference to the creditors as a whole."

126. In relation to the interests of members and creditors as a whole, Fennelly J. continued:-

"In the case of an insolvent company, it is natural that the creditors will have the greatest interest in the future, if any, of the company. The court will take a balanced approach, as suggested by the reference to the creditors as a whole."

127. In light of this observation, I have taken into account the submissions and positions which have been taken by the creditors and other interested parties.

Submissions of Creditors

128. Represented at the hearing of the petition were the Revenue Commissioners, a trustee for certain bondholders, and a number of leasing and finance creditors including BOC Aviation, AerCap IC Airlease, Engine Lease Finance Corporation, FPG Aviation Ltd, SMBC Aviation Ltd, Goshawk Aviation Leasing Ltd, Otra Aviation Leasing Ltd, Jackson Square Aviation, Mitsui, SMBC, Rolls Royce, Airbus S.A.S., Lufthansa Technik, Wells Fargo and others.

129. The only party to express support for the petition was Rolls Royce.

130. No party opposed the petition.

131. The Revenue Commissioners had raised in correspondence with the petitioners a number of questions and the reply was shown to the court. Their queries related to matters such as the basis for cash flow assumptions, further information regarding the Group's strategy and business plans, why the Companies did not seek to avail of any Revenue support in terms of warehousing of liabilities, whether the companies had availed of COVID-19 relieving measures or arrangements in any other jurisdictions, questions concerning staffing levels and certain of the litigation cases pending between the company and other parties in other jurisdictions. Counsel for Revenue stated that they were "*guardedly neutral*" in relation to the petition.

132. Mr. Steen, solicitor for Airbus SE, referred to the affidavit of Mr. De Saint-Exupery, in which he had taken issue with the accuracy of certain aspects of the IER. I have already considered those issues earlier in this judgment (para. 64 - 69). He did not oppose the petition, and stated that Airbus were "*guardedly neutral*".

133. On behalf of Aviation Capital Group, Mr. Thomas Ryan, solicitor, stated that his clients were neutral as regards the appointment of the examiner but reserved their position as regards the extraterritorial effect of these proceedings. No submissions were made on this question by Mr. Ryan.

134. Counsel and solicitors for the leasing companies, bondholders, financial institutions and others all stated that they were neutral as to the appointment of the examiner, in most cases stating also that they reserved their position as regards the proceedings generally.

Report of the Interim Examiner

135. At the first application for directions in these proceedings on 18 November, 2020, I appointed Kieran Wallace of KPMG 1, Stokes Place, St. Stephen's Green, Dublin 2 to be examiner of each of the companies on an interim basis pending the hearing of the petition. At the hearing of the petition the court had the benefit of a report of the Interim Examiner. In his report, Mr. Wallace outlines the actions which he has taken since his appointment and his initial engagement both with the directors and management of the Companies and with key creditors and stakeholders. Based on his initial engagement he states that he believes that the conditions for the survival of the company as a going concern as identified by the Independent Expert are in the course of being achieved or are capable of being achieved during the examinership period. He states that he has no reason to disagree with the conclusions reached in the IER that the Companies have a reasonable prospect of survival as a going concern.

Do the companies have a reasonable prospect of survival?

136. Since the establishment of the Group in 1993 it has grown from operating only short flights and flights within Europe, to eventually longer haul flights.

137. The establishment in 2013 of the Asset Management Platform, and the commencement of operations from Dublin through NAI has been a central feature of the development of the Group, principally in the manner in which it sources and finances aircraft.

138. The setbacks of the global grounding of the Boeing 737 Max in 2019, and the COVID-19 pandemic in 2020 drove restructuring action.

139. Restructuring measures in 2019 achieved cost savings of approximately $327 m across the Group. Despite the implementation of these cost savings and other restructuring measures, the Group suffered a significant loss in value with its stock price down more than 85% from the previous years.

140. Further restructuring and cost mitigation measures were implemented in 2020, including the following:

(1) The cancellation of 85% of flights and the temporary lay-off of approximately 7,300 workers.

(2) Reduction of the active fleet in March 2020 to 7. There was some resurgence in the third quarter of 2020 but further flight reductions and suspensions were necessary in the final quarter, leaving the Group currently employing 600 persons and only six aircraft in operations.

(3) The Group engaged with its principal lessors and finance creditors to restructure lease and loan agreements including the following measures –

i. Debt to equity conversions;
ii. financial restructuring;
iii. "power by the hour" agreements (whereby payments are made by the reference to the utilisation of aircraft, with the differential between the contractual rent and cash rent paid being discharged by conversion to equity proposed).

141. The success of these measures enabled the Group to access a State Aid package from the Norwegian Government.

142. In their forecasts, the Companies project an incremental increase in returning to pre-COVID-19 operations from April 2021 onwards with the hope of returning to profit for the full year 2022. This relies on the assumption that smaller aircraft and regional capabilities will recover quickly after the pandemic whereas larger international flights may recover at a slower pace.

143. Against this background, the Group's stated intention is to maintain its business in "a reasonable state of readiness in order to return to operations". This requires the Group to maintain its obligations in respect of maintenance and upkeep of aircraft and therefore significant holding costs continue.

144. The petitioners have received expressions of interest by potential investors. Understandably, the identities of such parties were not provided in court. Nor were any details of the current status of such interest. It is said that investment activity has in the past been sourced from the aviation industry itself, from international financial institutions

with an interest in investing in the aviation industry and fundraising through public offerings.

145. Mr. Colgan's affidavit informs the Court that NAS has convened an extraordinary general meeting for Thursday, 17 December, 2020. The agenda for this meeting includes proposals for resolutions altering the designation of shares in NAS to comply with certain requirements of the Oslo Børs. It also includes proposals to authorise the board of NAS to issue new shares, bonds and convertible loans and to propose further rights offerings and debt for equity conversions. The notice convening the EGM and its explanatory attachment were exhibited. In this attachment NAS outlines its current status and the restructuring process for the Group, including these examinership proceedings. It says that no agreement has been entered into with creditors or investors to contribute further equity to the company. Therefore, the resolutions are proposed for the purpose of authorising the board to progress equity raising measures.

146. It is also said that the Group remain hopeful that upon completion of a restructuring and the emergence of a more streamlined operation, the Norwegian Government may alter is position and support further investment into the future. In light of the most recent decision taken by the Norwegian Government, this is no more than an aspiration, but I shall not disregard it.

147. The Independent Expert expresses the opinion that the Companies have a reasonable prospect of survival as a going concern. He has identified the conditions which are necessary for such survival (see para. 57). He says that there can be no certainty as to the long term intention of the Companies' lessors and secured lenders.

148. Mr. Fennell is realistic in the expression of his opinion when he states that it is beyond the scope of his report to provide a detailed assessment of the long-term commercial impact on trading of the COVID-19 pandemic. He says that the effect of the pandemic has been to "all but" cease international and regional air travel. As of now it is unknown when normal trading conditions will return, but he states that the current assumption that the petitioning group, as a consequence of international restrictions, will not be conducting flying operations until market conditions attain a degree of normality is a realistic and prudent assumption.

149. I have taken into account the following: -

(1) The trading history and expansion of the core business and brand of the Group;

(2) The successes already achieved in cost reduction and restructuring measures adapted by the Group in the face of the grounding of Boeing 737 Max and the COVID-19 pandemic;

(3) The support which the Group has enjoyed to date in restructuring debt and leasing obligations;

(4) The opinion of the Independent Expert that the companies have a reasonable prospect of survival as a going concern, and that an attempt to continue the whole or any part of the undertaking of the companies would be likely to be more advantageous to the members and creditors as a whole than a winding up of the companies,

(5) The Group's history of attracting investment, and the steps NAS continue to take to facilitate investment.

150. There is a measure of caution in the opinion of Mr. Fennell, where he states that the long-term commercial impact of the pandemic is beyond the scope of his report. Such a reservation is to be expected and the opinion is therefore not unrealistic. However, having regard to the evidence summarised above, I find that the petitioners have a reasonable prospect of survival as a going concern and that it is appropriate to appoint an examiner pursuant to s.509 of the Act.

151. NAS has a sufficiently close connection with the State to qualify as a related company for the purpose of s.517 of the Act. Its business and fortunes are inextricably linked with those of the petitioners. I am satisfied that NAS has a reasonable prospect of survival as a going concern and that the appointment of an Examiner to it is likely to facilitate the survival of it and of the petitioners.

152. For these reasons, I have made the order appointing the examiner to the petitioner companies and to NAS.

[2021] IEHC 268

THE HIGH COURT

2020 366/COS

IN THE MATTER OF ARCTIC AVIATION ASSETS DESIGNATED ACTIVITY COMPANY

AND

IN THE MATTER OF NORWEGIAN AIR INTERNATIONAL LIMITED

AND

IN THE MATTER OF DRAMMENSFJORDEN LEASING LIMITED

AND

IN THE MATTER OF TORSKEFJORDEN LEASING LIMITED

AND

IN THE MATTER OF LYSAKERFJORDEN LEASING LIMITED

AND

IN THE MATTER OF PART 10 OF THE COMPANIES ACT, 2014

AND

IN THE MATTER OF NORWEGIAN AIR SHUTTLE ASA,

AS A RELATED COMPANY WITHIN THE MEANING OF SECTION 517 AND SECTION 2 (10) OF THE COMPANIES ACT, 2014

Judgment of Mr. Justice Quinn delivered on the 21st day of April, 2021 (Section 537)

1. Section 537 of the Companies Act 2014 provides as follows: -

> *"(1) Where proposals for a compromise or scheme of arrangement are to be formulated in relation to a company, the company may, subject to the approval of the court, affirm or repudiate any contract under which some element of performance other than payment remains to be rendered both by the company and the other contracting party or parties".*

2. Subsections 2 and 3 provide as follows: -

> *"(2) Any person who suffers loss or damage as a result of such repudiation shall stand as an unsecured creditor for the amount of such loss or damage*
>
> *(3) In order to facilitate the formulation, consideration or confirmation of a compromise or scheme of arrangement, the court may hold a hearing and make an order determining the amount of any such loss or damage mentioned in subsection (2) and the amount so determined shall be due by the company to the creditor as a judgment debt."*

3. Applications for approval of a repudiation under this section are made on notice to the counterparties to the relevant contract and to the appointed examiner of the company (s. 537 (4) and RSC O. 74A, r. 19).

4. This judgment relates to applications pursuant to s. 537 (1) by certain of the companies named in the title above for approval of the repudiation of contracts, where the applications are opposed by the counterparties.

5. The companies did not apply for orders under subsection (3) determining the quantum of loss or damage suffered by the counterparties. Instead they proposed that the quantum

be determined by an expert to be appointed under the examiner's proposals for a scheme of arrangement. The opposing parties objected to that approach and submitted that if orders were made approving repudiations the court should hold a hearing pursuant to subsection (3) to determine the quantum of their loss.

6. On 5 March, 2021, I made orders approving repudiations. I also concluded that the court should hold a hearing pursuant to subs. (3) to determine the amount of the loss of the objecting counterparties. The background and reasons for making the orders are summarised in this judgment.

7. This judgment is structured as follows:

(1) Introduction and background to the applications,

(2) The facts relating to the opposed applications,

(3) Identification of the legal issues raised by opposing parties,

(4) Consideration of Section 537 and Part 10 of the Act,

(5) Evidence relevant to the opposed applications,

(6) Conclusions on threshold issues,

(7) Conclusions on discretionary issues,

(8) Extraterritorial jurisdiction and recognition issues,

(9) The Convention on International Interests In Moveable Equipment and the Protocol relating to Aircraft Equipment, made at Cape Town, 16 November 2001.

(10) Mode of determination of the quantum of losses of counterparties.

The examinership

8. On 18 November, 2020, five companies in the Norwegian Group petitioned for the appointment of an examiner pursuant to s. 509 of the Companies Act 2014 ("the Act"). The petitioners were: -

- Arctic Aviation Assets Designated Activity Company ("AAA").
- Norwegian Air International Ltd. ("NAI").
- Drammensfjorden Leasing Ltd ("DLL").
- Torskefjorden Leasing Ltd. ("TLL").
- Lysakerfjorden Leasing Ltd. ("LLL").

9. The petitioners applied also for the appointment of an examiner to a related company, Norwegian Air Shuttle ASA ("NAS"), which is the ultimate shareholder of the Norwegian Group of companies, and an aircraft operating company. I refer to NAS and the petitioners as "the companies".

10. As required by RSC O. 74A, r. 5, on the day on which the petition was presented, the petitioners applied to this Court for directions, and the court appointed Kieran Wallace of KPMG Dublin, as examiner of the companies on an interim basis pending the hearing of the petition.

11. On 7 December, 2020, I heard the petition and appointed Mr. Wallace examiner of the companies.

12. The background to the petition and the reasons why the court was satisfied to appoint the examiner are summarised in a judgment delivered by this Court on 16 December, 2020, (2020 IEHC 664) ("The First Judgment").

13. In the First Judgment, I found that each of the petitioners had its centre of main interests in the State and therefore that these proceedings are main proceedings within the meaning of Article 3.1 of Regulation EU 2015/848 of 20 May 2015 on insolvency proceedings (Recast) ("the Regulation").

14. NAS is incorporated and has its headquarters in Norway. No submission was made that it had its centre of main interests otherwise than in Norway. Accordingly, the Regulation does not apply to NAS. I therefore examined the jurisdiction of this Court to appoint an examiner by reference to the Companies Act 2014. S. 517 of the Act establishes the jurisdiction to appoint an examiner to a company related to a company to which an examiner has been appointed pursuant to s. 509. For that purpose, the definition of a "related company" includes *"any body that is capable of being wound up under this Act"* pursuant to s. 2 (10) and s. 2 (11) of the Act.

15. Chapter 3 of Part 22 of the Act governs the winding up of unregistered companies, which may include a foreign company, subject to the satisfaction of certain conditions for the exercise of this jurisdiction. Having considered the established line of cases on this jurisdiction and the connection between the business and activities of NAS and the State, I concluded that NAS was a company liable to be wound up under Part 22 of the Act and was therefore a related company for the purposes of s. 517 (see paras. 80 – 101 of the First Judgment).

16. In this judgment the term "petitioners" refers to the five companies which presented the petition. The term "companies" refers to the petitioners and NAS. The terms "Norwegian" or "the Group" refer to the companies and other companies in the Norwegian Group registered in the State and elsewhere. It includes companies which are not the subject of these or other insolvency or restructuring proceedings. I refer to those companies as "excluded subsidiaries".

17. NAS and NAI are airline operators. NAS is also the ultimate parent company of the Group and the direct shareholder in NAI and AAA. AAA performs a centralised asset management function for the group as a whole. It manages the Group's new aircraft orders, sources aircraft financing, and manages aircraft leasing from external lessors.

18. AAA has 36 Irish incorporated subsidiary companies, including DLL, TLL and LLL. These subsidiaries typically act as the "head lessee" of aircraft, and sublease aircraft to the operating companies in the Group, including NAS and NAI. DLL, TLL and LLL performed this function for 20, 24 and 28 aircraft respectively.

19. AAA and its subsidiaries are referred to as the *"asset management platform".* AAA conducts its business from its leased office premises at Dublin Airport where it employs seven fulltime employees.

20. At the time of the presentation of the petition a total of 140 aircraft were leased by the Group as a whole, although a smaller number were operating at that time. The debt and leasing obligations associated with the fleet were approximately US$5.19 billion.

21. NAS and AAA also executed guarantees in favour of the ultimate owners and head lessors or other finance parties in respect of the obligations of individual subsidiary lessees and sublessees. Many of those guarantees are the subject of the applications for approval to repudiate.

Restructuring

22. In early 2020, the Group had embarked on intense restructuring activity. The requirement for restructuring was prompted by a combination of the impact in 2019 of the global grounding of all Boeing 737 Max and the impact in 2020 of the COVID-19 pandemic. The restructuring plan entailed the conversion of debt and leasing commitments to equity, adjusting lease rentals to market rates by reference to the value of aircraft, the introduction where possible, by agreement with lessors of a "power by the hour" ("PBH") arrangement whereby leasing payments would reflect the actual utilisation of aircraft, adjustments to payment obligations for maintenance in respect of aircraft and engines, and a postponement of operations outside Norway until the effects of the pandemic had eased.

23. New cash and equity was secured through a public offering and at an early stage of the restructuring, support was provided by a Norwegian government state aid programme.

24. In November 2020, it became clear that although significant savings had been achieved in the restructuring negotiations, the process would take more time and the Group could not survive without availing of further restructuring steps, which included availing of Part 10 of the Act by these proceedings.

25. Following the appointment of the examiner, the companies in conjunction with the examiner continued their restructuring discussions with lessors, financiers and relevant contract counterparties.

26. The Group retained an investment bank, DNB Bank ASA, and industry specialists Seabury Capital Advisors LLC.

27. On 21 December, 2020, Seabury issued to lessors a document described as a *"request for lease restructuring".* Through this document the Group identified the critical changes

which it believed were necessary to the relevant aircraft leases. In particular, it identified the following requirements: -

(1) To reset rent to market levels based on the company's research and experience in the market.

(2) Requiring counterparties to move to a PBH structure.

(3) A revision of the basis upon which maintenance costs would be discharged such as to require lessors to share maintenance costs, a practice which the companies believed was in accordance with market conditions.

28. There was also presented to lessors on 24 December, 2020, a "*slide deck*" containing a detailed presentation of the Group's business plan. This document contained extensive details of the proposed routes to be serviced by the Group in 2021 with a view to "*ramping up*" in 2022 and details of the Group's proposal to position itself as a "smart cost carrier" having regard to cost advantages being sought. The presentation contained details of the Group's strategic plan for the development of its brand and target customer base, details of the portions of the business identified as profitable, the specific intentions of the group regarding the maintenance of its operations in Norway, Sweden, Denmark and Finland, and descriptions of the company's intention going forward to compete at least within Europe. It also contained information as to the Group's proposal to simplify its operations, projections and forecasts with details of cost reductions including aircraft lease costs, intended profit and loss accounts, balance sheet and cash requirement estimates.

29. On 14 January, 2021, the Group made a public announcement of its business plan.

30. As far as concerned the operations of the Group, the business plan entailed the following key features: -

(1) That the Group would focus on its core business in the Nordic countries, operating a short haul network with narrow body aircraft.

(2) That it would cease to operate long haul routes.

(3) That it would initially operate up to 50 Boeing 737 aircraft, operating within Norway and other Nordic countries and between those countries and the rest of Europe.

(4) A significant reduction in the number of aircraft assets leased by the Group and;

(5) A reduction in the volume of services procured by the Group.

31. The announcement also described, on a preliminary basis, the Group's intentions as regards its capital structure going forward. Under the plan new investors in the Group would own approximately 70% of the shares, existing shareholders would own approximately 5% and "*impaired creditors*" would own approximately 25%.

32. The examiner reported to this Court that he was in the course of evaluating the business plan. He stated his preliminary view that he would be in a position to formulate proposals for schemes of arrangement which would facilitate the survival of the companies and the preservation of employment on the basis of the business plan proposed by the Group.

33. One of the petitioner companies, TLL, was the parent company of a sub-group within the asset management platform which focussed on leasing the wide bodied aircraft required to service the Group's long haul activity. Arising from the announcement made on 14 January, 2021, it was apparent that TLL would no longer feature in or form part of the Group's business plan. The examiner so reported on 15 January 2021 and on that date, the court made an order lifting the court protection as regards TLL, discharging him as examiner of TLL, and appointed him as liquidator of TLL.

These applications

34. The companies say that to effectively implement the business plan and permit the continued viability of the companies and the whole or part of their undertakings as a going concern it is necessary to repudiate certain contracts and to address the liabilities arising from such repudiation in schemes of arrangement.

35. To that end the companies issued applications pursuant to s. 537 (1) for approval to repudiate some 425 contracts with 68 counterparties.

36. The first repudiation application was issued on 22 January, 2021. It related to two categories of contracts as follows: -

(1) Contracts associated for the most part with long haul operations. These were principally contracts relating to ground handling and fuel line services provided to NAS or NAI at a number of US international airports.

(2) The second group comprised a variety of contracts which it was said were no longer required in the context of the Group's business plan either because they were surplus to the future requirements of the Group in light of its scaled back operations, or where the Group would require in order to achieve the required economies to enter into less expensive contracts or substitute third party contracts with in - house resources.

37. Most of this second group comprised contracts relating to the leasing of aircraft ("head leases") with lessors and financiers including Aercap, DVB Bank, Goshawk, ICB Leasing, Mitsui, Orix, SMBC, Wings Capital, Avalon, Macquarie, Accipiter, Jackson Square Aviation, Aviation Capital Group, Rolls Royce plc and related companies, Engine Lease Finance Corporation, and Willis Lease Finance Corporation. They also included leases and contracts relating to the purchase of aircraft and engines, the supply of in-flight entertainment systems, ground handling services, supply of spare parts, catering services contracts, cleaning related contracts and other airport facility arrangements with such parties as Boeing, Airbus, Lufthansa, Panasonic Avionics, Gate Gourmet, Airdata and others.

38. The second repudiation application related to two groups of leases. Firstly, it related to sub-leases between DLL and LLL, as sub-lessor and aircraft operating companies within the Group principally NAI and NAS.

39. Secondly, it related to sub-leases of an additional 54 aircraft subleased to NAS and NAI by excluded subsidiaries. The interests of those excluded subsidiaries under the subleases had been assigned or were otherwise held for the benefit of third party lessors or finance parties. Therefore, those excluded subsidiaries were not free to agree consensual termination of the subleases.

40. The third application related principally to guarantees given by NAS and AAA in respect of the obligations of other operating companies or companies in the asset management platform, including excluded subsidiaries, in favour of head lessors or other finance parties.

41. The fourth application related to a particular agreement with International Lease Finance Corporation (a "put and call option") and a contract for the installation of seating with an entity referred to as Recaro Aircraft Seating GmbH.

42. The first notice of motion was initially returnable before the court on 28 January, 2021. It was adjourned from time to time to enable the respondents to deliver replying affidavits and legal submissions. The second and third applications were initially returnable before the court on 4 February, 2021, and the fourth application on 15 February, 2021.

43. After a number of preliminary hearings for directions and adjournments to enable the parties exchange affidavit evidence and legal submissions, the opposed applications were listed for hearing together before the court on 23 February, 2021, and heard over a period of five days.

44. At the initial return date and directions hearings, and on each day of the substantive hearing, the court was informed that settlement terms had been concluded with a large number of the counterparties. In a number of cases, parties had agreed consensual termination of the contracts or other modifications to the relevant contracts, and certain of the applications were withdrawn by consent. For others, orders were made under s. 537 (1) by consent. In a number of other cases the applications were unopposed and proceeded. Ultimately, this Court was required to determine the opposed application in respect of three groups of counterparties described below.

45. The three groups in respect of which the applications were opposed, and which are the subject of this judgment can be described by reference to the names of the parties having a commercial interest in the relevant contracts namely, Credit Agricole Corporate and Investment Bank (the "Credit Agricole Group"), Bank of Utah and Citibank NA (the "Utah Citibank Group") and PK Air Finance SARL (the "PK Air Finance Group"). I refer to these groups collectively as "the opposing parties".

Credit Agricole

46. Credit Agricole was the finance party interested in contracts concerning six aircraft. In respect of the first three aircraft (MSN numbers 63310, 63311 and 63312), the aircraft had been acquired by a company referred to as AAAB 7871, being the head lessor, and leased to one of the excluded subsidiaries Sognefjorden Limited. Sognefjorden then subleased the three aircraft to NAS.

47. The acquisition of the aircraft by AAAB 7871 in each case was funded by loans from funders for whom Credit Agricole acted as security trustee.

48. In respect of each of these aircraft, NAS had two sets of contractual obligations: -

(1) Obligations under the aircraft operating sublease from Sognefjorden to NAS.

(2) A guarantee given directly to Credit Agricole in respect of the obligations of Sognefjorden to the lessor and to the secured parties.

49. NAS seeks approval to repudiate both the operating lease and the guarantee.

50. Aircraft number 63313, was acquired jointly by three lessor companies, namely Flip No. 70 Limited, Flip No. 171 Limited and Flip No. 172 Company Limited. The aircraft was acquired by the "Flip" companies with funding provided by lenders represented by Credit Agricole. The aircraft was leased to Ofotfjorden Limited, an excluded subsidiary.

51. NAS executed two guarantees in respect of the obligations of Ofotfjorden under the lease, one to the "Flip" companies as lessors and the second to Credit Agricole directly.

52. For aircraft nos. 63314 and 63315, the structure was identical to that for 63313, save that the lessee was a different excluded subsidiary, Tysfjorden Limited.

53. An important feature of s. 537 is that the court can only be asked to approve repudiation of contracts: -

> *"under which some element of performance other than payment remains to be rendered both by the company and the other contracting party or parties".*

54. To show that this threshold test is met, the contracts of lease and contracts of guarantee, together with the other contracts the subject of these applications, were all exhibited. Having regard to the volume of contracts and the multiplicity of documents involved there was exhibited also what were referred to as "Contract Summaries". For the purpose of these applications the contents of these contract summaries were accepted as valid summaries of the contracts.

55. Each of the contract summaries was prepared by the companies' solicitors, Matheson. The contracts the subject of this judgment were expressed to be governed by English law and subject to the exclusive jurisdiction of the Courts of England. Therefore, the companies exhibited opinion letters by the companies' English counsel Hogan Lovells which confirmed, by reference to English law, the following: -

(1) That the description of the relevant agreements and of their provisions in the contract summaries was correct, save where expressly corrected, and;

(2) That the clauses identified in the contract summaries as constituting obligations of the parties to the agreements in respect of which some element of performance other than payment remains to be rendered, constitute obligations to do something other than the payment of money ("non-monetary obligations"). Such contracts are generally referred to as executory contracts.

56. Since the judgment of the Supreme Court in *Re Linen Supply of Ireland Limited* (Unreported, 10 December 2009), it has been accepted that leases of property constitute contracts to which the provisions of s. 537 (and its predecessor s. 20 of the Companies (Amendment) Act 1990) apply.

57. It has not been disputed in these applications that the leases of aircraft or other aircraft objects, being either aircraft bodies or engines, are executory contracts for the purpose of s. 537. The position regarding guarantees is less clear, and I shall return later to that question (paras 189 and 190). Therefore the evidence of Hogan Lovells as to the categorisation of contracts as executory is important and is considered in more detail below.

Aircraft MSN 63310 – Sub-Lease Sognefjorden to NAS

58. This was an aircraft operating lease made on 3 May, 2018, between Sognefjorden Limited and NAS, which operated the aircraft with the benefit of its aircraft operator's certificate ("AOC"). As regards non-monetary obligations of the lessee the contract summary refers to the following: -

- Clause 8: Operational undertakings whereby the lessee undertook throughout the lease period and until redelivery that it would ensure that the aircraft was operated in accordance with the terms of the head lease including certain operational covenants, covenants regarding possession and sub-leasing, and maintenance and repair of the aircraft.

- Clause 8.1 contained a covenant that the lessee would at all times ensure that the aircraft is used operated maintained and controlled in accordance with the requirements of the relevant Aviation Authority of each jurisdiction to which the lessee is subject.

- Clause 8.2: Obligations to observe and comply with all laws, regulations, codes and standards applicable.

- Clause 8.3 imposed the obligation to procure that accurate complete and current records are kept of all flights, of all hours and cycles completed by each engine and each part and of all maintenance and repairs carried out to the aircraft.

- Clause 8.4 provided that the lessee would not permit the aircraft to leave its possession other than for the purpose of overhaul, repair, modification or maintenance in accordance with the terms of the agreement and may not sub – lease the aircraft without the prior written consent of the lessor and the security trustee.

- Clause 9.1 contained obligations to ensure that the aircraft is maintained and repaired in accordance with the terms of the head lease and to ensure that the aircraft is serviced, repaired, maintained, overhauled, tested and where applicable, stored as set out in the agreement.

- Clause 10 contained obligations to register and maintain the registration of the aircraft and to protect the lessor, owner and financiers interest against the claims of any other persons.

- Clause 12 contained the obligation on the lessee to effect and maintain insurance in respect of the aircraft.

- Clause 13.1 imposed the obligation on the lessee to redeliver the aircraft to the lessor on the expiry date of the lease.

- Clause 13.2 contained obligations to provide not later than six months prior to the expiry date a technical report in a prescribed form.

- Clause 13.3 obliges the lessee to take the aircraft out of service at least two weeks prior to the expiry of the lease period to ensure the condition of the aircraft complies with redelivery conditions.

- Clause 13.4 contained obligations to make all relevant aircraft documents available to the lessor for inspection at least 90 days before the redelivery date.

- Clause 13.5 contained obligations, after completion of final maintenance, on the lessee to perform ground tests on the aircraft to demonstrate to the lessor the satisfactory ground operation of the aircraft.

- Clause 13.6 contained an obligation on the lessee, after completion of ground tests to perform a test flight.

- Clause 13.9 contained the basic obligation that the lessee would withdraw the aircraft from commercial service and begin the work required to comply with redelivery condition on a date prior to the expiry date.

59. As regards obligations to be rendered by the lessor, the following were identified as the non-monetary obligations: -

- Clause 2.1: the obligation to lease the aircraft to the lessee.

- Clause 2.3: the obligation to provide not less than five business days prior written notice to the lessee in the event of any early termination notice.

- Clause 13.8 contains obligations on completion of the final inspection and the correction of any defects to execute and deliver a return acceptance certificate.

Aircraft MSN 63310: Guarantee NAS to Credit Agricole

60. The contract summary recites that Credit Agricole is the beneficiary of the guarantee, in its capacity as security trustee for secured lenders named in the associated transaction documents.

61. The monetary obligations of NAS as the guarantor are to guarantee to the beneficiary the due and punctual payment, performance and discharge by the lessee of the guaranteed obligations. The guaranteed obligations are defined to mean "*all monies, liabilities and obligations (whether actual or contingent … and whether or not for the payment of money and including any obligation or liability to pay damages) from time to time owing by the lessee to the lessor and to the secured parties."*

62. The guarantor undertook to the beneficiary that whenever the lessee would not pay perform or discharge any of the guaranteed obligations when due, the guarantor would immediately on demand pay or discharge such guaranteed obligations as if it was the principal obligor.

63. The non-monetary obligations of the guarantor are summarised as follows: -

- Clause 7.1 contains an obligation to comply with and do all that which is necessary to maintain in full force and effect any authorisation required by any law or regulation.

- Clause 7.2 contains an obligation to comply in all respects with all relevant laws to which it is subject.

- Clause 7.5 obliges the guarantor to provide to the beneficiary a copy of its annual audited financial statements for each relevant financial year of the term of the lease.

64. The contract summary also states that by guaranteeing the performance obligations of the lessee the guarantor has potential obligations in respect of the maintenance, storage, insurance and other non-monetary obligations of the lessee under the lease agreement itself.

65. In respect of non-monetary obligations remaining to be rendered by the beneficiary, reference is made to obligations of confidentiality, albeit that they are stated to be contained in an associated "*all parties agreement",* which confers obligations of confidentiality in respect of all relevant transaction documents, stated to include the guarantee.

66. Although the reference to the obligation of confidentiality is derived from an "*all parties agreement*" which was not exhibited to the court, the contract summary recites that this obligation is transposed into each transaction document, which includes the guarantee.

67. The evidence of Hogan Lovells in their confirmatory letter, in this case dated 5 February, 2021, is that the contract contains obligations "to do something other than the payment of money". That evidence has not been contradicted on this application.

68. Clause 4.4 provides that where the guarantor makes a "Tax Payment" and the beneficiary later determines that a tax credit is attributable to that payment and where the relevant tax credit has been obtained utilised and retained by the beneficiary, the beneficiary may be obliged to make a payment to the guarantor to place the guarantor in the same after tax position as it would have been in had the tax payment not been required to be made by the guarantor. This was referred to in the contract summary as a "non-monetary obligation". I had some doubt as to whether it could seriously be suggested, despite the contents of the contract summary, that such a clause constitutes an obligation other than the payment of money. It is surprising that although the court's attention was drawn to Cl. 4.4, counsel did not refer the court to the fact that Appendix D to the Hogan Lovells letter specifically corrected this, and confirmed that Clause 4.4 was a monetary obligation. Therefore, the reference by the companies to C. 4.4. is of no assistance.

69. Similar contract summaries and opinions of Hogan Lovells were provided in respect of aircraft numbers 63311 and 63312, also leased by AAAB 7871 to Sognefjorden and the subject of guarantees given by NAS to Credit Agricole.

Aircrafts MSN 63313, 63314 and 63315

70. The lessee of MSN 63313 is Ofotfjorden Limited. For 63314 and 63315 it is Tysfjorden Limited. These are excluded subsidiaries. Therefore s. 537 cannot be invoked to repudiate the leases. The section is invoked to repudiate the two guarantees granted by NAS in respect of each aircraft, one in favour of the borrower lessor being the relevant "Flip" company, and a second in favour of Credit Agricole, as the finance party.

71. The contract summary relating to these guarantees describes the obligation on the part of NAS as guarantor to guarantee the due and punctual payment, performance and discharge by the lessee of the guaranteed obligations.

72. The non-monetary obligations of the guarantor were described to include the following: -

- Clause 7.1: the obligation to obtain and comply with all required authorisations under any law or regulation.
- Clause 7.2: the obligation to comply with all laws to which the lessees may be subject.
- Clause 7.5: Information obligations including the obligation to deliver copies of the lessees annual audited financial statements.

73. It was also stated in the contract summary that by guaranteeing the performance obligations of the lessee, the guarantor potentially has obligations in respect of maintenance, storage, insurance and other non-monetary obligations of the lessee under the lease agreement.

74. As regards non-monetary obligations of the beneficiary, reference was made, again unhelpfully and incorrectly, to a clause 4.4 concerning tax credits and a potential repayment of a tax amount.

75. The contract summary states that *"where the Guarantor is called upon pursuant to the Guarantee, to perform obligations of the Lessee under the Lease, the Beneficiaries/Representative Beneficiary will have non-monetary obligations in favour of the Guarantor in those circumstances to enable the Guarantor to fulfil its obligations qua Lessee pursuant to the Lease*". It was submitted that this was a reference to the potential for the beneficiary to call on the guarantor to "*step in*" to the lease in which event the beneficiary would attract obligations corresponding to those of the lessor.

76. No particular provision or term of the borrower guarantee or of the finance party guarantee was cited in support of this proposition. Nonetheless, the guarantee is expressed to be governed by the laws of England and Wales and the only evidence before the court on this point is the exhibited opinion of Hogan Lovells to the effect that these provisions constitute non-monetary obligations. No contrary evidence was proffered.

Bank of Utah / Citibank NA

77. Each of the Bank of Utah and Citibank, and funders represented by them is the beneficiary of guarantees given by both NAS and AAA.

78. In relation to Citibank, the structure relevant to six aircraft being MSN numbers 42825 to 42830 inclusive, was that the aircraft were acquired by AAA Max One Limited, the lessor, with the benefit of funding provided by secured parties for whom Citibank was acting as trustee. The relevant aircraft were then leased to Hardangerfjorden Limited, an excluded subsidiary. Each of NAS and AAA granted a guarantee in favour of Citibank guaranteeing payment of the obligations owing by the lessee Hardangerfjorden to the lessor, AAA Max One Limited, and to the secured parties.

79. In addition to guaranteeing the payment of rent and other charges under the lease, the contract summary describes the non-monetary obligations of the guarantors as follows: -

- Clause 7.1: registration.
- Clause 7.2: Maintenance.
- Clause 7.3: Operational obligations under the lease.
- Clause 7.6 (a): Restrictions on the use of the aircraft.
- Clause 7.6 (k): Obligations regarding inspection facilities.
- Clause 7.7: Information obligations concerning the aircraft and engines.
- Clause 10: Insurance.

80. The guarantor is also obliged to provide copies of all relevant authorisations and to ensure compliance with all governing laws, and to provide its audited financial statements.

81. In respect of non-monetary obligations of the beneficiary, reference is made in the contract summaries to obligations of confidentiality, albeit that they are conferred under a "Participation Agreement" governing the relationship between the parties. Reference is also made to obligations to notify the guarantor of any amendment, modification waiver discharge termination or other change which the beneficiary has signed or agreed to sign.

82. The references to non-monetary obligations, on the part of the beneficiary are limited. However, the uncontradicted evidence before the court is the opinion of Hogan Lovells, in their letter of 5 February 2021 that the contract, being a contract governed by English law, is a contract which contains obligations "to do something other than the payment of money."

83. A similar guarantee is granted in favour of Citibank by AAA.

84. The Bank of Utah funded the acquisition by another company in the group, AAAB 787, of a further eight aircraft which were leased to three other excluded subsidiaries, namely Nordfjorden Limited, Trollsfjorden Limited and Ulsfjorden Limited. The form of the guarantees in favour of the Bank of Utah broadly correspond with the provisions given in favour of Citibank and guarantees were given again by each of NAS and AAA.

PK Air Finance

85. Three aircraft, namely MSN 39002, 39162 and 39164 were acquired by so-called "Flip" companies namely Flip No. 156 Company Ltd., Flip No. 159 Company Ltd., and Flip No. 158 Company Ltd. The relevant "Flip" company in each case acted as lessor of the aircraft to DYI Aviation Ireland Ltd. which in turn sub-leased the aircraft to Norwegian Air Sweden AB, another excluded subsidiary.

86. In respect of each of these transactions, NAS executed guarantees in favour of the relevant "Flip" companies, and PK Air Finance holds the commercial interest in the benefit of the guarantees as the security trustee for the lenders to the "Flip" companies.

87. In respect of one of these aircraft the application for approval to repudiate was withdrawn, namely MSN 39002. In respect of the remaining two, the contracts of guarantee were in identical form and are described in the contract summaries. The contract summaries note that the relevant aircraft were leased by the "Flip" company to DYI Aviation Ireland Limited, which in turn sub-leased the aircraft to Norwegian Air Sweden AB. The guarantee provided by NAS in favour of the relevant "Flip" company was a guarantee of all of the obligations of DYI Aviation.

88. The non-monetary obligations remaining to be rendered by the guarantor are stated in the summary to include the following: -

- Clause 7.2: Obligation to comply with all relevant laws and regulations.

- Clause 7.5: The obligation throughout the relevant lease period to provide annual consolidated audited financial statements and to deliver copies of all reports notices and financial statements which the guarantor makes available to its stakeholders.

- Clause 7.6: Requires the guarantor NAS at all times to remain in control of the lessee.

89. In this case, the beneficiary of the guarantee is also the head lessee. Its non-monetary obligations are described as including the following: -

- Confidentiality: albeit pursuant to the lease, but incorporated by reference as a *"relevant document";*

- Clause 2.1: The obligation to lease the relevant aircraft to the lessee under the corresponding lease agreement;

- Clause 10: Prohibitions on assignment or transfer of any of the rights or obligations under the guarantee.

90. It was also submitted that in circumstances where the guarantor is required to perform the obligations of the lessee under the lease on an enforcement of the guarantee the lessor, in such a "step in" scenario, would have corresponding non-monetary obligations in favour of the guarantor to enable the guarantor to render performance of the lessee's obligations.

91. The exhibited letter of opinion as to English law as by Messrs. Hogan Lovells confirms their opinion that the guarantee contains obligations to do something other than the payment of money and no contrary evidence was proffered.

92. The issues which I am required to determine on this application may be summarised as follows.

Threshold issues: -

(1) Are proposals for a compromise or scheme of arrangement "*to be formulated*" in relation to the companies?

(2) Are the relevant contracts such that some element of performance other than payment remains to be rendered both by the company and the other contracting party or parties?

Discretionary issues

(3) What is the standard of review which the court should apply in considering an application for approval of a repudiation?

(4) Is the evidence before the court sufficient to satisfy the court that it should approve repudiations of the contracts?

Jurisdiction and recognition questions

(5) Can s. 537 be invoked to approve repudiation of a contract having effect outside the jurisdiction of the State?

(6) Can s. 537 be invoked to repudiate contracts which are expressed to be subject to the laws of another State and which provide that any disputes in relation to such contracts shall be resolved in the courts of that other State?

Other questions

(7) The impact, if any, of the Convention on International Interests in Mobile Equipment and the Protocol thereto, on matters specific to Aircraft Equipment, adopted in Cape Town, South Africa, 16 November 2001.

(8) The manner of determination of the quantum of loss or damage suffered by any person as a result of any repudiation approved by the court. (s. 537 (3) of the Act).

Examinership generally

93. Before turning to the evidence before the court on this application it is appropriate to place s. 537 and these applications in their context.

94. The restructuring remedy of examinership was first introduced in the Companies (Amendment) Act 1990. It has been the subject of a number of amendments from time to time, and is now governed by Part 10 of the Companies Act 2014.

95. Where a company is unable to pay its debts or unlikely to be able to pay its debts the court may appoint an examiner for the purpose of examining the state of the company's affairs and performing such functions in relation to the company as may be conferred by or under the Act.

96. An examiner may only be appointed where the court is satisfied that the company and all or part of its undertaking has a reasonable prospect of survival as a going concern.

97. The core functions of the examiner are to formulate proposals for a compromise or a scheme of arrangement in relation to the company. Where the examiner formulates such proposals he convenes statutory meetings of members and creditors to consider and vote on the proposals. Provided at least one class of creditors approves the proposals, the examiner may then present them to the court for confirmation pursuant to s. 541 of the Act.

98. Subject to due compliance with the requirements of the Act and rules as to the formulation of proposals, the contents of the proposals, the convening and conduct of the statutory meetings, the provision of relevant information, and the absence of irregularities or impropriety, the court may confirm the proposals if: -

(1) The proposals are fair and equitable in relation to any class of members or creditors that has not accepted the proposals and whose interests or claims would be impaired by implementation, and;

(2) The proposals are not unfairly prejudicial to the interests of any interested party.

99. Subject to the fundamental test of fairness and the absence of unfair prejudice, a member or creditor whose interests or claim would be impaired by the proposals may object to confirmation on a number of grounds including the following: -

(1) That there has been some material irregularity at or in relation to the statutory meetings.

(2) That the acceptance of the proposals by the meeting was obtained by an improper purpose.

(3) That the proposals were put forward for an improper purpose.

(4) That the proposals unfairly prejudice the interests of the objector.

100. Once confirmed, the proposals are rendered binding on the company and on all members and creditors affected by the proposals, including parties and classes of parties who have voted against the proposals.

101. Commencing on the day on which the petition for the appointment of the examiner is presented the company is under the protection of the court, which is the equivalent of an "automatic stay". No proceedings for the winding up of the company or resolution for a winding up may have effect, no receiver may be appointed over assets of the company, no attachment sequestration distress or execution may be effected against the assets of the company except with the consent of the examiner, no action may be taken to realise the whole or any part of any security held over assets of the company except with the consent of the examiner, no steps may be taken to repossess goods in the company's possession under hire purchase agreements or retention of title agreements and no other proceedings may be commenced or continued against the company without leave of the court.

102. The examinership process is limited in its duration. The examiner is required to formulate his proposals, hold the statutory meetings and report to the court on the outcome within 35 days of his appointment. That period can be extended initially for a further period of 35 days, and ultimately up to a period of 100 days from the date of his appointment.

103. The Companies (Miscellaneous Provisions) (COVID-19) Act 2020 provided at s. 13 for extensions of the period of court protection and the time for final reports of the examiner by a period not more than 50 days to enable the examiner to make his final report, in exceptional circumstances. The term "exceptional circumstances" was defined by that section to include the nature and potential or actual impact of COVID-19 on the company. This provision for extension was initially intended to apply up to 31 December, 2020, but was subsequently extended by order of the Minister. In this case the initial period within which the examiner was obliged to report was extended to 25 February, 2021. On 19 February, 2021, the examiner applied to this Court for, and was granted an extension up to and including 16 April, 2021.

104. For the duration of an examinership, the company remains in possession and control of its assets and business under the continuing authority and responsibility of its directors. It is essentially a "debtor in possession" remedy. The essence of the process is that the company continues its business in the ordinary way, and the examiner is charged with the responsibility of formulating proposals for a scheme of arrangement in accordance with the Act. This is generally done, as in this case, in collaboration with the company.

105. The Act provides a number of special "tools" to enable the objectives of rescue and restructuring to be achieved. A number of these special powers are conferred on the examiner, and other provisions are particular to the company itself.

106. The examiner is given certain powers of information which he may invoke in order to secure cooperation of officers and shareholders. These powers include the right to attend at or convene meetings of the directors and shareholders, the right to require production of documents and evidence and other records (s. 526), the right to deal with certain charged property after prior application to the court (s. 530) and the right to apply to the court for orders for the return of assets improperly transferred from the company (s.557).

107. On an exceptional basis the examiner may apply to the court for an order transferring to him certain functions or powers of the directors (s. 528).

108. Whilst the company is expected to conduct its business in the normal fashion, there are certain restrictions on its activities. For example, s. 521 prohibits the payment of pre-petition debts of the company, save where the report of the independent expert accompanying the petition so recommended or where the court otherwise orders on an application for that purpose. The company is obliged to cooperate in all respects with any requirements of the examiner, including the production of documents and information and to give him all assistance he may require in the performance of his function (s. 526).

Repudiation of contracts

109. In this framework of the powers of the examiner and limitations on the powers of the company, s. 537 sits as a special and unique provision. It confers the power to repudiate executory contracts on the company and not on the examiner and may only be exercised with the prior approval of the court.

110. The purpose of the section is to enable the company to repudiate certain contracts where doing so is appropriate and necessary to facilitate the survival of the company and all or part of its undertaking as a going concern.

111. The objectors on this application submit that before a court approves a repudiation it must be shown in respect of each contract the subject of an application for approval that its repudiation is absolutely necessary to the formulation of proposals and the survival of the company as a going concern.

112. In the scheme of the Act, it is clear that the purpose of s. 537 is that a contract which might otherwise have been capable of being enforced by specific performance after the company exits examinership may be repudiated. The remedy of the counterparty for any

loss or damage which flows from the repudiation is that it shall stand as an unsecured creditor for the amount of that loss or damage (s. 537 (2)).

113. Although there has been extensive case law relating to Part 10 of the Act since the original introduction of examinership in 1990, much of it relates to cases in which the appointment of an examiner is contested or cases where objection is made to the confirmation of proposals for a scheme of arrangement. Throughout these judgments, much emphasis has been placed by the court on the objective of the rescue of all or part of the undertaking of the company as a going concern, with the consequential benefits in terms of the company's commercial and business activities, and the saving of employment associated with its activities.

114. Although s. 537 has been invoked in numerous cases since the enactment of the legislation, there are relatively few cases in which applications under s. 537 have been opposed. Only three such cases have been the subject of extensive reporting and have been referred to in the course of submissions in this case, namely *Re Linen Supply of Ireland Limited* (unreported, SC, 10 December 2009), *Re Bestseller Retail Ireland Limited* [2010] IEHC 155 and *Re O'Brien's Irish Sandwich Bars Limited* [2009] IEHC 465.

115. In *Re Linen Supply of Ireland Limited*, the court was invited to consider, for the first time since the enactment of the legislation, the question of whether s. 20 of the Companies (Amendment) Act 1990 (the predecessor of s. 537) properly construed could be invoked to repudiate a lease. In the High Court, the court found that a lease was not appropriate for the utilisation of s. 20. This decision was overturned by the Supreme Court. Murray C.J. said: -

> *"The issue concerning the interpretation of s. 20 centred on whether the reference to the repudiation of "any contract" in that section included repudiation of a lease. The section must first of all be interpreted in accordance with the ordinary meaning to be attributed to the words used and in its ordinary meaning the word 'contract' includes leases. Leases as a matter of law are contracts. Moreover, if the Oireachtas intended to exclude leases from the term 'contract' by which they are normally covered it would have said so explicitly.*
>
> *Furthermore, certain arguments centred on the phrase in s. 20(1) which confined the repudiation of contracts to those "under which some element of performance other than payment remains to be rendered" by the company and other contracting parties. However, a lease by its very nature involves the performance of obligations by both the lessor and the lessee other than payment of money. Some of these obligations have been referred to in the course of the hearing such as the right to quiet enjoyment and to obligations to insure. It has not been shown that the obligations arising under the leases in this case are confined to the making of payments.*

Accordingly, in my view, s. 20 must be interpreted as conferring jurisdiction on the High Court to decide whether it should approve or otherwise a repudiation of a contract which is a lease".

116. This judgment is significant in the context of the case before me for two reasons.

117. Firstly, it establishes beyond doubt that s. 537 can be invoked in respect of a lease. Secondly, the analysis of whether a contract contains "an element of performance other than payment remains to be rendered" is significant. In that case, a question had been raised as to whether what was being described as the "passive" obligation of conferring quiet enjoyment on a lessee constituted an obligation within the meaning of the section. Murray C.J. made it clear that to take a contract outside of the scope of the section it must be shown that obligations remaining to be performed under the relevant agreement "are confined to the making of payments".

118. *Re Bestseller Retail Ireland Limited* concerned an application by the company for approval to repudiate leases of retail outlets. It emerged during the course of the hearing that although all of the company's outlets were operating at a loss, no repudiation of a lease had been sought where the lease obligations were guaranteed by the applicant's parent company, which was not in examinership.

119. The court found this to be unfair, and concluded that the dominant motive for excluding those properties from the application for approval to repudiate was not to protect the interests of the company and its creditors, but to protect the interests of its shareholders. The court found that in that case the applications were "*designed to help shareholders whose investment has proved to be unsuccessful*", quoting Clarke J. in *Re Traffic Group Limited,* and found that this was outside the scope and purpose of the Act.

120. In making these findings, McGovern J. made a number of observations in relation to the objectives of the Act and the context of repudiation applications pursuant to the then – s. 20. He stated as follows: -

> *"It is clear on the evidence that if the Company is allowed repudiate the leases, the landlords concerned will suffer significant loss. As this is a loss affecting a property right of a landlord, it is something which can only be done in exceptional circumstances and where permitted in law. The Supreme Court has held in Re Linen Supply of Ireland Ltd. (10th December, 2009) that the High Court has jurisdiction under s. 20 to decide whether it should approve, or otherwise, a repudiation of a contract which is a lease. In each case, the court has to exercise its discretion, depending on the particular circumstances that arise".*

121. The court expressed its dissatisfaction that no reasonable explanation had been given for the fact that the company had selected for repudiation only those leases in respect of which there was no parent company guarantee in place. The court concluded that it was:

"…difficult to escape the conclusion that the company is seeking to repudiate these leases because a guarantee has been given by the holding company".

122. McGovern J. continued: -

"The repudiation of a lease under s. 20 of the Act is a significant interference with the property rights of a landlord and it must not be exercised lightly. The court has a wide discretion. I must consider the overall purpose of the examinership legislation".

123. Part of the complaint made in that case by objectors was that the company had failed to provide clarification and confirmation of the criteria which had been applied in selecting the leases to be repudiated. In the absence of that information, coupled with the finding that the company had sought to repudiate only leases in respect of which there were no parent company guarantees, the court found that the process embarked upon by the company was not intended to serve the objectives of the legislation in facilitating the survival of the company and its undertaking as a going concern, but was instead *"designed to help the shareholders".*

124. In *Re O'Brien's Irish Sandwich Bars Limited*, the company sought to repudiate leases as part of a scheme under which it was intended that the sub-lessees, who were franchisees of the company, would assume the company's liability under the leases to the head lessors, thereby in effect becoming direct lessees.

125. Ryan J. found that such a scheme, under which the sub-lessees and franchisees would be imposed on the lessors carried with it a range of uncertainties, not least from the perspective of landlord and tenant legislation, that wholesale repudiations of the leases were not permissible on such a basis.

126. The company invited the court to determine the quantum of the losses of the counterparties as part of the same hearing. The court noted that the only evidence before the court on that issue was a report of a chartered surveyor engaged by the company itself.

127. The court held that where the application had been brought very close in time to the expiry of the time limit for the examiner to report on the schemes of arrangement, it would not have been possible for the court to comply with the basic constitutional requirements for a fair hearing of the matter of quantum, although it noted that it had been accepted by the company that a hearing as to quantum in that case may have been capable of being postponed.

128. The exceptional powers which are conferred on an examiner or a company in other aspects of Part 10 contain express requirements that they may only be exercised in circumstances where the failure to do so would considerably reduce the prospects of the survival of the company or would prejudice the survival of the company as a going concern.

129. The power to make payments in respect of pre-petition debts only after the approval of the court has been granted is subject to the condition that it must be shown that a failure to discharge or satisfy the relevant payment would considerably reduce the prospects of the company or the whole or part of its undertakings surviving as a going concern.

130. Section 525 confers on an examiner power to take steps to prevent or rectify the effects of certain acts, omissions, course of conduct, decisions or contracts where he is of the opinion that failure to do so would be likely to prejudice the survival of the company or the whole or part of its undertaking as a going concern.

131. Section 529 permits an examiner in certain circumstances to certify as expenses properly incurred by him liabilities incurred by the company during the protection period, where in the opinion of the examiner the survival of the company as a going concern during the protection period would otherwise be seriously prejudiced.

132. Section 530 establishes a power to dispose of charged property on certain conditions where doing so would be likely to facilitate the survival of the whole or any part of the company as a going concern.

133. Section 517, which establishes the power to appoint an examiner to a related company, may only be exercised in circumstances where the court is satisfied that there is a reasonable prospect of the survival of the related company and the whole or part of its undertaking as a going concern, and the court is required to take into account whether the making of the order would be likely to facilitate the survival of the company or of the related company and the whole or part of its undertaking as a going concern.

134. None of these tests concerning necessity in the context of the survival of the company as a going concern are stated in s. 537. This does not mean that the court is "at large" in the exercise of its discretion

135. The requirement to give notice of an application to the examiner (s. 537 (4)) and to the counterparty (O. 74A, r. 19) clearly means that the court is required to consider the interests of the counterparties in determining an application for approval. This must mean that the court must balance the interests of individual counterparties in the context of the objectives of the examinership as a whole and therefore against the interests of the members and creditors of the company as a whole.

136. Repudiation of a contract is traditionally understood to mean the termination of a contract by one party which is justified by conduct on the part of the other party which amounts to what is referred to as a repudiatory breach. Section 537 creates a statutory exception to this by conferring on a company the power to repudiate a contract, without establishing repudiatory breach on the part of the counterparty.

137. In the absence of a requirement to establish a repudiatory breach, subs. 2 and 3 of the Section recognise that such a repudiation, not being justified by the conduct of the counterparty, will invariably give rise to loss or damage suffered by the counterparty for

which there is a remedy in damages, the amount of which ranks as an unsecured claim against the company. Subsection 3 then provides a facility for the court to determine the quantum of those damages.

138. Because of the exceptional nature of the power to repudiate, and the effects on the rights of counterparties, as per *Re Bestseller*, it is not sufficient to simply demonstrate that repudiation will facilitate the formulation of proposals for a scheme of arrangement or the survival of the company as a going concern. It seems to me that it necessarily follows that where such an exceptional power is to be invoked it is necessary to illustrate that, as with the other exceptional powers referred to above, the very survival of the company will be prejudiced if the repudiation is not effected. I now turn to the evidence before the court supporting these applications.

Evidence of the companies

139. The petition for the appointment of the examiner described the Group's negotiations with lessors and financiers of aircraft with a view to securing reductions in the cost of sourcing and holding aircraft. Reference was made to agreements which had previously been made with certain lessors and finance creditors and to continuing engagement with more such parties. It is said on this application that the applications for approval of repudiations are necessary in the case of those counterparties with whom it has not been possible to reach such agreement.

140. The petition refers also to the status of the excluded subsidiaries. These are aircraft holding companies mostly with multiple aircraft but each of which has only one principal third party creditor. The third party creditors typically held security interests in the aircraft held by the excluded subsidiaries. The benefit of any lease and/or sub-lease between the excluded subsidiaries and NAS, NAI or other operating companies in the Group stands assigned to the third party creditors by way of security assignment. Whether the excluded subsidiaries could continue as going concerns is dependent on whether the relevant principal creditors in each case would agree to revised trading terms on their aircraft leases or secured loans. The Group was continuing to engage with the creditors of those subsidiaries in the hope of successfully negotiating revised terms. Where negotiation of suitably revised economic terms could not be achieved, it was likely that the relevant aircraft would have to be handed back to the ultimate owner or the secured creditor. In such a case the relevant excluded subsidiary would ultimately be liquidated in accordance with Irish law.

141. As regards the companies entering examinership, it was said that there would have to be a restructuring of the remaining forward-looking obligations of the relevant companies to facilitate the attraction of additional capital to support the future business of the companies and the Group as a going concern.

142. The applications were grounded on a series of affidavits sworn by Mr. Tore Jenssen on 22 January, 2021, 29 January, 2021, 1 February, 2021, 9 February, 2021, 16 February, 2021. Mr Jenssen is a director of each of the companies except NAS.

143. Affidavits were sworn in support of the application by the examiner on 28 January 2021, 8 February 2021, 17 February 2021 and 22 February 2021.

144. Mr. Jenssen referred to the background and exhibited the contracts and contract summaries.

145. Mr. Jenssen referred to the stated intention of the examiner to formulate proposals for a scheme of arrangement in respect of the companies. Mr. Jenssen said that the examiner has determined, together with NAS, that a number of agreements to which the companies are a party are required to be terminated in order to enable the examiner to finalise his proposals for a scheme of arrangement in respect of the companies.

146. In his first affidavit, referring to the contracts principally relating to long haul business, Mr. Jenssen said as follows: -

> *"In order most effectively to implement the business plan and thereby permit the continued viability of the companies, and the whole or part of their undertakings, the companies believe that it is necessary to repudiate certain contracts and to address the liabilities arising from such repudiation (both direct liabilities of any relevant company and liabilities by way of guarantee on the part of any other company) in schemes of arrangement to be brought forward. As such the companies are of the view that repudiation facilitates, and indeed is necessary, to the formulation of proposals for schemes of arrangement by the examiner."*

147. In relation to the contracts relating to long haul operations, Mr. Jenssen continued: -

> *"These contracts, which are described in the table below, relate, for the most part, to ground handling and/or fuel line services provided to NAS and/or NAI at a number of US international airports. Consequent upon the decision to dispense with long haul operations, such US-based services are no longer required by the group and it is for this reason that NAS and NAI are seeking the leave of this Honourable Court to repudiate the relevant contracts".*

148. In relation to the leases of aircraft and aircraft engines and a number of other contracts, Mr. Jenssen said the following: -

> *"There are a number of contracts (including aircraft and aircraft engine leases) which are no longer required in the context of the group's business plan. This is because they are either surplus to the group's future requirements in light of its scaled back operations (particularly in the case of aircraft and aircraft engine leases) or where the group will require, in order to achieve the required economies, to enter into less expensive contracts or substitute third party contract counterparties with in-house resources."*

149. In his affidavit grounding the second repudiation application sworn on 29 January, 2021, Mr. Jenssen referred to the business plan which had been announced by the Group at the

Oslo Børs on 14 January, 2021, and to the liquidation of TLL. He continued that the examiner remained of the view based on the group's business plan "*which in turn is premised inter alia on the repudiation of contracts the subject of the present application and* [the first repudiation application*] that it is possible for him to formulate proposals for a scheme of arrangement in respect of the companies*". Mr. Jenssen said that the examiner had determined that a number of the agreements to which the companies are a party are required to be terminated in order to enable him to finalise those proposals.

150. Mr. Jenssen expanded on the companies' explanations regarding the manner in which they had treated lessors generally. In response to a complaint made by certain objectors to the application that insufficient information had been placed before the court as to the manner in which the companies had reached the commercial conclusion that those objectors' contracts ought to be repudiated, Mr. Jenssen said the following: -

> *"The applicants affirmed their view that they had treated the relevant notice parties fairly and had given them, on a number of occasions, the opportunity to continue to lease aircraft to the applicants on the terms offered to other parties. The applicants reiterated that it was their belief that the group would be in a position to secure a number of aircraft specified by the examiner on terms that are consistent with the group's business plan. I confirm that the contracts the subject of the first repudiation application and indeed this application have been chosen on a consistent basis. This followed engagement with the various lessors and a proposal made to each of them concerning the retention of aircraft on a substantially similar basis. These proposals included the moving of lease payments to a new arrangement which was based on a model which was proposed uniformly. These proposals, which are known to all the parties, contained specific monetary proposals which are commercially sensitive to the parties and which I do not propose to exhibit here but can as necessary be made available to this Honourable Court on a confidential basis. Accordingly, the choice of contracts for repudiation were fair as between the counterparties, and in the management's view were determined by the requirements of the group's business plan".*

151. In the affidavit grounding the third application, sworn on 1 February, 2021, Mr. Jenssen expanded on the rationale for the application to repudiate guarantees of lease and other finance obligations when he stated as follows: -

> *"The guarantees [the subject of this application] constitute the vast majority of the guarantees given by NAS (or as the context requires AAA), in respect of counterparties to operating leases, finance leases and financing in respect of the purchase of aircraft. All of the guarantees contain an undertaking by NAS and/or AAA, as guarantor that in the event of the failure by the relevant group entity which is a party to the underlying lease or finance arrangement in respect of the aircraft, to pay or perform its obligations under the relevant lease or finance arrangement NAS [and/or AAA where appropriate] will pay or perform such*

obligations as primary obligor. Because all of the relevant leases contain obligations to effect performance other than payment of money (such as, for example the maintenance and storage of aircraft), NAS or as the case may be, AAA, is arguably required under the guarantees to effect performance other than payment of money. To the extent that NAS (and/or AAA where appropriate) has what might best be termed step in obligations (of a monetary and non – monetary nature) in respect (typically) of an aircraft lease, it appears to follow that the lessor/beneficiary of the guarantee will have performance obligations in respect of NAS (and/or AAA where appropriate) in such circumstances".

152. In a supplemental affidavit sworn on 16 February, 2021, Mr. Jenssen restates and updates the position regarding the intention to liquidate the excluded subsidiaries in cases where restructuring of lease and finance terms remain unagreed with the relevant external counterparties.

Evidence of the examiner

153. In his affidavit of 28 January, 2021, the examiner referred to the business plan announced by the company on 14 January, 2021. He said that the business plan proposed that the Norwegian group would: -

(1) Focus on its core business in the Nordic countries, operating a short haul network with narrow body aircraft.

(2) Cease to operate long haul routes.

(3) Initially hold up to 50 Boeing 737 aircraft (owned and leased), primarily operating within Norway and the other Nordic countries and between those countries and the rest of Europe.

(4) The requirement for a significant reduction in the number of aircraft assets held by the group and of other services used by the group.

154. The examiner indicated that he and his team had been assisting the companies in assessing the fleet and services which would be required after the restructuring.

155. The examiner continued: -

"My team and I have and are continuing to carefully consider the Company's Proposal as a basis for proposals for a scheme of arrangement for the Company. Whilst the evaluation is ongoing I am of the view that I will be in a position to formulate schemes of arrangement that would facilitate the survival of the companies and the preservation of employment on the basis of the business plan proposed by the company.

In my view, the termination of the contracts the subject of the company's application would facilitate the formulation of proposals for schemes of *arrangement in respect of the companies in examinership. The approval of the repudiation of those contracts would, in my view, significantly enhance the prospect of the companies attracting the substantial investment that will be necessary to fund a scheme of arrangement to ensure the future survival of the companies and to finance the companies' future working capital requirements.*

In particular, the approval of the repudiation of those contracts would: -

(1) Help to reduce the group's fleet to a size that is consistent with its future scaled – down operating requirements (for example by terminating leases for aircraft and engine leases which are no longer required).

(2) Ensure that the companies are not burdened by ongoing obligations under contracts that relate to services which are surplus to the company's future requirements (for example ground handling or fuel line contracts at airports located in the United States).

(3) Help to reduce the company's operating costs to levels that will enable them to operate sustainably in the future".

156. The examiner continued that it was envisaged that a reduction in the company's fleet size and a restructuring of contractual obligations would be necessary. He referred to the report of the independent expert, Mr. Fennell, which had accompanied the petition for his appointment and in which the independent expert had identified conditions for the companies' survival as a going concern including that "…*a long term restructure of the operational fleet can be implemented*" and that "*the Companies restructure their long-term OEM obligations with regard to new fleet acquisitions*". The examiner stated that he agreed that the company's prospects of survival depend on the conditions identified by the independent expert being satisfied."

157. In a second affidavit sworn on 8 February, 2021, the examiner expressed the view that the business plan, and in particular the focus on the companies' operations on a "*Nordic-centric short haul business*", was critical to ensuring the survival of the companies as a going concern. He repeated his view that the approval of the repudiation of the contracts the subjects of these applications would "*significantly enhance the prospect of the companies attracting the substantial investment that will be necessary to fund a scheme of arrangement to ensure the future survival of the companies and to finance the companies' future working capital requirements*".

158. In the context of the application to repudiate contracts of guarantee the examiner explained that any given aircraft may be the subject of a lease between an external lessor and an entity within the group's asset management platform, including excluded subsidiaries, and the same aircraft may be subleased to an operating company within the group. In many of those cases guarantees were provided by NAS and/or AAA to the external lessor in respect of those leases. The examiner continued: -

> *"I believe that in order for the group to achieve the benefits of a reduction in its fleet size, it is essential that all contracts related to a given aircraft asset are addressed as part of the examinership process. There would be limited benefit to the group in, for example, terminating one of the company's obligations under a lease unless NAS's guarantee obligations in respect of that same lease were also released and discharged as part of the examinership".*

Are proposals for a compromise or a scheme of arrangement to be formulated in relation to the company?

159. The sworn evidence of the examiner is that he is in the course of formulating proposals for a scheme of arrangement in relation to the company.

160. I accept the evidence of the companies and of the examiner that the applications were brought at the point in time that it could confidently be said that proposals "*are to be formulated".*

161. During the course of the hearing certain complaints were made by opposing parties as to the timing of these applications. It was said that they ought to have been issued earlier in the examinership proceedings, and that their timing was designed to place maximum pressure on counterparties in the context of any ongoing negotiations to restructure the relevant contracts. They did not challenge the assertion that proposals for a scheme of arrangement "*are to be formulated*".

162. Subject to certain observations I make in pars. 330 and 331 about timing, I am satisfied that there was nothing inappropriate about the timing of the applications for approvals under s. 537.

Are the relevant leases, guarantees and other agreements "*contracts under which some element of performance other than payment remains to be rendered both by the company and the other contracting party or parties*"?

163. No party has submitted that leases of objects are not executory contracts for the purpose of the section. This question was put beyond doubt by Murray C.J. in *Re Linen Supply of Ireland Limited*, where he said the following: -

> *". . . a lease by its very nature involves the performance of obligations by both the lessor and the lessee other than payment of money. Some of these obligations have been referred to in the course of the hearing such as the right to quiet enjoyment and to obligations to insure. It has not been shown that the obligations arising under the leases in this case are confined to the making of payments".*
> (emphasis added)

164. The question of whether the contracts of guarantee are executory contracts is less clear, and requires an examination of the contracts in each case.

165. The traditional approach to guarantee obligations in an examiner's scheme of arrangement is to treat them as contingent liabilities capable of being subjected to the provisions of the scheme itself, typically with the scheme recognising the obligation at the level of priority which the claim would enjoy on the occurrence of the contingency.

166. Each of the guarantees the subject of this judgment, contains a clause expressing it to be subject to the laws of England and contains a submission to the jurisdiction of the courts of England. The companies have exhibited the opinion of their own English solicitors, Hogan Lovells, in which they express their view on this question having regard to the Contract Summaries exhibited. The critical paragraph in their opinion letters in each case is para. 6 in which they state as follows: -

> *"Based on the foregoing and the assumptions in Appendix A to this report (which we have taken no steps to verify) and subject to the qualifications and observations set out below and to any matters not disclosed to us, we confirm that:*
>
> *(a) Save for the items identified in Appendix D to this report, the description of the Agreements and their provisions in the Contract Summaries is correct.*
>
> *(b) Without prejudice to the generality of para. (a) above, the clauses identified in the contract summaries as constituting obligations of the parties to the Agreements, in respect of which some element of performance other than payment remains to be rendered, constitute obligations to do something other than the payment of money ("Non-Monetary Obligations")".*

167. The letter refers in each case to the Contract Summary prepared by Matheson. The exhibited opinions of Messrs. Hogan Lovells are evidence as to the description of non-monetary obligations in each case and no contrary evidence has been proffered. That evidence is that the contracts contain non-monetary obligations, as required by s. 537.

Credit Agricole

168. In the case of Credit Agricole the Contract Summary refers to the basic obligations whereby the guarantor NAS guarantees to the beneficiary Credit Agricole the due and punctual payment performance and discharge by the lessee of the guaranteed obligations. The lessees are excluded subsidiaries: Sognefjorden Limited, Ofatjorden Limited, and Tysfjorden Limited.

169. The guaranteed obligations are defined to mean "*any and all monies liabilities and obligations (whether actual or contingent, whether now existing or hereafter arising, whether or not for the payment of money and including without limitation any obligation or liability to pay damages) from time to time owing by the Lessee to the Lessor and the Secured Parties under the Lessee Documents*."

170. The non-monetary obligations of the guarantor are described to include the following:-

- The obligation to comply with all authorisations, laws and regulations.

- To provide such information as may be required and in any event to provide within 180 days after the end of each financial year to the beneficiary a copy of its annual audited financial statements for that year.

171. Reference is then made to the potential obligations of the guarantor in respect of other performance obligations such as maintenance, storage, insurance.

172. Turning to the non-monetary obligations of the beneficiary, the summary refers to obligations of confidentiality. The obligation of confidentiality appears to derive not under the guarantee document itself but under a related All Parties' Agreement which governs the guarantee, the leases and related instruments. The All Parties' Agreement also contains other obligations on the part of the beneficiary and notes the beneficiary acceding to such obligations as the quiet enjoyment covenants under the relevant leases.

173. Although the confidentiality obligation is not expressly contained within the guarantee contract, the All Parties' Agreement requires that the guarantee be read in conjunction with the entire suite of agreements relating to the relevant asset. Accordingly the confidentiality obligation is an integral feature of the contractual obligations between the parties.

174. It was submitted by the objectors that an obligation of confidentiality is so passive as to not be a performance obligation other than the payment of money as required by s. 527(1). It is clear from the judgment Murray C.J. in *Re Linen Supply* that unless it can be said that the contract is strictly or confined to the making of payments, it qualifies under the section.

175. It was submitted by the companies that because the guarantor may be called on to perform obligations of the lessee which are non-monetary, such as maintenance, repair and other compliance obligations, this places the beneficiary in a position where if it calls on the guarantor to perform such obligations it will attract corresponding obligations to the guarantor to enable the guarantor to fulfil its obligations qua lessee.

176. This is a somewhat inventive analysis and was not the subject of any detailed submissions. However, it was not contested by the objectors.

177. Taking into account the obligations referred to above, and the uncontested evidence of Messrs. Hogan Lovells as to the nature of the obligations, I am satisfied that the relevant contracts meet the test identified by Murray C.J. in *Re Linen Supply* in that they are not confined to the payment of money.

Utah and Citibank Group

178. The contract summaries relating to the guarantees in favour of Citibank NA refer to guaranteed obligations as meaning "*any and all monies, liabilities and obligations (whether actual or contingent, whether now existing or hereafter arising, whether or not for the payment of money and including, without limitation any obligation or liability to pay damages) from time to time owing by the Lessee to the Lessor and the Secured Parties under the Operative Documents"*.

179. The Operative Documents are defined to mean a suite of agreements governing such matters as the leases themselves, payment undertakings, insurance policies, security agreements, notices of assignment of subleases and acknowledgments thereof, aircraft

mortgages, aircraft insurance assignments, notices to aircraft insurers, aircraft reinsurance assignments, share charges, purchase assignment supplements, powers of attorney, funding requests, inter creditor deeds, declarations of trust and numerous other agreements.

180. The non-monetary obligations remaining to be rendered by the guarantor are stated to extend to a guarantee of "*the due and punctual payment, performance and discharge by the lessee of the guaranteed obligations*" (emphasis added). These are stated to include obligations relating to registration, maintenance, operation, use, inspection, insurance and information concerning the aircraft and engines.

181. As regards the beneficiaries, the non-monetary obligations are stated to include the obligation of confidentiality incorporated by a Participation Agreement which is one of the relevant Operative Agreements.

182. Having regard to the obligation of confidentiality referred to, and the potential reciprocal obligations in the event that the guarantor is called upon to perform obligations under the lease, taken together with the uncontested evidence of Hogan Lovells, I am satisfied that the guarantee agreement is not one in which the obligations of the beneficiary are confined to the making of payments.

183. Similar contract summaries and conclusions arise in relation to the guarantees in favour of Bank of Utah.

PK Air Finance

184. In relation to PK Air Finance, the guarantees sought to be repudiated were granted in favour of Flip no. 156 Company Ltd. and Flip no. 158 Company Ltd, which, importantly, are also the head lessors.

185. They are expressed to be guarantees of all of the monetary obligations under the terms of the relevant leases and of non-monetary obligations comprising the obligation to perform or discharge any of the lessee guaranteed obligations, which include such matters as the obligations to ensure continued compliance with laws and regulations, obligations concerning information and production of financial statements, and obligations by the guarantor, NAS, concerning the retention of ownership of the relevant lessee.

186. The non-monetary obligations on the part of the head lessor as beneficiary of the guarantee are expressed to include the following: -

- Confidentiality.
- Obligations concerning the provisions of notices in respect of any defaults by the lessee.
- Objections concerning the assignment or transfer of rights.

187. It is also submitted in relation to the guarantees that in any case where the guarantor is required to perform the obligations of the lessee under the lease, the beneficiary, being

also the lessor would attract corresponding non-monetary obligations in favour of the guarantor to enable the guarantor to render and deliver performance of the remaining obligations under the lease.

188. Taking account of the provisions referred to above, and the uncontested opinion of Hogan Lovells, I am satisfied that the guarantees in these cases also meet the test identified by the Chief Justice in *Re Linen Supply*.

189. It is unusual to characterise guarantees as executory contracts. Typically they impose predominantly monetary obligations. However, the contract summaries have referred me in each case to non-monetary obligations. In certain cases, those non-monetary obligations are limited and the predominant feature of the guarantees is the monetary obligations. Nonetheless, it is clear from *Re Linen Supply* that unless the contract obligations are found to be confined to monetary obligations and nothing more, they satisfy the test of being an executory contract which is a threshold for the application of s.537.

190. Having regard to the terms of the Contract Summaries and the Hogan Lovells' opinions, I am satisfied that it cannot be said of the relevant leases or of the guarantees that they establish obligations which are confined to the payment of money. Therefore, they satisfy the test described by Murray CJ. in *Re Linen Supply*, and are contracts to which s. 537 applies.

Exercise of the court's discretion – the standard of review

191. The companies submit that it is not the function of the court on this application to enter into an appraisal of the commercial merits of the companies' decisions to repudiate contracts or to substitute its own judgment for that of the companies. They submit that provided the company is acting in good faith and rationally the court should not enter this sphere. The submission continues that the court should allow considerable scope to the company itself to determine what is commercially necessary to enable a sustainable and "*investible*" business to be rescued and emerge from examinership. It submits that the court should only concern itself with scrutinising whether the company in selecting particular contracts for repudiation has done so for a proper purpose, in good faith and in pursuit of the business rationale of the survival of the company as a going concern.

192. The companies submit that the scheme of the Act is such that when the companies determine to repudiate contracts and apply to court for approval under s. 537 (1) they must present evidence of a rational position and belief on their part that the proposed repudiations will facilitate the bringing forward of proposals for a scheme of arrangement which in turn will facilitate the survival of all or part of the companies and the whole or part of its undertaking as a going concern. They say that the focus of the court should be to ensure, before approving a repudiation that the companies have undertaken a genuine process of deliberation that is not obviously flawed and that there is a rational connection between the proposed repudiation and the survival objective. It is submitted that it is proper for the court to inquire whether the decision as to intended repudiations are made

in good faith and for proper purpose and genuinely aimed at what the company believes is a satisfactory optimal restructuring.

193. The companies cite the judgment of McGovern J. in *Re Bestseller Retail Ireland Limited* [2010] IEHC 155, as an instance of the court finding that the decision of a company was made for a different purpose than the objective of Part 10 of the Act. In that case, the court had found that the selection decision in terms of which contracts to repudiate was made in order to shelter the parent company from demands under guarantees.

194. The companies submit that in accordance with the judgments of the court in *Re Ladbrokes (Ireland) Limited* [2015] IEHC 381, [2015] 1 IR 243, and Re Eircom Limited [2012] IEHC 158, it is appropriate to afford a measure of deference to the decisions of the company. They submit that since the examiner has endorsed the company's approach and stated that the repudiation of the contracts is necessary, and will make the companies investible the principle in *Ladbrokes* and *Eircom* (followed by this Court in *Re MDY Construction* [2018] IEHC 676) should be applied, namely that a degree of curial deference should be afforded to the decisions of the companies.

195. The objectors submit as follows: -

(1) That the principle in *Eircom/Ladbrokes* applies to the special position of the examiner and not to the companies.

(2) That there is no reason to afford the same deference to the decision of the companies as the court in those judgments afforded to the examiner.

(3) That the onus is on the companies to explain intelligibly and with evidence the commercial rationale underpinning the decision and the perceived undesirability of maintaining each individual contracts ought to be repudiated.

(4) That particular evidence should be provided in respect of each individual contract sought to be repudiated. That only if this is done can the counterparties and the court engage with the decisions and analyse whether a repudiation was truly necessary to facilitate the formulation of proposals by the examiner and to facilitate the survival of the company as a going concern.

(5) That the companies have not in this case put before the court the evidence, in respect of each of the contracts to be repudiated, to show why repudiation of each such contract is necessary. That the general evidence of the company's restructuring plan, involving as it does a resetting of the levels of cost associated with contracts, both leases and others, albeit endorsed by the examiner, is not sufficient to meet the proper test to be applied.

(6) That the judgments in *Ladbrokes* and *Eircom* do not mean that a lower standard of review should be applied than would otherwise be applied to the commercial decisions of the company.

(7) That *Bestseller* is not authority for a proposition that only if an improper purpose can be shown should the court refuse approval.

(8) It is submitted that the court should not simply "rubber stamp" the decisions to repudiate.

(9) That the constitutionally protected property right of the counterparties in their contracts cannot be defeated merely based on the company's assertion that repudiation is necessary, and therefore that repudiation should be approved only on an exceptional basis.

196. The objectors do not submit that the decisions of the company are improperly motivated. They submit that the timing of the applications, and the bringing of such wholesale applications reveal a strategy on the part of the companies to apply pressure on counterparties to negotiate more favourable terms going forward.

197. The objectors accept that it is not essential that it is shown that the contracts are "onerous" within the meaning of that term defined by s. 615 for the purpose of disclaimer by a liquidator. They submit instead that it should at least be proved that the relevant contract is commercially detrimental to the company to such a degree that its repudiation is necessary for the restructuring.

198. It is submitted that the default position in an examinership is that a company should exit examinership with its commercial contracts undisturbed and that the facility of repudiation under s. 537 is an exceptional facility to be used sparingly.

199. *Re Eircom Limited* concerned an application under s. 13 (7) of the Companies (Amendment) Act 1990, the direct equivalent of s. 532, subs. 9 of the Companies Act 2014. That section provides that where an examiner has been appointed to a company: -

> *"…any interested party may apply to the court for the determination of any question arising out of the performance or otherwise by the examiner of his or her functions".*

200. The application was made by a party which was a creditor of the company and which had also sought unsuccessfully to participate in the process of investment in the subject company. The applicant sought orders directing the examiner to engage with the applicant, to disclose certain valuation reports which had been prepared for the examiner and an order postponing of statutory meetings of creditors, pending further engagement between the examiner and the applicant.

201. The court declined the application finding that if the court were to make the orders sought it would be micromanaging the examinership and embarking on a form of judicial review of the examiner's decisions, which decisions involved a commercial judgment being exercised by him.

202. Kelly J. noted that it was important that the role of an examiner is conferred on persons who were appointed by the court who have particular knowledge and expertise. The court noted the requirement for an affidavit verifying the fitness of the person nominated as examiner. The court continued: -

> *"The court has neither the expertise, nor indeed the backup to make commercial decisions. The court is here in a supervisory role and to decide legal issues. And in the event of the examiner either misbehaving or doing something which is wrong in law there may well be an ability for the court to intervene in such circumstances. But in areas of commercial judgement it seems to me that the court's scope for intervention is very limited. And I am not sure at all that the Act envisaged anything like an application of this sort because it doesn't envisage an appeal mechanism or a judicial review mechanism".*

203. As to the standard by which the conduct of the examiner would be judged, Kelly J. continued: -

> *"There is no authority in point in respect of an examinership in this jurisdiction but I am very much inclined to take the view that the observations of the courts in England, which are encapsulated in a passage from Lightman and Moss on the Law of Administrators and Receivers of Companies is persuasive. It persuades me that the court should only intervene in respect of the behaviour of an examiner in very limited circumstances".*

Kelly J. then quoted the passage from Lightman & Moss on the Law of Administrators and Receivers of Companies which he believed summarised the appropriate test: -

> *"When called upon to review the exercise by insolvency office-holders of their powers, the Court has said that in the absence of fraud it will only interfere if they have done something so utterly unreasonable and absurd that no reasonable man would have done it. The question is not whether the Court would have acted in the same way or would have reached the same conclusion as the insolvency practitioner. Nor will the resulting transaction be set aside where it is established merely that a reasonable practitioner may have acted differently or reached a different conclusion as long as the course of action pursued by the administrator was one that a reasonable practitioner could reasonably have contemplated. The legal basis for interference is the office-holder's perversity or irrationality. To this extent it can be said that in exercising its power for their proper purposes the administrator is under a duty to act rationally".*

204. Kelly J. held that this quote represented the appropriate standard to apply in assessing the decisions of the examiner which were sought in that case to be impugned.

205. In *Re Ladbrokes (Ireland) Limited*, an application was made under the same section by a potential investor in the companies in examinership. The examiner had invited parties to

submit final offers. In doing so he declined to provide certain commercial information concerning shops operated by the companies which were sought by the applicant. The court refused an order directing the examiner to provide the additional information sought by the applicant.

206. Cregan J. adopted the test described by Kelly J. in *Re Eircom Limited.*

207. In the course of his decision Cregan J. analysed the question of whether the decision made regarding access to information sought by the applicant was a decision of the examiner or a decision of the company. He concluded that the decision to withhold the relevant confidential information was a decision of the examiner in the exercise by him of his commercial judgment.

208. Cregan J. then cited with approval the passages quoted above from the decision of Kelly J. in *Re Eircom Limited* and the passage from *Lightman & Moss on the Law of Administrators and Receivers of Companies* (5th edn, Sweet & Maxwell 2011) as to the standard of review to be applied to decisions of the insolvency office holder.

209. It is clear from the judgments of Kelly J. and of Cregan J. that they were conferring on the decision of the examiner a measure of deference having regard to the commercial judgment being exercised by him and having regard to his particular position as an independent insolvency office holder appointed by the court pursuant to the provisions of the Act and having regard to his credentials and expertise in the conduct of examinership matters.

210. By contrast, the decision to invoke s. 537 to repudiate contracts is a decision of the company and not of the examiner. The fact that the decision to repudiate requires the approval of the court does not elevate the decision to being one of the examiner.

211. It was submitted on behalf of the companies that inasmuch as the examiner endorsed the decisions made by the companies as to which contracts to repudiate the court should accord a measure of deference to that professional judgment in a fashion akin to the approach followed in *Eircom* and *Ladbrokes*.

212. The support of the examiner is relevant and informative, but does not alter the fact that the decisions are those of the companies, and must be assessed in that light.

213. None of this is to say that the court should substitute its judgment for that of the commercial judgment of the companies themselves. I have earlier in this judgment analysed the context of s. 537 and concluded that as the power to repudiate is an exceptional power, it is necessary to show not only that the repudiation will facilitate the formulation of proposals for a scheme of arrangement and the survival of the company as a going concern, but that the relevant repudiations are actually necessary to achieve that purpose.

214. It seems to me that the following sequence of questions should be asked: -

(1) Has the company made its decisions as to repudiations in furtherance of the objective and purpose of Part 10 of the Act and the purpose for which the examiner was appointed by this Court, namely the formulation, consideration and confirmation of proposals for a scheme of arrangement which will facilitate the survival of the company and all or part of its undertaking as a going concern?

(2) Has the company established that repudiation of the contracts is necessary to achieve that purpose?

(3) If (1) and (2) above have been satisfied, the court should balance the interests of the individual counterparty against the interests of the company and the members and creditors of the company as a whole.

215. It is a necessary part of the analysis at (1) above to consider if there is any evidence that the choice of contracts to be repudiated was made by reference to a purpose different from the purpose of the Act and of the examiner's appointment.

216. Earlier in this judgment I have quoted extensively from the evidence of Mr. Jenssen and the evidence of the examiner. There is some force in the submissions made by the objectors that the information placed before the court is generic in nature and lacks an evidence-based analysis for each individual contract as to why repudiation thereof is necessary to achieve the objectives of the Act. Nonetheless, the time constraints in Part 10 of the Act rendered it necessary to commence these applications before all possible negotiations had been exhausted. Therefore, when the applications were first issued, it was said that the repudiation of 425 contracts with approximately 68 counterparties was necessary. Up to and including the hearing of these applications, and over the course of the five days during which they were at hearing progress was made by the companies in negotiations with the counterparties culminating in the withdrawal of a large number of the applications.

217. In the particular circumstances of this complex case the evidence which was placed before the court for the purpose of the hearing, which of necessity did not take account of the final outcome of all of the negotiations with every counterparty, demonstrates that the repudiations were necessary. No evidence has been put before the court that the contracts with the counterparties who are still maintaining their objections were selected for any improper purpose or inconsistently with the objective of the Act and of the Section.

218. The objectors submit that it is not enough for the companies to contend that the companies will be more "investible" after these contracts have been repudiated. It seems to me that in circumstances where the examiner has sworn that he believes that repudiations of these contracts are necessary to secure the investment necessary to underpin the scheme of arrangement and has detailed the basis for this belief, the requirement of necessity has been established.

219. The information has been presented fairly and in a balanced fashion and across the range of contracts the subject of these applications. The court is now left with the question of whether to authorise the repudiation of those contracts with counterparties in respect of whom no consensual outcome has proved possible.

220. I accept the evidence of the company that it has set about this process in an even-handed and balanced fashion. The examiner was appointed at a time when the companies found that court protection and a formal restructuring by a scheme of arrangement pursuant to Part 10 of the Act was necessary for their survival as a going concern.

221. After the examiner was appointed the company continued its efforts to secure consensual resolution or restructuring of contracts and this process continued following the appointment of the examiner and up to and including the commencement of these applications and continued through to the dates on which they were heard.

222. Inasmuch as the evidence was somewhat generic, and, apart from basic factual information, not individual to each and every contract as far as concerns the question of necessity, this in turn was a necessary consequence of the scale of the application and the complexity of this examinership as a whole. I therefore concluded that the presentation of that information was sufficient to illustrate such necessity.

223. Since the issue and service of the applications and even after the commencement of the hearing of these motions, a number of the applications were withdrawn, and a number of orders approving repudiation were made on terms which have been agreed between the parties. Although the court was informed of the fact that such progress was being made and that consent orders could be made, the court was not informed of precisely the terms on which the vast majority of the 425 contracts have been either terminated, repudiated or amended by an agreement.

224. Against this background of 425 contracts and 68 counterparties, all of whom were notice parties on these applications, I have come to the conclusion that the information presented to the court is sufficient to conclude that the applications before the court were made for the proper purposes intended by Part 10 of the Act and that repudiation of the contracts the subject of these applications are necessary and will facilitate the survival of the companies as a going concern.

225. Inasmuch as the repudiations trespass on the rights of counterparties to the contracts, the companies were clearly insolvent at the time of the presentation of the petition. The evidence before the court is that their return to viability is dependent not only on the investment and the restructuring proposals which will be brought forward by the examiner, but also on the restructuring of the cost base of the companies sought to be achieved by the repudiations.

226. If the companies were to enter liquidation they would by definition be unable to perform the contracts and the counterparties claim for damages flowing from the breach would

rank as unsecured claims. The effect of s. 537 (2) is that the Act respects their rights in respect of damages, to be recognised in the scheme of arrangement.

Are there any factors pertaining to the three groups of objecting counterparties which would justify refusal of approval in their particular cases?

Credit Agricole

227. NAS seeks approval to repudiate the subleases of three aircraft from Sognefjorden Limited (an excluded subsidiary). The undisputed evidence is that the three aircraft concerned were "*wide bodied aircraft*", utilised typically in the context of the long haul operations of the group, which it is said are being discontinued. That evidence is not contradicted and it is clear therefore that if inasmuch as the business plan entails a discontinuance of the long haul business, the repudiation of leases associated with that business is necessary for the restructuring.

228. Only the sublease to NAS can be the subject of a s. 537 repudiation and Sognefjorden Limited as an excluded subsidiary cannot avail of the section.

229. The evidence of the companies is that in such cases, it will be a matter for the excluded subsidiary to negotiate a return of the aircraft to the lessor and if ultimately terms cannot be agreed the excluded subsidiary will itself be liquidated. Against that background, NAS seeks approval to repudiate the guarantee it granted in respect of Sognefjorden's obligations to the head lessor and to Credit Agricole.

230. If there were evidence before the court that any of the companies or any of the excluded subsidiaries intended to retain and continue to avail of the benefit of an aircraft or object, the court would not permit the repudiation of a guarantee granted to the head lessor or finance party in respect of obligations corresponding to that object. That is not the evidence here, and Sognefjorden is an excluded subsidiary which it is said will be liquidated. Therefore, the head lease is surplus to the Group's requirements and repudiation of the corresponding guarantee is consistent with the repudiation of the sublease and the inevitable termination of the head lease.

231. Similarly, in relation to the three aircraft leased to Ofotfjorden and Tysfjorden, again being excluded subsidiaries, the destination of the aircraft themselves is outside the scope of the examinership in that these excluded subsidiaries cannot avail of s. 537. However, the evidence is that these excluded subsidiaries will not be retaining the aircraft or operating the aircraft in the future. Therefore, repudiation of the corresponding guarantees by NAS is consistent with the requirements described by the companies and the examiner.

Bank of Utah and Citibank NA

232. Fourteen aircraft are relevant to these objectors. All are leased to excluded subsidiaries. The excluded subsidiaries cannot avail of s. 537.

233. The application relating to these parties concerns only the guarantees of the leasing obligations granted by both NAS and AAA in favour of Citibank and Utah.

234. The evidence of the company is that these excluded subsidiaries will not be retaining the benefit of the relevant aircraft. Although the court does not have before it direct evidence as to precisely what has transpired between these excluded subsidiaries and the relevant lessors and finance parties, this is consistent with the stated business plan in the evidence of the companies and there are no particular factors would justify refusing approval of the repudiation of the corresponding guarantees.

PK Air Finance

235. In this case, a resolution was concluded in relation to one of the aircraft and one of the three applications was withdrawn. Nonetheless, the application for approval was pursued in respect of guarantees issued by NAS in respect of the obligation under a lease to DYI Aviation and a sublease to Norwegian Air Sweden. Both of these companies are excluded subsidiaries. It was not in dispute that it was not the intention of any of these companies to retain the benefit of the relevant aircraft. In those circumstances no special reason exists for refusing to sanction or approve the repudiation of the corresponding guarantees

236. Certain issues were raised by PK Air Finance in relation to the application of the Cape Town Convention, which I shall consider below (para. 302 et seq.).

Jurisdiction

237. Submissions were made by the opposing parties to the effect that orders should not be made pursuant to s. 537 in circumstances where they would purport to have extraterritorial effect. It is submitted that there is nothing in the Act to justify the enlargement of the court's jurisdiction to affect contracts entered into with a Norwegian company where those contracts are governed by English law and contain exclusive jurisdiction clauses in favour of the courts of England. It is submitted that as a matter of basic statutory interpretation, s. 537 is not intended to and does not have extraterritorial effect.

238. These submissions relate only to the applications made by NAS. They do not extend to the applications made by AAA because, AAA has been found to have its centre of main interests in the State and is therefore a company to which the provisions of Regulation EU 2015/848 on Insolvency Proceedings (Recast) apply. Because a number of the submissions as to an absence of extraterritorial effect in the case of NAS are made by way of contrast with the position which prevails with AAA, it is appropriate to refer briefly to the provisions of the Regulation on this subject ("the Regulation").

239. Article 3 of the Regulation provides that the courts of the member state in which the centre of main interests of a debtor is situated have jurisdiction to open main insolvency proceedings in relation to the company.

240. I have already found ([2020] IEHC 664) that NAI, AAA and each of the subsidiaries of AAA has its centre of main interests in this State and accordingly these proceedings are main proceedings for the purpose of the Regulation.

241. Article 5 provides that a debtor or any creditor may challenge the decision to open main insolvency proceedings on the grounds of international jurisdiction. No such challenge has been made in this case.

242. Article 6 provides: -

> *"The courts of the Member State within the territory of which insolvency proceedings have been opened in accordance with Article 3 shall have jurisdiction for any action which derives directly from the insolvency proceedings and is closely linked with them, such as avoidance actions".*

243. Again, in the context of AAA, it has not been suggested that an application pursuant to s. 537 is otherwise than an action "which derives directly from the insolvency proceedings".

244. Article 7 governs applicable law and provides inter alia: -

> *"2. The law of the State of the opening of proceedings shall determine the conditions for the opening of those proceedings, their conduct and their closure. In particular, it shall determine the following: …[where relevant]*
>
> *(c) the respective powers of the debtor and the insolvency practitioner; …*
>
> *(e) the effects of insolvency proceedings on current contracts to which the debtor is party;* (emphasis added)
>
> *(g) the claims which are to be lodged against the debtor's insolvency estate and the treatment of claims arising after the opening of insolvency proceedings;*
>
> *(h) the rules governing the lodging, verification and admission of claims;*
>
> *(i) the rules governing the distribution of proceeds from the realisation of assets, the ranking of claims and the rights of creditors who have obtained partial satisfaction after the opening of insolvency proceedings by virtue of a right in rem or through a set-off".*

245. It has not been suggested that applications under s. 537 do not relate to the conduct and closure of these proceedings in relation to AAA and clearly s. 537 relates to the "*effects of insolvency proceedings on current contracts to which the debtor is a party".*

246. Article 19 provides as follows: -

> *"1. Any judgment opening insolvency proceedings handed down by a court of a Member State which has jurisdiction pursuant to Article 3 shall be recognised in all other Member States from the moment that it becomes effective in the State of the opening of proceedings".*

247. Article 32 provides as follows: -

> *"Judgments handed down by a court whose judgment concerning the opening of proceedings is recognised in accordance with Article 19 and which concern the course and closure of insolvency proceedings, and compositions approved by that court, shall also be recognised with no further formalities. Such judgments shall be enforced in accordance with Articles 39 to 44 and 47 to 57 of Regulation (EU) No 1215/2012.*
>
> *The first subparagraph shall also apply to judgments deriving directly from the insolvency proceedings and which are closely linked with them, even if they were handed down by another court".*

248. As regards the effect of the Regulation in England and Wales the court was informed that by virtue of the European Union (Withdrawal Agreement) Act 2020 (c. 1), the Regulation applied to insolvency proceedings which had been opened before the end of the transition period ended 31 December, 2020. These proceedings had been commenced on 18 November, 2020. Accordingly, it was not in dispute that the Regulation applied to AAA and that these proceedings and orders made in the matter of AAA would have full force and effect in England and Wales in accordance with the Regulation.

249. On behalf of the Credit Agricole creditors and PK Air Finance it was submitted that the jurisdiction of a domestic court to determine rights affecting parties outside of its jurisdiction can only be established by international treaty. The submission continues that there is no such treaty which vests jurisdiction in an Irish court to make orders affecting NAS because the Regulation does not apply to it.

250. This submission fundamentally misunderstands the purpose and effect of the Regulation.

251. The Regulation does not set out to harmonise substantive rules on insolvency law. It harmonises the rules concerning the jurisdiction of courts as between member states and the rules regarding applicable law governing those proceedings and concerning the recognition of orders made in such proceedings.

252. A perusal of the recitals to the Regulation reinforces this conclusion where it states as follows: -

- *"The proper functioning of the internal market requires that cross-border insolvency proceedings should operate efficiently and effectively"* (Recital 3).
- *"It is necessary for the proper functioning of the internal market to avoid incentives for parties to transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favourable legal position to the detriment of the general body of creditors (forum shopping)"* (Recital 5).
- "*In order to achieve the aim of improving the efficiency and effectiveness of insolvency proceedings having cross-border effects, it is necessary, and appropriate, that the provisions on jurisdiction, recognition and applicable law in*

this area should be contained in a Union measure which is binding and directly applicable in Member States" (Recital 8). (emphasis added)

253. The recitals therefore recognise that the purpose of the Regulation is to improve the regime concerning jurisdiction and recognition, and the avoidance of forum shopping. Article 3 governs the question of whether insolvency proceedings opened in relation to a debtor to which the Regulation applies, namely a debtor having its centre of main interests within a Member State, are main proceedings or secondary proceedings and accordingly the scope of their effect.

254. Article 7 then addresses the question of applicable law and Articles 8 to 18 contain special rules governing the applicable laws as regards the effect of insolvency proceedings on particular matters and asset categories.

255. In relation to a debtor which does not have its centre of main interests in a Member State, the national laws govern the question of jurisdiction, in the case of Ireland by the Companies Act 2014. In relation to such a debtor, that jurisdiction is no less today than it was before the enactment of the original Regulation in 2002.

256. The submission of the opposing parties was to the effect that the default position under domestic law is that which obtained prior to the insolvency regulation, and which it is said that regulation was necessary to overcome, namely that an Irish court had no jurisdiction in an insolvency context to extraterritorially "*interfere with*" matters within the jurisdiction of a foreign court such as England. It was submitted that the result or effect which NAS is contending for in these applications is to be treated as though it were an entity to which the Insolvency Regulations (Recast) applied in circumstances where that regulation does not apply.

257. For the reasons I have identified earlier, this is not what NAS seeks to do and therefore I now return to the basic question of whether, outwith the Regulation, the court has jurisdiction to make orders under s. 537.

258. The objectors cited Dodd on *Statutory Interpretation in Ireland* where the following was relied upon: -

> *"Unless the contrary intention appears, enactments generally are not intended to apply to persons who are not citizens or residents of the Republic of Ireland in respect of their affairs or conduct which are outside of the territory of the Republic of Ireland. Comity refers to the convention of mutual recognition and respect afforded by sovereign nations to each other. Under the comity of nations, the legislature of one country is presumed not to legislate for persons or matters the jurisdiction over which properly belongs to another sovereign state. Courts are likely to be disposed to interpret a provision so that it will not infringe the generally recognised principles of international law, and issues of enforcement and comity will inform interpretation. By way of general comment*, where there is some relevant

nexus with the State, arguments against extraterritorial scope of an enactment may be less well received". (Emphasis added).

259. In the First Judgment in these proceedings delivered on 16 December, 2020, (2020 IEHC 664), I found as a matter of fact that there was such a nexus with the State, and that NAS had a sufficient connection with the State to enable the jurisdiction under Part 22 of the Act to be invoked and therefore that the company was a company liable to be wound up under Part 22 of the Act. I found as follows: -

> *"Whilst much of the above activity is performed through the subsidiary companies incorporated in Ireland, it is clear that the commercial operations of the Group taken together with the range of legal transactions entered into by both NAS and its subsidiaries are so closely linked and interdependent that NAS has a real and deep connection to the State, and meets the test of a sufficient connection endorsed by Laffoy J. in Re Harley Medical Group. Accordingly, NAS is liable to be wound up under Part 22 of the Act and is a related company for the purpose of s. 517".*

260. The examiner was appointed to NAS under the provisions of s. 517 of the Act which established the jurisdiction to appoint an examiner to a company related to a company to which an examiner was appointed under the principal jurisdiction conferred by s.509.

261. Having regard to the objectives and purposes of Part 10 of the Act as a whole, it seems to me that to read and apply Part 10 and in particular s. 537, such as to limit its effects to only those members, creditors and counterparties of the company which are themselves within the jurisdiction of the State would undermine the objective of the legislation, and would deprive Part 10 of its purpose.

262. Insofar as Part 22 relates to a company incorporated outside Ireland, and the court exercises the jurisdiction to appoint an examiner on the basis that it is a company capable of being wound up in the State, this almost by definition, means that it is an entity having multinational transactions. The very decision to extend the appointment of the examiner to NAS as a related company, recognises that the court in making the appointment is exercising jurisdiction over a company which has sufficient connection for that purpose to the State and may have substantial assets and undertakings, including contracts with counter parties, outside the State. To find that this Court had such jurisdiction and then to limit the effects of the proceedings, and of the tools necessary for the achievement of the objectives of the proceedings pursuant to Part 10, to activities and counterparties within the State would defeat the purpose of the jurisdiction conferred by the Act and which this Court has already determined to exercise in relation to NAS.

263. *Bilta (UK) Ltd (in Liquidation) v Nazir* [2015] UKSC 23, [2016] AC 1, concerned proceedings by liquidators under s. 213 of the Insolvency Act 1986 seeking to hold certain parties personally liable for fraudulent trading. Certain of the defendants contended that the claim was bound to fail because the section had no extra territorial effect. Lord Sumption rejected this argument stating as follows: -

> *"Most codes of insolvency law contain provisions empowering the court to make orders setting aside certain classes of transactions which preceded the commencement of the liquidation and may have contributed to the company's insolvency or depleted the insolvent estate. They will usually be accompanied by powers to require those responsible to make good the loss to the estate for the benefit of creditors. Such powers have been part of the corporate insolvency law of the United Kingdom for many years. In the case of a company trading internationally, it is difficult to see how such provisions can achieve their object if their effect is confined to the United Kingdom".*

264. Lord Sumption referred to the discretionary power to impose personal liability, noting that the relevant section contained no express limits on its territorial application. He referred also to s. 238 of the Insolvency Act 1986 (UK), which deals with preferences and transactions at an undervalue and which was held by the Court of Appeal to apply without territorial limitations in *Re Paramount Airways Limited* [1993] CH 223. At para. 110, he quoted from the leading judgment in that case of Sir Donald Nicholls V-C where he observed as follows: -

"(i) that current patterns of cross-border business weaken the presumption against extra-territorial effect as applied to the exercise of the courts' powers in conducting the liquidation of a UK company;

(ii) that the absence in the statute of any test for what would constitute presence in the UK makes it unlikely that presence there was intended to be a condition of the exercise of the power".

265. Lord Sumption referred also to the submission to the effect that the words "*any persons"* in s. 213 meant only persons in the UK. He said that in his opinion that argument was misconceived. The submission made by the opposing parties in this case requires the court to find that the word "*contract*" in s. 537 (1) was intended to mean only a contract entered into with a counterparty within the State.

266. Again in *Bilta*, Lord Toulson and Lord Hodge stated the following: -

> *"Whether a court has such subject matter jurisdiction is a question of the construction of the relevant statute. In the past it was held as a universal principle that a UK statute applied only to UK subjects or foreigners present in and thus subjecting themselves to a UK jurisdiction unless the Act expressly or by necessary implication provided to the contrary…That principle has evolved into a question of interpreting the particular statute …*
>
> *…In Cox v Ergo Lord Sumption suggested that an intention to give a statute extra-territorial effect could be implied if the purpose of the legislation could not effectually be achieved without such effect.".*

267. Their Lordships continued: -

> *"It would seriously handicap the efficient winding up of a British company in an increasingly globalised economy if the jurisdiction of the court responsible for the winding up of an insolvent company did not extend to people and corporate bodies resident overseas who had been involved in the carrying on of the company's business".*

268. If a company is permitted to avail of the examinership regime prescribed in Part 10 of the Act but the tools contained in the Act, including s. 537, were limited in their effect in the manner suggested by the objectors, the purpose of the legislation itself, particularly in circumstances of a company having an airline business, would be defeated.

269. Reference was made by the objectors to the judgment of Carroll J. in *Chemical Bank v McCormack* [1983] ILRM 350, concerning the Banker's Books (Evidence) Act 1879 and to the judgment of McKechnie J. in *Walsh v National Irish Bank* [2013] 1 IR 294, concerning s. 908 of the Taxes Consolidation Act 1997. In both of these cases the court found that in the absence of express provisions regarding extraterritorial effect, the relevant Acts should be presumed to be limited in their application to the State. These cases were relied on as authority for a presumption that the legislature did not intend s. 537 to have extraterritorial effect.

270. A critical difference between the issues under consideration in *Chemical Bank v McCormack* and Walsh v *National Irish Bank* and the present case is that the provisions of the Parts 10 and 11 of the Act relate to the collective effect of insolvency and restructuring proceedings on a company and its counterparties. That collective effect is at the heart of the application of a system of rules governing the effect of the insolvency on all counterparties, including its effect on transactions and the rules governing priorities. To deprive those proceedings of such universal effect would set at nought the purpose of the Act. Therefore, I am not persuaded that there is any basis to find that s.537 of this Part, should be limited in the manner suggested by the objectors.

Regulation (EC) No. 593/2008 on the Law Applicable to Contractual Obligations (Rome I)

271. Brief references were made to the provisions of the Rome I Regulation, which confers primacy to contractual choice of law clauses.

272. Article 1.2 (f) excludes from the application of the Regulation: -

> *"questions governed by the law of companies and other bodies, corporate or unincorporated, such as the creation, by registration or otherwise, legal capacity, internal organisation or winding-up of companies and other bodies, corporate or unincorporated, and the personal liability of officers and members as such for the obligations of the company or body".*

273. The court was referred to extracts from the Giuliano-Lagarde Report (OJ C 282, 31.10.1980, p. 1–50). That Report makes it clear that all questions governed by the law of companies are excluded by Article 1.2 (f). and that this was the clear intention of that Article. Although the "winding up" of companies is specifically referenced in the exclusion,

no express reference is made to reorganisation or restructuring proceedings. Nonetheless, it is clear that Part 10 is part of the law of companies in Ireland, and an application pursuant to s.537 is a "*question governed by the law of companies*". Rome I cannot therefore be invoked to limit the application of that Section to contracts expressed to be subject to the laws of Ireland.

Recognition of an order as a discretionary consideration

274. It was submitted that in the exercise of its discretion, this Court should take into account the prospect that orders made approving repudiation of contracts by the companies could be found ultimately to have been made in vain because of doubt as to their recognition outside the State.

275. In the First Judgment I referred to the case of *Re Business City Express Limited* [1997] 2 BCLC 510. That was a pre-Regulation case in which Rattee J. in the English High Court granted an application under s. 426 of the Insolvency Act 1986 (UK) for recognition of a scheme of arrangement following confirmation of the scheme by this Court (Kelly J. as he then was) in proceedings under the Companies (Amendment) Act 1990, being the predecessor of Part 10 of the Act. Rattee J. considered the provisions of the Companies (Amendment) Act 1990 and the process which led to the confirmation of the scheme of arrangement, namely the formulation of proposals for a scheme of arrangement by the examiner, the consideration and approval of those proposals at statutory meetings of members and creditors, and the sanction by the court. He described the Irish examiner as *"roughly (but only roughly) equivalent to an English administrator".*

276. The dearth of recent authorities on recognition of Irish restructuring and insolvency proceedings pursuant to s. 426 is largely due to the fact that for the last 19 years the Insolvency Regulation has been in force and has governed insolvency proceedings regarding companies having their centre of main interests in either England or Ireland. Nonetheless, the persuasive authority of the decision in *Re Business City Express Limited* is undiminished.

277. In the context of the petition for the appointment of the examiner to NAS there was exhibited an opinion from Mr. Daniel Bayfield QC of South Square, London, dated 4 December, 2020. Citing, *inter alia*, the decision of Rattee J. in *Re Business City Express,* Mr. Bayfield opined that a scheme confirmed by this Court pursuant to Part 10 of the Act would fall within the definition of "insolvency law" which would be recognised by the procedure provided for in s. 426. A supplemental opinion of Mr. Bayfield dated 22 February, 2021, was exhibited in the context of this application. In this opinion Mr. Bayfield considered the question of whether s. 537 fell within the definition of "*insolvency law*", again for the purpose of potential assistance and recognition by reference to s. 426. Addressing the absence in English law of a provision directly corresponding to s. 437, Mr. Bayfield stated as follows: -

> "The authorities suggest that a broad approach should be taken to the meaning of 'corresponds' and that it is not necessary that the foreign law be the same as the 1986 Act provisions, or, at least, to involve the same approach or procedure. I say

'suggest' because little judicial consideration appears to have been given to the meaning of 'corresponds to' within the meaning of s. 426 (10)(d). Nevertheless, the authorities do tend to contain detailed comparative analysis of the relevant provisions".

278. Mr. Bayfield expressed his opinion to the effect that s. 437 is part of the "insolvency law" of Ireland which would be afforded recognition by way of assistance under s. 426. Mr. Bayfield's Opinion is the evidence of English law before this court and no evidence was relied on by the opposing parties to contradict his opinion.

279. The question of recognition and enforceability of an order made was considered by Snowden J. in *Noble Group Ltd* [2018] EWHC 3092 (Ch) where he quoted from a prior judgment of his own in *Van Gansewinkel Groep B.V. and Others* [2015] EWHC 2151 (Ch) as follows: -

> *"The English court does not need certainty as to the position under foreign law – but it ought to have some credible evidence to the effect that it would not be acting in vain".*

280. The opinion of Mr. Bayfield is more than credible evidence as to the prospect of recognition of orders made or repudiations effected pursuant to an approval granted under s. 537. This taken together with the authority of *Re Business City Express Limited* is good reason for the court to be satisfied that orders made as sought in these applications would not be made in vain.

The Cape Town Convention

281. A number of submissions were made by the opposing parties concerning the effect on this application of the Convention on International Interests in Mobile Equipment signed at Cape Town on 16 November, 2001, and the Protocol to the Convention on matters specific to aircraft equipment (the "Convention" and the "Protocol").

282. The Cape Town Convention has the force of law in the State pursuant to International Interests in Mobile Equipment (Cape Town Convention) Act 2005.

283. The Convention establishes international standards for regulating the registration of interests in mobile equipment, including contracts, security interests and leases.

284. The Convention and the Protocol contain provisions concerning the registration and protection of such interests, and protecting the remedies of the holders of such interests in circumstances of default by parties in possession of movable objects, and on the occurrence of insolvency of a debtor.

285. Article 11 of the Protocol provides for alternate remedies on insolvency. As permitted under the Protocol the Government of Ireland elected for the application of Alternative A, the key relevant provisions of which are summarised below.

286. The Convention defines "insolvency proceedings" as follows: -

"bankruptcy, liquidation or other collective judicial or administrative proceedings, including interim proceedings, in which the assets and affairs of the debtor are subject to control or supervision by a court for the purposes of reorganisation or liquidation".

287. It has not been disputed that examinership pursuant to Part 10 of the Act is a form of insolvency proceedings for the purpose of the Convention.

288. Under Alternative A, the relevant provisions are as follows: -

"2. Upon the occurrence of an insolvency-related event, the insolvency administrator or the debtor, as applicable, shall, subject to paragraph 7, give possession of the aircraft object to the creditor no later than the earlier of:

(a) the end of the waiting period; (which in the case of Ireland is prescribed to be 60 days); and

(b) the date on which the creditor would be entitled to possession of the aircraft object if this Article did not apply.

5. Unless and until the creditor is given the opportunity to take possession under paragraph 2:

(a) the insolvency administrator or the debtor, as applicable, shall preserve the aircraft object and maintain it and its value in accordance with the agreement; and

(b) the creditor shall be entitled to apply for any other forms of interim relief available under the applicable law.

6. Sub-paragraph (a) of the preceding paragraph shall not preclude the use of the aircraft object under arrangements designed to preserve the aircraft object and maintain it and its value.

9. No exercise of remedies permitted by the Convention or this Protocol may be prevented or delayed after the date specified in paragraph 2.

10. No obligations of the debtor under the agreement may be modified without the consent of the creditor.

11. Nothing in the preceding paragraph shall be construed to affect the authority, if any, of the insolvency administrator under the applicable law to terminate the agreement". (emphasis added)

289. The term "*insolvency administrator*" is defined in the Convention to include "*a debtor in possession if permitted by the applicable insolvency law*". Under Part 10, the company is clearly "*a debtor in possession".*

290. The Convention and the Protocol are designed to protect interests in objects and the enforcement remedies available to the holders of security and lessors and sellers, which are rights *in rem*. Therefore, it does not follow that its provisions affect the proposed repudiation of guarantees. However, it is clearly relevant to the opposed applications for approval of the repudiation by NAS of the three leases granted to it by Sognefjorden, an excluded subsidiary.

291. Para. 10 of Article 11 of the Protocol prohibits the modification of an agreement without the consent of the counterparty. Para. 11 makes it clear that the Protocol does not preclude an act of termination. Repudiation of a contract is an act of termination and not modification and is therefore not prohibited by the Protocol.

292. Insofar as the definition of "insolvency administrator" extends to the "debtor in possession" (Article 1 of the Convention), the act of repudiation by the company, if approved by this court, pursuant to s. 537 (1) is clearly not prohibited.

293. The interaction between the Cape Town Convention and national insolvency rules was considered by the Federal Court of Australia in *VB Leaseco Pty Ltd (administrators appointed) v Wells Fargo Trust Company, National Association (trustee)* [2020] FCAFC 168.

294. In that case, it was argued by lessors that the obligation to "give possession" of aircraft objects contained in para. 2 of Alternative A of Article 11 of the Protocol required the insolvency administrators of the debtor lessee to redeliver the aircraft objects in accordance with provisions governing the physical return of those objects in an existing agreement between the parties. This would have required the administrators at their expense or at the expense of the debtor's estate to incur the cost of redelivery of the relevant objects from their current location in Australia to a location at Florida, USA.

295. The court of first instance had determined that there was such an obligation on the insolvency administrators and this was overturned by the Federal Court.

296. In its judgment the court considered the meaning of the phrase "*to give possession*" in Article XI (2) and observed as follows: -

> *"Once it is understood that the content of an obligation to 'give possession' under Article XI (2) does not include an obligation to effect a physical redelivery as if the lease were at an end, the question of the commercial reasonableness of the exercise of a remedy agreed upon by the parties does not arise.*
>
> *The effect of the construction of Article XI of the protocol preferred by the primary judge is that the funds available to creditors generally in the insolvent administration would have to be applied to meet the costs of redelivery and priority to any other claim (including claims by the insolvency administrator to administration costs and other claims afforded statutory priority such as, in Australia, employee claims and taxation liability.)*

On such an approach, instead of the creditor being confined to claims against the relevant aircraft object (being the extent of its security or property interests as the case may be) it would be able to look to the insolvency administrator (and thereby the insolvent administration) to cover the costs of redelivery of the object. In effect the creditor would stand first in line to secure out of the insolvency administration the costs of effecting redelivery (which may be considerable) to the necessary detriment of all other creditors.

As a result, funds, which in the ordinary course of things would be shared equally between general creditors, subject to priority claims such as the costs of the insolvent administration and statutory claims, would instead be made available first and foremost to the creditor to meet the costs of redelivery. The claims of other creditors to be administered in insolvency would then be entirely subjected to the need to meet the costs of redelivery of the aircraft object to the creditor. Indeed, it appears that such a construction may be pressed so far as to burden the insolvency administrator with having to satisfy claims made by third parties (such as those with prior legal claims to the object by way of lien or otherwise) that need to be met in order for the insolvency administrator to be able to effect redelivery as required under the agreement.

In our view, it is tolerably clear that the Convention and the Protocol were not intended to operate in a way that would result in such a reworking of generally accepted principles of insolvency law". (emphasis added).

297. In *AirAsia X Berhad v BOC Aviation Limited* (WA-24NCC-467-10/2020), the High Court of Malaysia considered the Cape Town Convention and Protocol in the context of proposals for a scheme of arrangement. The court considered the provisions of Alternative A of the Protocol and Articles XI, parargraphs 7, 10 and 11 as follows: -

"[290] To my mind, reading Article XI (7), (10) and (11) together, Alternative A of the Protocol provides the following protection to the creditor, namely, in the event the debtor chooses not to terminate the agreement when an insolvency-related event has occurred or the creditor does not exercise its right to repossess the aircraft, the obligations under the agreement including the obligation to pay the rentals cannot be modified by the debtor unless with the consent of the creditor.

[291] For example, if the Scheme seeks to provide for a variation to the obligation to pay the rentals (either a reduced sum or a deferral in payment), this would be in contravention of Article XI (10) as AAX [the company proposing the scheme] would be seeking to modify its obligations under the Lease Agreements and the consent of the Lessors have not been procured.

[292] But in this case, the Scheme provides for the termination of the Lease Agreements which under Article XI (11), AAX is entitled to do. With the termination, the Lessors would be left with the remedies of repossession under

the Convention as provided under Article XI (7). These remedies are not interfered with under the Scheme at all.

[293] With the termination of the Lease Agreements, apart from the right to repossession under the Cape Town Convention, the Lessors also have the right to claim against AAX for damages which comprises both the accrued rentals that were unpaid and the future rentals under the remaining terms of the Lease Agreements subject to the duty to mitigate.

[294] This claim for damages arises from the termination of the Lease Agreements. This is the same claim that the Lessors would make against AAX in the event of liquidation where the Lessors would have to share pari passu with other unsecured creditors in the assets of AAX. What the Scheme is seeking to do is to compromise this claim for damages. To my mind, this has nothing to do with Article XI (10) (modification) of Alternative A of the Protocol.

[295] For the reasons above, it is my judgment that AAX does not require the consent of the Lessors in respect of the "cram-down" provision under the Scheme in the form of a 99.7% hair-cut of their claims".

298. The conclusions I draw from these cases are as follows: -

(1) The company cannot unilaterally modify the terms of any leases or guarantees. Of course, Part 10 itself does not permit such modification.

(2) The company may terminate contracts under applicable law, which includes a repudiation in exercise of the power conferred by s. 537.

(3) There is nothing in the Cape Town Convention or Protocol to preclude a lessor or holder of security from exercising the self-help remedy of taking possession of the asset.

(4) It would not be appropriate to enter as a condition of an approval under s. 537 a requirement that the company discharge the claims of third part lienholders, for the benefit of the contract counterparty and in priority to all other claims against the company.

(5) The remedy of damages arising from the repudiation is respected, again to be addressed in accordance with the law applicable to the company, in this case to sound in an unsecured claim for such damages.

299. If any of the companies sought to rely against lessors on the protection of the court conferred by s. 520, the automatic stay, different questions would arise by reference to the Convention and the Protocol. But the essence of s. 537 is that by repudiating the agreement the company no longer seeks to retain possession of or the benefit of the asset.

300. Monetary claims such as those necessary to meet the claims of any lien holders form part of claims which can be made by way of damages for breach of the contract.

301. As discussed earlier in this judgment, if there were any evidence before the court that either the company seeking to repudiate pursuant to s. 537, or any of the companies in the Group, including excluded subsidiaries, were to seek to retain the benefit of the aircraft or the engine or other objects the court would take a different view in relation to the repudiation of a guarantee of those obligations by a company in examinership. That is not the case as it has been described to me.

302. Particular issues arose by reference to the Cape Town Convention in the case of the interests represented by PK Air Finance.

303. PK Air Finance is the beneficiary of guarantees given by NAS in respect of three aircraft leased to DYI Aviation, a Norwegian group company and subleased to Norwegian Air Sweden, an excluded subsidiary.

304. The court was informed that the dispute in relation to one of the three aircraft has since been resolved. During the course of the hearing the court was also informed that in in one case the relevant aircraft is located in Bucharest and that one of the engines is at a Lufthansa facility. In the case of the second aircraft, it is located in Oslo but at a Lufthansa facility.

305. The parties were in disagreement both as to the up to date facts concerning the status of the aircraft and the questions of law. Limited evidence was given as to the status of the aircraft. It appeared that the companies asserted that they were willing to release the aircraft to PK Air Finance, but that the aircraft were in locations under the control of Lufthansa, which was exercising a lien in respect of charges for works previously undertaken by Lufthansa on the relevant engines. The companies say that they are willing to return the aircraft, in compliance with the Convention, but that their obligations under the Convention do not extend to funding the cost of discharging the claim of the lienholder.

306. Neither DYI Aviation or Norwegian Air Sweden are in examinership. They are therefore not subject to the jurisdiction of this Court in these proceedings. It is clear from the position taken by the companies that they are desirous of permitting the lessor to take possession of the relevant aircraft, but assert that the lien claims of the third parties are matters for the lessors.

307. The remedies of repossession which are available to PK Air Finance and its borrower are not stayed or restricted by these proceedings, nor does this Court have jurisdiction to make any orders imposing any terms regarding their obligations on return of the aircraft.

308. In circumstances where there is no evidence that either the lessees or sublessee, or NAS or any other group company is seeking to retain the benefit of the relevant aircraft or engines the existence of these lien claims would not justify refusing approval of

repudiation of the guarantee in this case. Any additional cost associated with the repossession of the aircraft, including any payments PK Air Finance finds it necessary to make to lienholders, will be relevant to the determination of the quantum of its losses.

Quantification of losses

309. Subsection 3 of s. 537 provides that: -

> *"In order to facilitate the formulation, consideration or confirmation of a compromise or scheme of arrangement, the court may hold a hearing and make an order determining the amount of any such loss or damage mentioned in subsection (2) and the amount so determined shall be due by the company to the creditor as a judgment debt".*

310. The common practice which the court has seen in previous applications under s. 537 is to include an application for an order pursuant to subs. 3 determining the quantum of the loss of the counterparty to any contract the subject of a repudiation. In this case, no application has been made by the companies under subs. 3. The applicants propose that the quantum of losses, which would rank as unsecured claims pursuant to subs. 2, would be determined by the procedure for the resolution by an expert of unagreed claims of creditors to be provided for in the examiner's proposals for a scheme of arrangement.

311. Provisions for expert determination of unagreed claims, although not expressly provided for anywhere in Part 10, are commonly and invariably contained in schemes of arrangement approved by this Court.

312. In this case the examiner has indicated in his affidavits that he proposes to include in that process the claims of any counterparties whose contracts are repudiated pursuant to s. 537 and where the quantum is not agreed.

313. The structure of such a resolution procedure is that within a defined period after the confirmation of the schemes, in this instance 14 days, the counterparty would submit a proof of claim to the company. The company will have a defined period within which to state whether it accepts the claim. If the claim is not accepted the counterparty has the right to refer the dispute to an expert for determination. The proposals will contain provisions for the exchange of submissions in writing and the quantum of the claim will be determined by the expert whose decision will be final and binding on both parties.

314. The examiner has indicated that his current proposal is that such an expert determination process would be completed within 60 days of the date on which the scheme of arrangement is confirmed by the court.

315. The examiner states that the legal principles which will be applied by the expert in determining the amount of the claim would be the same principles which would be applied by a court on a hearing under s. 537 (3) to determine the amount of any loss and damage.

316. Reservations were expressed by the objectors as to whether the expert, who in many cases is charged to resolve ordinary trade creditor claims, may not have the level of expertise to adjudicate on the quantum of claims of this nature in this case. The examiner proposes that an aviation specialist with industry expertise and experience would be appointed as an expert for this group of claims. That expert would have the ability to take any legal advice required. The examiner is considering a suitable pool of candidates and intends to consult with the affected creditors prior to finalising the selection of the expert to be appointed. He indicated that he was considering making a separate provision for the determination of claims by customers, and therefore the aviation expert would be dedicated to the process of resolving claims of this nature.

317. As is also common in such procedures the examiner proposes that the costs of the expert determination process would be borne on a 50:50 basis between the relevant company and the creditor.

318. It is submitted on behalf of the companies as follows: -

(1) That the holding of a hearing under subs. 3 would not facilitate the formulation consideration or confirmation of a compromise or scheme of arrangement, as the terms of subs. 3 require.

(2) That the use of the word "*may*" in subs. 3 means that the court has a discretion as to whether to hold such a hearing.

(3) That the expert process would be the most efficient way of dealing with these claims. The burden of participating in a court hearing under subs. 3 whilst at the same time participating in the ongoing process of statutory meetings and holding a confirmation hearing would be excessive in terms of the demands on the company and its resources.

(4) That at the level of principle, because subs. 2 provides that the quantum of damages ranks as an unsecured claim, this is no different from determining the quantum of other unagreed creditors' claims and therefore is appropriate for the expert dispute resolution process.

(5) That the "*decades long practice*" of having claims determined by an expert appointed in the scheme of arrangement is unobjectionable on a point of principle and desirable from a practical perspective.

(6) That there are practical considerations that can make court-based hearings cumbersome and excessively time consuming. Reference is made to the procedural protections of normal court process such as cross-examination and the provisions for appeals and that these could undermine the "*race to save a company and might even be used strategically for that purpose".*

(7) That a less involved proof or determination process under the scheme is fair and practicable given the company's insolvency and the fact that the resultant "*award*"

will generate not a full payment but only a dividend pursuant to the scheme of arrangement.

319. It was submitted on behalf of the companies that should there be any unfairness in the procedure proposed for the resolution of claims by an expert, this will be a matter which can be raised at the hearing to confirm the proposals for a scheme of arrangement.

320. The objectors submit that the only means of measuring damages is by agreement or by the court holding a hearing as envisaged by subs. 3. The objectors submit the following: -

(1) That if the company's interpretation of s. 537(3) is accepted a court may never hold a hearing as provided for under that subsection.

(2) That the court should not rely on the anecdotal evidence provided by the company to the effect that the practice of having claims of unagreed creditors adjudicated by an expert appointed under the scheme of arrangement has operated for many decades without challenge.

(3) That ordinary creditors, who do not have the benefit of a judgment, have no alternative but to participate in an expert process for resolving unagreed claims.

That, by contrast, express provision is made to the effect that creditors whose contract has been repudiated pursuant to subs. 1 may have the quantum of their damages assessed by the court.

(4) That the practical obstacles in terms of resources and timing identified by the company in its submissions should not stand in the way of the entitlement of counterparties to the benefit of hearings specifically envisaged by subs. 3.

(5) That it is necessary to have the quantum of these claims determined in advance of the holding of meetings of creditors so that the objectors will be in an informed position to vote on the proposals for a scheme of arrangement.

Conclusion as regards subsection (3)

321. The companies and the examiner submit that the process of determining claims by an expert process has been utilised and endorsed by the court for many decades. That statement is correct as regards unagreed claims of creditors. It is incorrect as regards the determination of the quantum of claims of counterparties to contracts repudiated pursuant to s. 537. When pressed for precedent on this, counsel for the companies referred the court to one case, namely *FCR Media Limited (ex tempore*, HC, 9 November 2017), in which the scheme of arrangement provided that the unagreed amount of losses pursuant to claims arising from repudiation of contracts would be determined by an expert. I was referred to no judicial consideration of the issue now before the court and *FCR Media Limited* was the only instance cited to me. It is clearly is not a "decades long" precedent.

322. The invariable practice in many applications under s. 537 before has been to include in the notice of motion an application for an order determining the quantum of damages pursuant to subs. 3.

323. The submission that there is no difference in principle between the proposed method of determining the unagreed claims of other categories of creditors and claim of the repudiated counterparties ignores the very existence of subs. 3. No equivalent provision is to be found in the Act for the determination of claims of other classes of creditors.

324. The wording of subs. 3 refers to the holding of a hearing *"in order to facilitate the formulation consideration or confirmation of a compromise of scheme of arrangement"*. It is not necessary to establish that the holding of such a hearing must facilitate each of the formulation, consideration and confirmation of a scheme of arrangement. There is no reason why even when such a hearing is pending, the examiner could not proceed with the formulation of his proposals, and hold meetings for their consideration. It may be that in such circumstances the outcome of a hearing as to quantum would inform the court at a hearing to confirm the proposals for a scheme of arrangement, but even that is not a prerequisite to the holding of such a hearing.

325. It is the policy of this Court as a general rule to uphold clauses providing for referral to an expert adjudicator in appropriate cases, provided there is nothing patently flawed or unjust about the procedure being embarked upon. I was referred to a number of English judgments relating to schemes of arrangement, in which the court upheld provisions for binding determination of disputes by a scheme adjudicator (*Re Hawk Insurance Company Limited* [2002] 2 BCLC 480, and *Re Pan Atlantic Insurance Company Limited* [2003] EWHC 1696 (Ch), [2003] 2 BCLC 678). In these cases, the court upheld the efficacy of clauses contained in the schemes which required disputes to be referred to a scheme adjudicator whose decision was to be final and conclusive.

326. A critical feature of those cases cited, and of Part 9 of the Act which governs schemes of arrangement outwith examinerships, is that they relate to scheme adjudication provisions in cases under a statutory framework, including Part 9, which contains no direct equivalent of subs. 3.

327. The court is always conscious of the practicality and time pressures which apply to companies and examiners during an examinership process. These pressures may be eased if, as suggested here, the process of determination of these claims by an expert would only commence after the court confirms a scheme of arrangement. That pragmatic consideration is no reason to deprive the counterparties of the recourse to this Court expressly provided for in subs. 3.

328. In *Re O'Brien's Sandwich Bars Limited*, the court found that although it was legally permissible under the section to arrange for a postponed determination of loss or damage pursuant to subs. 3, it was not possible in that case because of the time constraints including those imposed by the proposed investor. Ryan J. said that in such a case: -

"For the High Court to adopt such an unsatisfactory procedure would seem to me to put business exigencies, even though they are undoubtedly very important, above the fundamental requirements of justice and constitutionally mandated protections".

329. Ryan J. found that in that particular case, the timetable proposed for the determination of losses if orders were made was such as to deprive the counterparties of the opportunity of formulating and presenting their claims and obtaining appropriate professional advice for that purpose.

330. Where a company presenting a petition for the appointment of an examiner and/or the appointed examiner anticipates the need to repudiate executory contracts and anticipates the prospect that applications for approval of repudiation and/or for the determination of quantum will be contested, they should commence the process as early as possible following the appointment of the examiner. This may not always be practicable, but in a case of scale and complexity, such planning cannot be beyond the resources of the moving parties.

331. Where a court sees fit to appoint an examiner it invariably does so with a view to proposals for a scheme of arrangement being formulated. One of the matters which the independent expert is required to address is whether the formulation of proposals will facilitate the survival of the company as a going concern. I am not persuaded that it is necessary to defer the commencement of an application for repudiation until such time as the examiner has concluded definitively that he will be in a position to formulate such proposals. The very appointment of an examiner envisages that proposals will be formulated. It does not seem to me that an application under s. 537 would be refused on the grounds of prematurity if brought at very early stage in an examinership, but I am not required to determine such a question in this instance.

332. Mechanisms in schemes of arrangement for the binding determination of unagreed creditors' claims by an expert, as invariably proposed, are desirable and appropriate. They have the advantage that an expert with suitable expertise in the relevant industry can be appointed. It is also recognised that such a process is desirable from a costs proportionality perspective in circumstances where the outcome will not deliver a full payment but only a dividend. I am also conscious that examiners do not have a function of adjudicating liabilities which is conferred on a liquidator. Accordingly, there are good reasons for including an expert adjudication processes in schemes of arrangement. I would go so far as to say that there may be cases where it is appropriate that the determination of the quantum of claims of counterparties repudiated pursuant to s. 537 be referred to an expert and not determined by the court pursuant to subs. 3. This judgment does not mean that such a route will never be appropriate in a suitable case. However, for the reasons stated above, I concluded that this is not an appropriate case in which to deprive the counterparties of a hearing pursuant to subs. (3).

Conclusion

333. For these reasons I concluded that the court should grant approval under s. 537 (1) for the repudiation of the contracts the subject of the notices of motion, save for those which the court was informed were to stand withdrawn.

334. I also concluded that the quantum of the loss or damage suffered by the counterparties to such repudiations be determined at a hearing pursuant to s. 537 (3).

335. After I declared that the court would hold such a hearing under subs. 3, directions were made and a date fixed for that hearing. The court was subsequently informed that the parties had agreed the quantum, and that hearing date was vacated.

[2019] IEHC 407

THE HIGH COURT

COMMERCIAL

[2019 No. 190 COS]

IN THE MATTER OF

BALLANTYNE RE PLC

APPLICANT

AND

AND IN THE MATTER OF

THE COMPANIES ACT 2014

AND IN THE MATTER OF

A PROPOSAL FOR A SCHEME OF ARRANGMENT PURSUANT TO PART 9, CHAPTER 1 OF THE COMPANIES ACT 2014

EX TEMPORE JUDGMENT of Mr. Justice David Barniville delivered on the 6th day of June, 2019

Introduction
1. This is my ex tempore judgment in relation to an application heard by me yesterday, 5th June, 2019.

2. This is an application by Ballantyne Re Plc, an Irish Plc (the "Scheme Company"), for an order pursuant to Section 453(2) of the Companies Act 2014 (the "2014 Act"), sanctioning a proposed scheme of arrangement between that company and a number of its creditors (the "Scheme Creditors"), as defined in the Scheme (the "Scheme").

3. The application is opposed by one such creditor, namely ESM Fund I LP, a limited partnership formed in the United States. It is holder of some $5,000,000 of class A 3d notes. The application is supported by the overwhelming majority of the noteholders in the two relevant classes. As set out in the grounding affidavit of Mr. Masterson, sworn on behalf of the Scheme Company on 22nd May 2019, the overwhelming majority of the Scheme creditors have supported the Scheme, which provides for a compromise of the Scheme Company's obligations under the relevant notes and for the commutation of certain guarantees provided by the guarantors under those notes.

4. The Scheme Company and its directors have determined that the Scheme should be proposed. This is as a result of the fact that, due to significant investment losses, there is a net asset deficiency in the Scheme Company and this has led to events of default which are currently outstanding under the relevant provisions of an Indenture dated 2nd May 2006, as amended and supplemented subsequent to that date, under which the relevant notes were issued. The evidence establishes to my satisfaction that were the class A notes, as they are referred to later, to run to maturity, which is 2036, there would be no prospect of a full recovery by the relevant Scheme noteholders from the Scheme Company. Further, there is no prospect of any recovery by the junior noteholders or any subordinated liabilities or equities.

5. Against that background, Ambac Assurance UK Limited ("Ambac"), which is one of the two financial guarantors of the notes issued under the Indenture to which I have referred, engaged in certain discussions with certain of the Scheme noteholders to assess options to restructure the Scheme Company. Following those discussions and its assessment of the position, Ambac proposed a restructuring to the Scheme Company. While Ambac did propose the restructuring to the Scheme Company, the Scheme is nevertheless that of the Scheme Company itself and it is not Ambac's scheme.

6. The evidence establishes that the Board of Directors of the Scheme Company, having considered the proposal in detail and having taken legal and financial advice, formed the view that the restructuring provided for in the Scheme is in the best interest of all parties concerned, including the relevant Scheme noteholders and the Scheme Company itself. In addition, the evidence discloses that the Board of Directors considers that the Scheme is fair and equitable for all of the relevant Scheme noteholders.

7. Briefly stated, the objective of the Scheme is to restructure the Scheme Company's reinsurance obligations and its outstanding indebtedness under the Scheme notes such that the residual value in the Scheme Company can be distributed to the Scheme noteholders. I am also satisfied that the restructuring is for the benefit of the Scheme noteholders and that is clear from the fact that the Scheme encompasses not only what are called the Ambac Guarantee Notes and the Assured Guarantee Notes but, also, class A 1 notes, which, as we will see, do not have the benefit of any guarantee.

8. The benefits of the Scheme include:

1) An immediate return of capital as opposed to the status quo scenario, to which I will return.

2) The elimination of risk associated with the future performance and reinsurance cash flows of what is called the defined block of business.

3) The ability to monetise a distressed illiquid debt security.

4) In the case of the Ambac guaranteed noteholders, the elimination of future credit risk in relation to Ambac's ability to meet their claims under the relevant guarantees.

9. On the 29th April 2019, on the application of the Scheme Company, the court made the following orders and gave the following directions:

1) It entered the proceedings in the Commercial List.

2) It gave directions in relation to the summoning of meetings of two classes of creditors under section 250(3) of the

2014 Act, namely, the Ambac guaranteed creditors/noteholders and the Assured Guarantee/A 1 Scheme creditor/noteholders. They are referred to as the Scheme meetings.

3) The court gave directions in relation to the Scheme meetings, including the placing of advertisements in relation to those meetings.

4) Directions were given in relation to the issuing of an originating Notice of Motion to sanction the Scheme in the event that the requisite majority approved the Scheme at the Scheme meetings.

5) Directions were given that in the event that any person intended appearing at that hearing, it had to give notice of its intention to do so by a specified date, which was the 29th May 2019.

6) That the matter was then to be listed for further directions on the 23rd of May.

10. In accordance with the court's directions, the scheme meetings took place on the 22nd May 2019, following which this application was brought by originating Notice of Motion issued on 22nd May 2019, which was returnable for 23rd May 2019.

11. As appears from the report of the chairperson of those Scheme meetings, which is exhibited to Mr. Masterson's grounding affidavit, the Scheme was overwhelmingly approved by the Scheme noteholders, being 98.12% in value of the Ambac guaranteed scheme creditors present and voting and 100% in value of the Assured Guarantee/A 1 Scheme creditors present and voting at that meeting.

12. It is, perhaps, unsurprising that the Scheme was approved by the vast majority of the Scheme noteholders in circumstances where, on the evidence, I am satisfied that the proposed dividend payable by the company represents a materially better outcome than under what is called the "status quo scenario", and the commutation payment to Ambac Guaranteed Noteholders represents the net present value of the future payments that the holders of those notes would otherwise receive from Ambac.

13. The fact that such an overwhelming majority of the relevant noteholders/creditors voted in favour of the Scheme is not conclusive or determinative of the court's role in considering whether to sanction the Scheme. It is, obviously, of significance however.

14. Further directions were given by the court (Mr. Justice Haughton), on 23rd May 2019. On that date, amongst other things, he directed that the matter be listed for hearing on 5th June, 2019, by way of an application for the sanctioning of the Scheme. He directed the hearing to be advertised in various different media and he directed that if any person wished to appear at the hearing of the petition they had to give notice of their intention to do so and to provide any affidavit setting out the basis on which they intended appearing by the 31st May 2019.

15. ESM is the only creditor that has indicated an intention to object and, as indicated earlier, it is the holder of $5,000,000 of class A 3d notes. It voted against the Scheme at the relevant Scheme meeting.

16. On 30th May 2019, the day before the deadline for the provision of any affidavits opposing the sanctioning of the Scheme, ESM, through its Irish solicitors, sought a copy of the relevant papers in respect of the sanction hearing. On the 31st May 2019, ESM delivered affidavits sworn by Dr. Eric Meyer of ESM and by Mr. Jim Luby of McStay Luby. Further affidavits have since been sworn by Dr. Meyer and by Mr. James Bonner, a US lawyer, in support of ESM's opposition to the sanctioning of the Scheme.

17. In accordance with the directions of the court made on the 23rd May 2019, the Scheme Company delivered a supplemental affidavit of Mr. Masterson, which was sworn on 3rd June 2019. In addition, affidavits have been sworn on behalf of Ambac by Mr. John Tifft and by Mr. Alan Dee, which were both sworn on 3rd June 2019, and an affidavit was sworn by a creditor, Merced Capital LP ("Merced"), that affidavit being sworn by Mr. Vince Vertin on 2nd June 2019. Those parties are all supportive of the Scheme and urged that the Scheme be sanctioned by the court.

18. On foot of further directions made by Mr. Justice Haughton on the 31st May 2019, ESM delivered written submissions on the 3rd June 2019. And on the same date it also delivered an affidavit, sworn by Mr. Bonner, on certain issues of US and New York law. Written submissions were also provided by the Scheme Company.

19. The hearing of this application took place yesterday, the 5th June 2019. The parties represented at the hearing were the Scheme Company, Ambac, Assured Guaranty (Europe) and Assured Guaranty Corporation ("Assured Guaranty"), Merced Capital LP and ESM. I had the opportunity of reading all 13 affidavits sworn in respect of the application and the two sets of written submissions prior to the hearing. Further, I heard helpful and focused submissions from counsel for all of the parties involved in the hearing.

20. The principal protagonists at the hearing were the Scheme Company and Ambac, on the one hand, who advocated that the Scheme be sanctioned, and ESM, on the other, who urged the Court not to sanction the Scheme. As I say, submissions were also made by Merced and by Assured Guaranty in support of the sanctioning of the Scheme.

21. ESM raised a number of objections to the sanctioning of the Scheme, those objections were refined somewhat at various stages of the process, from the initial letter sent on ESM's behalf by its Irish solicitors on 31st May 2019 through to the affidavits sworn by ESM and on its behalf, and then through the written submissions and oral submissions made at the hearing. In the initial letter sent on behalf of ESM by its Irish solicitors on 31st May 2019 it was indicated that ESM would oppose the sanctioning of the Scheme on grounds relating to jurisdiction. They also alleged that the Scheme was deficient in containing materially incomplete information, that the Scheme was impossible on the basis it was calculated on an incorrect calculation of interest, that there was an incorrect class composition, and that the Scheme was unfair and unreasonable.

22. In the legal submissions which it delivered, ESM made a number of slightly different or varied contentions as follows:

1) It contended that the Scheme would be unlawful if proposed by the Scheme Company in New York.

2) It contended that if the Scheme was sanctioned by the Court, ESM would be precluded from pursuing its claim against Ambac in the United States District Court for the Southern District of New York, on foot of a complaint filed by ESM very recently.

3) It contended that the Court does not have jurisdiction to sanction a Scheme which provides for the release of third

parties.

4) It contended that ESM and other Scheme creditors had not been provided with clear and accurate financial information in relation to the financial strength of Ambac.

5) Finally, it was contended that the Scheme was inextricably linked to the financial instability of Ambac, in respect of which it was suggested that there was no satisfactory evidence.

23. In oral submissions made at the hearing, the objections advanced by ESM were boiled or refined down to three principal objections and they were as follows:

1) It was alleged that the Scheme Circular was materially deficient in terms of the information it provided to the noteholders/creditors and in terms of the impression it created concerning the financial position of Ambac. It was suggested that the court had the option or discretion to adjourn the hearing in the event that it felt that the state of the evidence was unsatisfactory or incomplete in any material respect.

2) The second ground of objection advanced in the oral submissions was that the court has no jurisdiction to sanction a Scheme which makes provision for third party releases. It was suggested that on the proper interpretation of the provisions of Part 9 of the 2014 Act, construed against the backdrop of the Constitution, it was not open to the court to sanction a Scheme which made provision for the release of third parties. And it was noted that the Scheme contains two relevant releases, namely, a Scheme Release Agreement and the Ambac Release Agreement, provided for, respectively, in Part C section 14.8.1 and section 14.8.2 of the Scheme Circular.

3) The third ground of objection advanced in the oral submissions was that the sanctioning of the Scheme would have the effect of extinguishing the complaint that ESM has made in the United States District Court for the Southern District of New York against Ambac, which complaint was filed on 30th May 2019. It was said that if the Scheme was sanctioned by me it would not be open to ESM either (a) to pursue the allegations which it has made under New York law, in the application for the recognition of the Scheme under Chapter 15 of Title II to the US Bankruptcy Code, or (b) to litigate its complaint against Ambac in the New York courts. Various other grounds were advanced under this general heading.

24. As I explain in detail in this judgment, having carefully considered all of the evidence and the helpful submissions received by all parties, I have reached the conclusion that I must reject all of the grounds of objection raised by ESM and that I should, in the exercise of my discretion, sanction the Scheme under Section 453(2) of the 2014 Act.

Structure of Judgment
25. In the course of this judgment I will adopt the following structure. First I will provide a little more detail about the background to and a more detailed description of the Scheme. Secondly, I will look at the relevant legislation. Thirdly, I will briefly consider the question of jurisdiction. Fourthly, I will consider the approach which the Court should take in considering whether to sanction the Scheme. Fifthly, I will consider in more detail the issues raised by ESM in its objection to the Scheme. Finally, I will offer some very brief conclusions.

Background
26. The detailed background in relation to both the Scheme Company and the Scheme is set out in the grounding affidavit of Mr. Masterson, sworn on 22nd May 2019. The Scheme Company is an Irish Plc and has its registered offices here in Dublin. It was formed as a special purpose vehicle for the purpose of entering into and performing a reinsurance agreement, pursuant to which Scottish Re (U.S.) ceded to it risks relating to certain business described in the papers as the Defined Block of Business.

27. In connection with the acquisition of that block of business, and in order to fund its obligations under an existing indemnity reinsurance agreement, the Scheme Company issued a number of notes pursuant to an Indenture dated 22nd May, 2016, as amended and supplemented from time to time. That Indenture is stated to be governed by the law of the State of New York. Those notes were: 1 Class A notes, which have a maturity date of 2036, and there are various subclasses of those notes, namely:

1) Class A 1 notes consisting of some €250 million, which are not guaranteed by Ambac or by any other entity;

2) Class A 2a notes consisting of $500,000,000, which are guaranteed by Ambac.

3) Class A 2b notes consisting of $500,000,000 which are guaranteed by Assured Guaranty.

4) Class A 3 notes consisting of $400,000,000, which are guaranteed by Ambac.

There is in turn a subclass of the class A 3 notes, including class A 3d notes, which are held by ESM with the par value of $5,000,000.

5) There are also class B notes, class C notes, class D notes and preference shares.

28. The class A notes are senior secured indebtedness and ranked *pari passu* with one another. Payment of schedule interest and the ultimate repayment of the principal at final maturity in respect of class A 2a notes and the class A 3 notes is guaranteed by Ambac. Payment of schedule interest and the ultimate repayment of principal in respect of the class A 2b notes is guaranteed by Assured Guaranty. The class A-1 notes do not benefit from any financial guarantee.

29. In 2006, the Scheme Company engaged JP Morgan as investment manager in respect of a number of its investment accounts. There were then significant investment losses, which had significant adverse effects on the Scheme Company. In 2009, proceedings were commenced against JP Morgan by Ambac in the name of the Scheme Company arising from its management of the Scheme Company's investment accounts. That litigation was settled in early 2017 and, ultimately, the Scheme Company received a sum of $325.6 million on 17th April 2017.

30. At the date of the Scheme Company's most recent audited financial statements, which is 31st December 2017, the Company reported significant net liabilities. At that date the Company reported total assets of just over $1.254 million and total liabilities of just over $2.4 million. There was therefore a deficit of just over $1.15 million in the available assets, compared to the amounts due to Scheme noteholders and other creditors.

31. Unaudited management accounts for the year to the 31st December 2018 are available and show that the Scheme Company has an increased total deficit of $1.228 million. The Scheme Company is, therefore, currently insolvent. There is no dispute about this.

32. As a result of the extent of the current deficit in value available to class A notes, there is no prospect of a full recovery to the Scheme noteholders were those notes to run to their maturity in 2036. In those circumstances, Mr. Masterson explained that the directors formed the view that a restructuring which realised the residual value in the Scheme Company would be preferable to what is described as the "status quo scenario", which I touched on briefly and to which I will make further reference later in this judgment.

33. It is necessary now to say something more about ESM and the circumstances in which it acquired its notes. As noted in the supplemental affidavit sworn by Mr. Masterson on the 3rd June 2019 and in the first affidavit sworn by Dr. Eric Meyer of ESM on the 31st May 2019, ESM bought $5,000,000 of class A 3d notes in May 2018. I accept that at that time the Scheme Company's difficult and deteriorating financial position was well known. ESM bought those notes for just over 58 cents per note, (a fact not revealed by Dr. Meyer in his first affidavit). A number of points can be made about this. First, ESM, as I have noted, did not reveal the acquisition price in its first affidavit and this was something that was revealed in the replying affidavits served on behalf of the Scheme Company. Second, as a result of the discounted purchase price, ESM's exposure under the notes is significantly less than the $5,000,000 value of those notes. Thirdly, in the event that the Scheme is approved, ESM will make a return on its investment. Nonetheless, ESM has voted against the Scheme and has opposed the sanctioning of the Scheme. It is entitled to do so in pursuance of its own commercial interests.

34. Reference should then be made briefly to a tender offer made by ESM in October 2018. The purpose of that tender offer was to acquire some $226,000,000 of class A 3 and class A 2 notes. The tender offer was launched at a price of $60,000 per $100,000 principal amounts of notes, in effect representing 60 cent in the dollar. The tender offer expired in December 2018. ESM did not increase the tender offer and did not extend the tender offer. It appears that there was very limited, if any, take up of this tender offer. It is noted that the price was less than the price which the noteholders will receive under the Scheme.

The Scheme

35. I should briefly set out a summary of the terms of the Scheme. Again as explained by Mr. Masterson in his grounding affidavit, and as appears from the Scheme Circular itself, the primary objective of the Scheme is to restructure the Scheme Company's reinsurance obligations and its outstanding indebtedness under the Scheme notes such that the residual value in the Scheme Company can be distributed to the Scheme noteholders.

36. The key features of the Scheme, as described by Mr. Masterson at paragraph 41 of his grounding affidavit, are briefly summarised below:

> 1) There will be a novation to a new reinsurer, namely, Swiss Re Life and Health Inc., of the Scheme Company's rights and obligations under what is defined as the existing indemnity reinsurance agreement in respect of the remaining Defined Block of Business.
>
> 2) Ambac will direct the Trustee to declare the notes as due and payable and will direct the Trustee to disperse a sum on the RTA withdrawal amount and other sums in another account, the surplus account, in accordance with the provisions of the Indenture.
>
> 3) Each financial guarantor will waive any rights to receive guarantee fees.
>
> 4) Scheme noteholders will consent to turn over a portion of their scheme principal consideration to satisfy certain amounts to effect the restructuring.
>
> 5) Since all class A notes rank *pari passu* they will all be paid at the same dividend by the Scheme Company, which equates to a dividend of about 51.1% of the par value of each class A note.
>
> 6) Scheme noteholders who signed up to a lock up support agreement and complied with certain procedures will receive an additional lock up fee of 1.25% of the par value of each class A note.
>
> 7) In addition, the Ambac guarantees will be commuted and the holders of the Ambac Guaranteed Scheme notes, namely, the A 2a notes and the A 3 notes, will receive Ambac commutation payments of 17.4% and 14.5% respectively. In essence, each Scheme Noteholder will receive the estimated present value of:
>
> > (i) The balance of the 47.6% of principal that would not have been paid by the Scheme Company pursuant to the Scheme and which would otherwise be payable on maturity on the 2nd May 2036 and (ii) the interest payable thereon.
>
> 8) The Assured Guaranty financial guarantees are not being commuted under the restructuring.

There are various other key features of the Scheme mentioned in Mr. Masterson's affidavit which I do not need to consider or refer to.

37. As appears from the above description and from the Scheme Circular itself, the Scheme proposes particular and distinct arrangements for the Ambac Guaranteed noteholders and the Assured Guaranty/A 1 noteholders, which I can briefly summarise as follows:

> 1) The arrangement by which the Assured Guaranty/A 1 Noteholders will be bound is a compromise of rights as against the Scheme Company alone. The arrangement by which the Ambac guaranteed noteholders will be bound is a compromise of rights as against the Scheme Company and rights as against Ambac.
>
> 2) The Scheme provides that the Ambac guarantees will be commuted. The Assured Guaranty financial guarantees will not be commuted.

38. Following the implementation of the restructuring provided for in the Scheme, if sanctioned, it is intended that the Scheme Company will be wound up by way of a solvent liquidation under Irish law.

39. Consideration must then be given as to the alternative situation. This has been described in the papers as the "status quo scenario". The Scheme Circular sets this out in Part D Section 15. The Scheme Company retained PwC to carry out a Scheme comparator analysis. In the event that the Scheme is not sanctioned and the restructuring cannot take place in accordance with the Scheme, a scenario arises which has been called the status quo scenario. Under that scenario, the class A notes will mature on 2nd May 2036, being the stated maturity date. The evidence indicates that the main expectations of the status quo scenario are as follows:

> 1) There is no prospect of full recovery for the Scheme noteholders and no prospect of recovery for junior noteholders or any other subordinated liabilities or equity. PwC have estimated that on majority the dividend that Scheme noteholders might be expected to receive in this scenario is in the order of 45.3%.
>
> 2) The Scheme Company's sole source of capital is the investment returns generated by and the capital held in what are called the Reinsurance Trust Account (RTA) and the Surplus Account.
>
> 3) Payments to the ceding insurer will rank in priority to class A notes. At December 2017, as indicated, the nominal projected cash flow liabilities for the Defined Block of Business was $230,000,000.
>
> 4) Payment of the Scheme Company's operating expenses which also rank in priority to the class A notes.
>
> 5) As a result of (a) the prior ranking of payments and (b) the deficit between the investment assets held in the RTA, there will be insufficient cash flow generated from investment income to enable the Scheme Company to make the scheduled interest payments on the class A notes. Payment of schedule interest will require periodic withdrawal of capital from the RTA, thus depleting the sole source of capital of the Scheme Company.
>
> 6) Ambac has instructed periodic withdrawal of capital from the RTA to fund payment of schedule interest in the class A notes historically and it is anticipated that this will continue in the event that the restructuring is not implemented.
>
> 7) Periodic withdrawals from the RTA will result in a depletion of assets over time and a substantial shortfall is projected on the maturity of the note, as indicated in the Scheme Circular.
>
> 8) The detailed analysis of the status quo scenario in the Scheme is set out in the Scheme Circular in Part D. It demonstrates that the principal redemption available to Scheme noteholders on maturity will not be greater than the return to the Scheme noteholders proposed by the Scheme. This is clearly set out in the table at section 9.3 of Part D of the Scheme Circular and is summarised at paragraph 115 of Mr. Masterson's grounding affidavit.

40. Mr. Masterson asserts at paragraph 72 of his grounding affidavit that it is highly unlikely that the status quo scenario would in fact continue until the final maturity of the class A notes in 2036. He asserts, and this is stated in the Scheme Circular, that there is a reasonable assumption that the parties, acting in accordance with their own financial interests, will look to implement some alternative restructuring or a novation of the Scheme Company's reinsurance obligation. That alternative may well result in a similar acceleration of the notes and the *pari passu* payment to the noteholders.

The Legislation: Part 9 of the 2014 Act

41. It is now necessary for me briefly to consider the relevant provisions of the legislation under which this application is brought and against which ESM's objections to the sanctioning of the Scheme must be viewed and I now do so.

42. The Scheme Company seeks sanction of the Court for the Scheme. In order for the Scheme to become binding it must be sanctioned by the Court under Section 453(2)(c) of the 2014 Act. The discretion of the Court in relation to the sanctioning of the Scheme is a wide discretion.

43. I should first of all note that Section 450 of the 2014 Act makes reference to "a compromise or arrangement being proposed between a company and (a) its creditors or any class of them, or (b) its members or any class of them." This case is concerned with a Scheme which is proposed between a company and its creditors and, in particular, with two classes of its creditors, namely, the holders of the relevant notes referred to earlier.

44. Section 453 of the 2014 Act provides that certain conditions must be satisfied before a Scheme becomes binding on the relevant creditors or class of creditors. The conditions which must be satisfied are set out in Section 453(2) and they are:

> a) There must be a "special majority" at the Scheme meeting, or where more than one Scheme meeting is held, at each of the Scheme meetings, with votes in favour of a resolution agreement to the compromise or arrangement;
>
> b) notice must be given of the passing of such resolution or resolutions at the Scheme meeting or Scheme meetings and that an application will be made to the Court in relation to the compromise or arrangement in, at least, two daily newspapers, and
>
> c) the court, on an application to it, must sanction the compromise or arrangement.

45. It is necessary only briefly to consider two aspects of these conditions, the first concerns the special majority and the second concerns the notice. There is no dispute between the parties that those conditions have been satisfied in the present case and I am satisfied and so find that the Scheme Company has clearly satisfied the condition in relation to the special majority at section 453(2)(a) of the 2014 Act and the condition in respect of notification provided for in section 253(2)(b).

46. In relation to the special majority, the report prepared by the chairman of the meeting and exhibited by Mr. Masterson, records the results of the polls taken at the Scheme meetings. As appears from that report, 98.12% in value of the Scheme claims of the Ambac guaranteed Scheme creditors present and voting, voted in favour of the Scheme 10 voted in favour, five voted against. The value of the 10 voting in favour was $585.3 million. The value of the five voting against was $11.2 million. Again as appears from the report, 100% of value of the Scheme claims of the Assured Guaranty/A 1 Scheme creditors present and voting voted in favour of the Scheme. It was nine to zero, with the value of $471 million in favour and zero against the Scheme. It is clear that the condition in relation to the requirement of a special majority was satisfied. There is no issue in relation to notification and that condition was also clearly satisfied.

Jurisdiction

47. I now want to turn very briefly to the question of jurisdiction as this was one of the grounds originally advanced by ESM by way of objection to the sanctioning of the Scheme.

48. It was initially contended for ESM that if the Scheme was to be made then it ought to have been proposed in New York. It was suggested on behalf of ESM that this is the case as it would allow certain legal agreements entered into by the Scheme Company containing choice of law and New York jurisdiction clauses to be considered in that context. It was further suggested that, notwithstanding that the Scheme Company was incorporated in Ireland, it had no real connection to this jurisdiction.

49. On the evidence, I am satisfied that not only is the Scheme Company incorporated in Ireland, all of its directors are Irish and all board meetings are and have been held in Ireland.

50. The Scheme Company is a public limited company ("PLC") for the purpose of the 2014 Act. Section 1002 of the 2014 Act provides that the provisions of Parts 1 to 14 of the 2014 Act apply to a PLC except to the extent that they are disapplied or modified by

Part 17 of the 2014 Act or section 1002 of that Act. Neither applies in the present case.

51. It is clear, therefore, from s1002 of the 2014 Act, that the provisions of Part 9 of the 2014 Act dealing with Schemes of Arrangement apply to PLCs and therefore, apply to the Scheme Company.

52. I am satisfied that, in accordance with those statutory provisions, the Irish courts do have jurisdiction to consider and sanction a scheme brought by the Scheme Company, in this case an Irish PLC.

53. This objection (on grounds of jurisdiction), whilst made initially on behalf of ESM, was, quite properly, not pursued at all in the course of the submissions before the Court. To the extent that it is being in any way maintained by ESM, I reject it.

54. I will next consider the approach which the Court should take in considering whether to sanction the Scheme. I will then deal with the three objections relied on by ESM in its oral submissions as its grounds for opposing the sanctioning of the Scheme.

The approach of the court in considering whether to sanction a scheme

55. The nature and extent of the Court's discretion in relation to the sanctioning of a scheme has been considered in a number of Irish and English and other cases. The principles are set out concisely by Courtney in his leading text on *The Law of Companies* (4th edn., Bloomsbury, 2016) at paragraphs 22 056 (p.1597) onwards. That discretion was considered by the former Supreme Court of Ireland in the case of *Re John Power & Son Ltd* [1934] IR 412 ("*Re John Power*"). In that case, Mr. Justice Fitzgibbon quoted with approval from the judgment of Lord Justice Lindley in *Re Alabama, New Orleans, Texas and Pacific Junction Railway Company* [1891] 1 Ch. 213 and, in particular, he approved the following statement of principle:

> *"What the court has to do is to see, first of all, that the provisions of that statute […] have been complied with, and, secondly, that the majority have been acting bona fide. The Court also has to see that the minority is not being overridden by a majority having interests of its own clashing with those of the minority, whom they seek to coerce. Further than that, the Court has to look at the scheme, and see whether it is one as to which persons acting honestly, and viewing the scheme laid before them in the interests of those whom they represent, take a view which can be reasonably taken by businessmen. The Court must look at the scheme and see whether the Act has been complied with, whether the majority are acting bona fide and whether they are coercing the minority in order to promote interests adverse to those of the class they purport to represent; and then see whether the scheme is a reasonable one, or whether there is any reasonable objection to it, or such an objection to it that any reasonable man might say that he could not approve of it."*

Those observations, as I say, were approved by the former Supreme Court in *Re John Power.*

56. The approach to be applied in Ireland under the precursor to section 453 of the 2014 Act, namely, section 201 of the 1963 Act, can be seen in the leading Irish decision, namely the decision of the High Court (Mr. Justice Kelly) in *Re Colonia Insurance (Ireland) Ltd* [2005] 1 IR 497 ("*Colonia*"). That involved a solvent insurance company. The company proposed a scheme of arrangement to establish a mechanism to shorten the time for qualifying and paying certain liabilities. Mr. Justice Kelly considered the position in a detailed reserved judgment and I must make reference to certain parts of that judgment now.

57. Mr. Justice Kelly considered the functions of the court in considering whether to sanction the scheme and noted that they were succinctly set out in a passage in Buckley on the Companies Acts (14th ed, Butterworth & Co, 1981) which he said was derived from a number of decisions. In Buckley, as quoted by Mr. Justice Kelly and as approved by him in *Colonia*, it was stated as follows:

> *"In exercising its power of sanction the court will see, first, that the provisions of the statute have been complied with, second, that the class was fairly represented by those who attended the meeting and that the statutory majority are acting bona fide and are not coercing the minority in order to promote interests adverse to those of the class whom they purport to represent, and, thirdly, that the arrangement is such as an intelligent and honest man, a member of the class concerned and acting in respect of his interests, might reasonably approve.*
>
> *The court does not sit merely to see that the majority are acting bona fide and thereupon to register the decision of the meeting, but, at the same time, the court will be slow to differ from the meeting, unless either the class has not been properly consulted, or the meeting has not considered the matter with a view to the interests of the class which it is empowered to bind, or some blot is found in the scheme."*

58. Mr. Justice Kelly then set out the words of Lord Justice Lindley in the case of Re *English, Scottish and Australian Chartered Bank* [1983] 3 Ch 385 and stated that they were also relevant to an assessment of whether the Court should consider whether to sanction a scheme. He approved of the following passage from the judgment of Lord Justice Lindley, where the Judge stated:

> *"Now, it is quite obvious from the language of the Act and from the mode in which it has been interpreted, that the court does not simply register the resolution come to by the creditors or the shareholders, as the case may be. If the creditors are acting on sufficient information and with time to consider what they are about, and are acting honestly, they are, I apprehend, much better judges of what is to be their commercial advantage than the court can be. I do not say it is conclusive, because there might be some blot in a scheme which had passed that had been unobserved and which was pointed out later. While, therefore, I protest that we are not to register their decisions, but to see that they have been properly convened and have been properly consulted, and have considered the matter from a proper point of*

> *view, that is, with a view to the interests of the class to which they belong and are empowered to bind, the court ought to be slow to differ from them. It should do so without hesitation if there is anything wrong; but it ought not to do so, in my judgment, unless something is brought to the attention of the court to show that there has been some material oversight or miscarriage."*

59. Mr. Justice Kelly then cited with approval the judgment of Mr. Justice Neuberger in the case of *Re Osiris Insurance Limited* [1999] 1 B.C.L.C. 182 ("*Osiris Insurance*"). Having done so, he then set out five criteria which Mr. Justice Kelly felt had to be satisfied in order to sanction the scheme and they are set out as follows:

> *"(1) The court must be satisfied that sufficient steps have been taken to identify and notify all interested parties […]*
>
> *(2) The court must be satisfied that the statutory requirements and all directions of the court have been complied with […]*
>
> *(3) The court must be satisfied that the classes of creditors are properly constituted […]*
>
> *(4) The issue of coercion is one which the court must consider [...]*
>
> *(5) I am satisfied that the scheme of arrangement is such that an intelligent and honest man, a member of the class concerned, acting in respect of his interest might reasonably approve."*

60. Mr. Justice Kelly then cited with approval a passage from the judgment of Mr. Justice Neuberger in *Osiris Insurance* and it is worth just quoting that here also. Mr. Justice Neuberger said:

> *"There is, indeed, a risk that any scheme creditor will receive less under the scheme than he would receive in the normal way. However, the concern that one has about that aspect appears to me to be outweighed by the following factors. First, as already indicated, this risk is greatest for the London market policy holders, who will either be the sort of people who will have been able to take an informed view on the scheme and/or will have had access to brokers who would have been able to give them appropriate advice: they either voted in favour of the scheme or abstained; none voted against. Secondly, scheme creditors are just as likely, pursuant to the scheme, to receive a larger sum, as opposed to a smaller sum, than they would have received if they had pursued their claims in the run off in the normal way. Thirdly, their claims are to be determined by independent and properly qualified persons. Fourthly, their claims will be settled more quickly, and they are likely to be paid significantly more promptly, pursuant to the scheme, than in the normal way. Fifthly, a scheme creditor will almost certainly save on the costs of pursuing a claim under the scheme than in the normal way."*

61. Those factors were set out by Mr. Justice Kelly in *Colonia* in order to show the assessment by those attending the relevant meeting and voting on the scheme of the advantages and disadvantages of the terms of the scheme proposed.

62. Again, having set out those considerations and having set out the various principles which he indicated had to be applied, Mr. Justice Kelly was satisfied that the scheme the subject the application satisfied those criteria. The five criteria with which the court had to be satisfied in order to sanction a scheme were repeated by Mr. Justice Kelly in the case of *Re Depfa Bank Plc* [2007] IEHC 463 ("*Depfa Bank*").

63. In terms of those five criteria, in the present case, the first three criteria are not in issue at all there is no question but that those three criteria are satisfied in the present case. In the case of the fourth criteria, namely, the question of coercion, it seems to me that such coercion must involve improper coercion or pressure by one creditor or group of creditors in a class on another creditor or group of creditors where it is sought to promote interests adverse to the class which the alleged coercing creditor or group is purporting to represent. So the concept of improper coercion is what is relevant and that is what Mr. Justice Kelly was talking about. All schemes involve an element of coercion, in the sense of a dissenting member being rendered bound by the scheme, notwithstanding its disagreement with the scheme, and it seems to me that that is not the sort of coercion that Mr. Justice Kelly was referring in the fourth criteria which he identified which the Court had to be satisfied with before it could sanction a scheme. In any event, it is not suggested in the present case that there was any such improper coercion in the case of ESM.

64. The real issue concerns the fifth criterion which Mr. Justice Kelly indicated had to be satisfied, namely, that the scheme of arrangement must be such that an intelligent and honest person, being a member of the class concerned, acting in respect of his or her interest might reasonably approve, and it is to that question that I now turn.

65. There are a large number of authorities on this issue, it is not necessary to refer to them all. The Scheme Company relies, in particular, on a very recent decision of Mr. Justice Parker sitting in the Grand Court in the Cayman Islands in *Re Ocean Rig UDW Inc* (18 September 2017, Grand Court of the Cayman Islands, Parker J) ("*Ocean Rig*").

66. I agree that it is a case of considerable assistance and it is necessary, therefore, to refer to a number of passages from that judgment because it indicates the approach which I believe the court should take in considering this particular criterion from the list of criteria set out by Mr. Justice Kelly in *Colonia*.

67. At paragraph 85 of his judgment in that case Mr. Justice Parker set out in three paragraphs the relevant questions which the court had to consider at the sanction hearing, the third of those is the same as the fifth of the criteria identified by Mr. Justice Kelly in *Colonia*, namely, whether the scheme is one that an intelligent and honest scheme creditor, acting in respect of its interests might reasonably approve such that the court should exercise its discretion to sanction the Scheme.

68. Mr. Justice Parker quotes from the most recent edition of Buckley on the Companies Acts which he says provides a helpful synopsis of the relevant principles at paragraph 29, and he sets that out at paragraph 86 of his judgment where he quotes Buckley as follows:

> *"The sanction of the court is not a mere formality although the court has an unfettered discretion as to whether or not to sanction a scheme, it is likely to do so, as long as [the questions set out above] are satisfied."*

69. And he continues at paragraph 87 to quote from Buckley as follows:

> *"Members and creditors are normally the best judges of what is in their commercial interest and are in a better place*

> *than the court to decide where their best interests lie. The test is not whether the opposing members or creditors have reasonable objections to the scheme, because a member or creditor may be equally reasonable in voting for or against the scheme. The court can sanction a scheme notwithstanding that there are members or creditors who sincerely contend that the scheme is unfair. The court is not however bound by the decision of the meeting. A favourable resolution merely represents a threshold which must be surmounted before the sanction of the court can be sought. Parliament envisaged that the court's discretion whether or not to sanction would be a check or balance on the power of the majority to bind the minority…"*

70. At paragraph 88 of his judgment Mr. Justice Parker continues:

> *"I take from this formulation and the authorities which give rise to it that the court's function at the sanction stage is to look carefully at the votes cast at the meeting, to ensure compliance with all the formalities, and to see whether the vote taken has been representative of the particular class and bona fide. The objective element to the test is then provided by the court seeing whether the scheme is one which an intelligent and honest creditor, acting in respect of its interest, could vote for."*

71. I completely agree with the views set out in that passage of the judgment of Mr. Justice Parker. He continues at paragraph 89:

> *"The court should be slow to differ from the vote, recognising that it is the creditors who are clearly the best judges of what is in their commercial interest. However, the court is not a rubber stamp in this regard even where the scheme has the support of an overwhelming majority of the creditors who are to be subject to it. The court can differ from the vote, but only if it is satisfied that an honest, intelligent and reasonable member of the class could not have voted for the scheme, and in that regard the court's own view as to whether the Scheme is reasonable or even the best scheme is not relevant."*

72. Again, I fully adopt and endorse the views set out in that paragraph of Mr. Justice Parker's judgment.

73. It is clear, therefore, that the court should be slow to differ from the vote at the relevant meeting. However, the court must be satisfied that the proposed Scheme is reasonable, viewed from the perspective of an honest, intelligent and experienced person of business who is familiar with the Scheme. The court should only differ from the majority if it is satisfied that an honest, intelligent and reasonable member of the class could not have voted for the Scheme. The onus is on the objecting creditor, in this case ESM, to establish this and it must do so, in my view, to the standard of the balance of probabilities.

74. It is necessary before leaving *Ocean Rig*, to make reference to the views expressed at the conclusion of his judgment by Mr. Justice Parker. At paragraph 131 of his judgment he said:

> *"The vote at the UDW Scheme meeting was overwhelmingly in favour of the UDW Scheme. The purpose of the legislation is to give effect to the views of the large majority required by statute who approve schemes of arrangement, to proceed with implementation (and to release their rights in exchange for scheme consideration) in the manner prescribed, subject to the court's sanction applying the right tests to that exercise. Those tests should not be applied to enable minority creditors who have strongly opposing views to "hold to ransom" or "hold out" against the majority to prevent a Scheme from proceeding, or to force a modification of it, or indeed to opt out."*

75. I fully agree and endorse those views, which, in my view, have some resonance in the present case. I also agree that they fully represent the law in this jurisdiction.

76. In the case of *Re English, Scottish and Australian Chartered Bank*, to which reference was made earlier, Lord Justice Lindley further observed:

> *"If the creditors are acting on sufficient information and with time to consider what they are about, and are acting honestly, they are, I apprehend, much better judges of what is to their commercial advantage than the Court can be."*

77. That passage was approved by Mr. Justice Kelly in Colonia and I agree with it here. *Re English, Scottish and Australian Chartered Bank* was also approved and endorsed by the same judge in *Depfa Bank*. In that case, Mr. Justice Kelly stated that the Court will be slow to differ from experienced persons in the industry who are familiar with the subject matter of the scheme.

78. Similar sentiments can be seen in a number of the other decisions which are relied on in the submissions of the parties and, in particular, are set out in the written submissions of the Scheme Company in this case (at paragraphs 118 and 119).

79. Reference was made to one further case in the oral submissions of counsel for Ambac and I should make very brief reference to that case also. That is the decision of Mr. Justice David Richards in the Chancery Division of the Companies Court in England and Wales in the case of *Re Telewest Communications Plc (No. 2)* [2004] EWHC 1466 (Ch); [2005] BCC 36 ("*Telewest (No. 2)*"). My attention was drawn, in particular, to a passage from the judgment in that case, where again having quoted from the then version of Buckley on The Companies Act, along the lines which we have just seen, Mr. Justice Richards went on to say, and this is at paragraphs 21 and 22 of his judgment, on pages 777 and 778 of the report:

> *"This formulation in particular recognises and balances two important factors. First, in deciding to sanction a Scheme under s.425 [that was the relevant provision of the English Act] which has the effect of binding members or creditors who have voted against the Scheme or abstained as well as those who voted in its favour, the court must be satisfied that it is a fair Scheme. It must be a Scheme that 'an intelligent and honest man, a member of the class concerned and acting in respect of his interest, might reasonably approve'. That test also makes clear that the Scheme proposed need not be the only fair Scheme or even, in the court's view, the best Scheme. Necessarily there may be reasonable differences of view on these issues."*

80. And at paragraph 22 he said:

> *"The second factor recognised by the above cited passage is that in commercial matters members or creditors are much better judges of their own interests than the courts. Subject to the qualifications set out in the second paragraph [of the quotation from Buckley] the court 'will be slow to differ from the meeting'."*

81. Again, I endorse and approve the principles set out in those paragraphs from the judgment of Mr. Justice Richards in the *Telewest*

(No. 2) case.

82. Therefore, I accept the submission advanced by the Scheme Company as to the appropriate test and principles to be applied in considering whether to sanction this Scheme. I note that it is extremely rare that a court would refuse to sanction a Scheme where it has been approved by such an overwhelming majority and, in this jurisdiction, by the required special majority where the classes are correctly constituted and where there is no suggestion that the majority did not represent the views of the class. There is no suggestion in the present case now, or at least no suggestion is maintained, that the classes have not been correctly constituted and it is not suggested that the majority in this case did not represent the views of the relevant class. ESM does maintain that the information provided to the creditors was materially deficient in certain respects. I address this later.

83. I conclude this section of my judgment by making brief reference to another decision brought to my attention by counsel for the Scheme Company, namely, the decision of Mr. Justice Lewison, as he was, in the case of *Re British Aviation Insurance Co. Ltd* [2005] EWHC 1621 (Ch). There are just two paragraphs from that judgment that I want to refer to and I do so with approval. At paragraph 75 of his judgment in that case Mr. Justice Lewison, having referred to Buckley on The Companies Act to the effect that a court should normally sanction a scheme if it is one which an intelligent and honest person, a member of the class concerned and acting in respect of his or her interests might reasonably conclude, Mr. Justice Lewison went on to state at paragraph 75 of his judgment:

> *"Thus stated, the test is not whether the opposing creditors have reasonable objections to the scheme. A creditor may be equally reasonable in voting for or against the scheme. In such a case Mr. Moss submitted that creditor democracy should prevail. Where, as here, those who voted in favour of the scheme are large and sophisticated corporations, the rigid application of this test as the sole criterion would rarely, I think, enable the court to refuse to sanction a scheme. It is also not entirely clear to me how the rigid application of this test sits with statements that the court has an unfettered discretion."*

84. At paragraph 76 he said:

> *"Be that as it may, none of the very experienced counsel in the case was able to show me a case in this jurisdiction in which the court, having decided that it had jurisdiction to sanction a scheme, nevertheless refused, as a matter of discretion, to do so."*

85. And then he went on to say there was one possible exception and he referred to a decision from 1900 (*Re Canning Jarrah Timber Co (Western Australia) Ltd*. [1900] 1 Ch 708) in which the Court had refused to sanction the scheme, but after it had been amended it was ultimately sanctioned by the Court of Appeal.

86. I want to make clear that in concluding this section of my judgment I adopt and accept the principles set out in the cases and in the passages of the cases which I have set out earlier. They are the principles which I apply in considering whether to sanction the Scheme at issue here.

ESM's Objections
87. I now move on to the next section of the judgment, which is to consider the objections raised by ESM. In considering this it must be borne in mind that ESM must satisfy me that an honest, intelligent and reasonable member of the class could not have voted for the Scheme. ESM seeks to do so by making and advancing the three grounds of objection which I referred to earlier and which I now consider.

(1) Alleged Material Deficiencies
88. I now consider the first of those grounds of objection. The first of those grounds is that the Scheme Circular was materially deficient, with particular reference to the information it provided concerning the financial position of Ambac. It is that ground which really engages the test that we have seen concerning the honest, intelligent and reasonable member of the relevant class.

89. ESM accepts that it has to demonstrate to the Court that the information presented to the noteholders in the Scheme Circular was materially deficient. It relies on the two affidavits sworn by Dr. Meyer and on the affidavit of Mr. Luby and, also, on the two affidavits sworn by the representatives of Ambac, namely, Mr. Tifft and Mr. Dee. ESM also draws my attention to certain parts of the Scheme Circular itself, as well as material exhibited by Dr. Meyer and by Mr. Luby, including the Solvency and Financial Condition Report in respect of Ambac for the period to 31st December 2018 and, in particular, paragraphs 4.7.3 and 6.4 of that report. Essentially, ESM contends that the financial position of Ambac is not at all as bad as was presented in the Scheme Circular and that, therefore, there was a material deficiency in the material provided to the noteholders in the Scheme Circular in relation to the financial position of Ambac. Time does not permit me to recite in more detail the evidence relied upon by ESM to support this suggestion. However, I wish to make clear that I have considered it in full before reaching my conclusion.

90. ESM is critical of what is said, in particular, in Part B section 3.2 of the Scheme Circular (at page 26 of the Scheme Circular). The particular part of section 3.2 with which ESM takes issue is the second sentence, where it is said:

> *"Furthermore, there are concerns regarding the current regulatory and financial position of Ambac as outlined below and in Part D of this Scheme Circular which may impact the ability of the Ambac Guaranteed Noteholders to make a full recovery on the Ambac guarantees in the future."*

91. As I say, particular issue was taken in relation to that statement and, also, in relation to the information set out in Part D, section 13 of the Circular, where the Circular provides an overview of the financial position of Ambac.

92. ESM says that this does not fairly represent the true financial position of Ambac and it relies on Dr. Meyer's affidavits and on Mr. Luby's affidavit in that regard. The financial position of Ambac is clearly of significance, having regard to the provisions of the Scheme providing for the commutation of Ambac's guarantees and the risks presented concerning Ambac's ability to meet the guarantees on maturity of the relevant notes in 2036. The contention of material deficiency in the Scheme Circular, is strongly resisted both by the Scheme Company and by Ambac.

> *93. Ambac's counsel took me through a number of documents to demonstrate that the picture presented in the Scheme Circular concerning Ambac's financial position was fair and accurate. He referred to Ambac's annual report and financial statements for the year ended 31st December 2018, which were exhibited to Mr. Luby's affidavit, and in particular, to the reference at page 4 to Ambac having* "a significant capital shortfall" *under the relevant solvency rules, that the directors have had to take* "detailed legal, financial and accounting advice since ceasing to write

new business", *and it ceased to write that new business in 2009, and that the run off of Ambac is subject to PRA supervisory requirements applicable to supervision of firms "in difficulty or run off", and, also, that Ambac is in close consultation with the PRA.*

94. Ambac's counsel referred to other provisions of those accounts also. He also referred to Ambac's quarterly operating supplement for Q1 2019 and noted that, as stated in that document, the top 7 of the 25 largest international finance exposures outstanding for Ambac as at 31st March 2017, each individually exceeded Ambac's net claims reserves of $687,000,000.

95. Ambac's counsel, like ESM's, also drew attention to aspects of the Solvency and Financial Condition Report for Ambac for the period to 31st December 2018 and referred, in particular, to the capital deficit which exists for the purposes of the "Solvency Capital Requirements" (the "SCR") of Stg£266,500,000 and the "Minimum Capital Requirements" (the "MCR") of Stg£29,000,000. He drew attention to the statement that Ambac has a "*significant capital shortfall as compared to its capital requirements*", on page 43 of that report. It must be said, as ESM notes, that the report also records that Ambac has sufficient resources to meet its obligations as they fall due and is, therefore, a going concern and solvent on a UK GAAP balance sheet and cash flow basis. In other words, it is not insolvent.

96. Ambac's counsel made the obvious point that Ambac would not be in run off if it was not in financial difficulty, nor would it have been prevented from writing new business, as it has been since 2009. He further drew attention to two matters, the first concerns the price for which ESM tendered for the Scheme Company's notes in 2018, which it did at a price representing 60 cent in the dollar, clearly indicating what it regarded as fair value for the notes, taking into account the risks involved including the risks attaching to Ambac. And he pointed out that the relevant noteholders, including ESM, will get more than this under the Scheme if sanctioned by the Court. Second, he noted that ESM had bought its notes in May 2018 at a discount, paying just over 58 cents per note. Both of these, he submitted, represented ESM's assessment of the value of the notes having regard to all the information out there in relation to the Scheme Company, including information relating to the financial position of Ambac. Finally, Ambac's counsel took me through the Scheme Circular to demonstrate that the information in relation to Ambac's financial position was accurate. Again, time does not permit me to recite all of the provisions relied on but I would mention, in particular, Part D section 13.2.3 and section 13.2.7, both on page 98 of the Scheme Circular.

97. In addition to all of this, it is necessary to refer to the evidence put forward by Merced in the affidavit sworn by Mr. Vertin on 2nd June 2019. Merced is the largest holder of class A notes in the Scheme Company, holding notes to the value of more than $510,000,000 across both classes of the Scheme notes, including $479.7 million of Ambac guaranteed notes. This is a multiple of more than 100 times of the value of the notes held by ESM. While this is relevant, it is not decisive to my consideration of the issues on this application. Merced strongly supports the Scheme. Of particular relevance for present purposes is the averment contained at paragraph 10 of Mr. Vertin's affidavit, where he said:

> *"I have reviewed the Scheme Circular, including in particular Part D (financial information). I do not yea with Mr. Meyer's contention that the information set out in the Scheme Circular is insufficient to enable a fully informed decision to be taken by Scheme Noteholders in respect of the Scheme. In particular, section 14 (Financial Impact of the Scheme on Ambac Guarantee Noteholders) of Part D sets out key factors to be taken into account in assessing the discount that must be applied to repayment of the Ambac guarantees at maturity. I believe that these are reasonable and appropriate factors to be considered."*

98. Succinct but powerful submissions were made to the Court by Merced's counsel in support of the Scheme which strongly disputed the contention that there was any deficiency in the material provided to the holders of the relevant notes. Similarly, brief but succinct submissions were made by counsel on behalf of Assured Guaranty in support of the Scheme.

99. I am not satisfied that there is or was any material deficiency in the information provided to the Scheme Noteholders in relation to the financial position of Ambac or otherwise. I would have reached that view irrespective of whether the burden of proof lay on ESM or on the Scheme Company itself. I find the evidence and submissions relied on by the Scheme Company and by Ambac, as well as the evidence and submissions of Merced to be convincing. Ambac is clearly in a difficult or distressed financial position, for all the reasons outlined by its counsel and in the affidavits sworn on its behalf.

100. ESM was well aware of this when it bought the $5,000,000 notes in June 2018 and when it launched its tender offer in late 2018. The Scheme Circular provided factual information in relation to Ambac's financial position much or all of it being publicly available. That information was available to all the Scheme noteholders. The vast majority of them in the relevant classes affected by the Ambac guarantees voted in support of the Scheme. Nobody except ESM complained about the financial information made available in the Scheme Circular relating to Ambac. Merced was satisfied with it. In the absence of any complaint from any other noteholder, apart from ESM, I infer that no other noteholder had any complaint about the information provided in relation to Ambac in the Scheme Circular.

101. Further, the suggestion by Dr. Meyer at paragraph 20 of his second affidavit that if Ambac obtained an injection of an additional $337,000,000 of equity its financial strength would be such as to enable it to write insurance again, is fanciful in the extreme and flies in the face of the Solvency and Financial Condition Report he himself exhibited at exhibit "2EM2" to his affidavit. And I refer in particular to the matters stated at pages 5 and 47 of that report, to which I will make a brief reference now. At page 5 of that report, which forms part of the executive summary of the report it is stated that:

> *"AUK* [i.e. Ambac] *is unlikely to be able to remediate any capital shortfall through additional capital issuance given that both AUK and its parent Ambac Assurance Corporation are in run off. Notwithstanding the fact that the segregated account of AAC exited from rehabilitation on the 12th February 2018, AAC remains under enhanced regulatory supervision by its regulator and there is no expectation of any injection of additional capital from AAC. It should be noted that regardless of this capital shortfall AUK have sufficient resources to meet its obligations as they fall due and is, therefore, both a going concern and solvent on a UK GAAP balance sheet and cash flow basis."*

102. It is also necessary then to refer to the body of the report on page 43, where it is repeated that there is no prospect of any additional capital coming into Ambac. At page 43, having referred to the significant capital shortfall of Ambac UK, it is then stated:

> *"AUK is unlikely to be able to remediate any shortfall through additional capital issuance given that both AUK and its parent AAC are in run off, and with AAC remaining under the close supervision of its regulator there is no prospect currently of any injection of additional capital from AAC."*

So it seems to me that the observations and suggestions made by Dr. Meyer at paragraph 20 of his second affidavit do not accurately reflect the reality of the situation as appears from the very report which Dr. Meyer himself exhibited.

103. There is no suggestion that the Scheme Noteholders effected by the Ambac guarantees were not honest or intelligent. I am not satisfied that an honest, intelligent and reasonable member of the relevant class acting in its own interest could not have voted for the Scheme and, therefore, I reject this first ground of objection maintained by ESM.

(2) Third Party Release
104. I now turn to the second ground of objection. The second ground of objection is that Part 9 of the 2014 Act cannot be interpreted so as to enable third party releases to be provided for in a Scheme under that part of the Act. It is contended by ESM that the court has no jurisdiction to sanction a scheme of arrangement which provides for the release of claims, including contractual and tortious claims, which each Ambac Guaranteed Noteholder may have against, amongst others, the Scheme Company and Ambac. ESM contends that these claims have constitutional protection as property rights under Article 40.3 and Article 43 of the Constitution of Ireland, that as a matter of statutory interpretation the provisions of Part 9 cannot be interpreted to permit or provide for a scheme which contains for the release of third party claims, and that there is no warrant for applying a broad or expansive interpretation (or what may be called a "pro release interpretation") of the provisions of Part 9, which it says is the interpretation being advanced by the Scheme Company.

105. ESM relies on cases such as the decision of Mr. Justice Keane in the High Court in *Iarnród Éireann v Ireland* [1996] 3 IR 321 where it was held that corporations are entitled to protection under Article 40.3 of the Constitution for unjust attacks on their property rights. A number of other cases are mentioned in this regard in the footnotes to ESM's written submissions to the Court.

106. ESM also relies on a passage from the leading text on statutory interpretation, namely, Dodd, *Statutory Interpretation in Ireland* (Tottel Pub., 2007), and in particular, paragraph 11.51 of that text, concerning the need to give a strict construction to a statutory provision which interferes with a constitutional right. ESM says that Part 9 of the 2014 Act would be such a provision if it could be interpreted as permitting third party releases in a scheme.

107. ESM further contends that the Scheme Circular does not demonstrate that the releases provided for in Part C, section 14.8.1 and 14.8.2, namely, the "Scheme Release Agreement" and the "Ambac Release Agreement" are necessary for the success of the Scheme. It accepts that this contention is less strong in the case of the Ambac Release Agreement.

108. Finally, ESM contends that little weight should be attached to the various English and other cases which have held that similar or equivalent statutory provisions permit third party releases to be included in schemes which may be sanctioned by the Court.

109. The Scheme Company and Ambac submit that third party releases of the type complained of by ESM can properly form part of a scheme of arrangement under Part 9 of the 2014 Act. The Scheme Company is prepared to accept for the purpose of this application that a non Irish corporate entity such as ESM, which is a limited partnership established in the United States, can assert rights under Articles 40.3 and 43 of the Constitution. It says that properly interpreted, taking account of the comments of Dodd in his leading text, schemes of arrangement under Part 9 of the 2014 Act can include provision for third party releases, such as those at issue in the present case. It relies on several English cases and cases from other common law jurisdictions in support of this contention.

110. It says that the Oireachtas must have been aware of this line of case law when enacting the 2014 Act, praying in aid the *Barras* principle discussed in this jurisdiction by the Supreme Court in *Clinton v Dublin City Council* [2006] IESC 58 and most recently by the Supreme Court in 2018 in *MAK v The Minister for Justice and Equality* [2018] IESC 18.

111. I should say that I'm not entirely convinced that that principle or presumption applies where the interpretation in question is one given by courts in other jurisdictions in respect of statutory provisions in those other jurisdictions. The Scheme Company further contends that the involvement of the court in deciding whether to sanction a scheme of arrangement under Part 9 of the 2014 Act provides the appropriate protection and balance for any constitutional rights involved, including the constitutional right to prevent an unjust attack on property rights and, indeed, any constitutional including the right of access to the courts. The Court will not sanction the relevant Scheme unless it is satisfied that it is fair and meets the tests discussed earlier. It relies on cases such as *Moran v Valentia Telecommunications Ltd.* (High Court, Smyth J., 21 January 2002), *Re McInerney Homes Ltd*. [2011] IEHC 25 (Clarke J.) , and *Re Linen Supply of Ireland Ltd*. High Court [2010] IEHC 28 (McGovern J) ("*Re Linen Supply*") in support of its contention.

112. The Scheme at issue in the present case includes two release agreements, namely, the Scheme Release Agreement and the Ambac Release Agreement. The Scheme Release Agreement provides that each Scheme creditor releases any claims against the released parties in respect of the Scheme notes, the Indenture, the Ambac guarantees, the implementation of the Scheme and its restructuring, and any documentation relating thereto. The Scheme Company is authorised to execute the Scheme Release Agreement in respect of all of the released parties.

113. The Ambac Release Agreement provides, amongst other things, that any claims of the Ambac Guaranteed Noteholders and the Trustee in its capacity as a Scheme creditor against Ambac are to be waived. It is proposed that the Scheme Company will execute that agreement on behalf of the Ambac Guaranteed Noteholders and the Trustees.

114. It seems to me that, having reviewed and considered the case law opened to me and referred to in the written submissions of the Scheme Company third party releases are fairly common in schemes of arrangement which have come before the courts of other jurisdictions. A case which considers whether schemes of arrangement can encompass third party releases, and one which was opened to me by the Scheme Company at the hearing, is the decision of the Federal Court of Australia in *Re Opes Prime Stockbroking Ltd* [2009] FCA 813 ("*Opes Prime*"). There are two relevant decisions of the Federal Court of Australia in this case. The first is the first instance decision of Mr. Justice Finkelstein and the second is a decision on appeal from the first instance judge. It is necessary briefly to refer to some passages in that case.

115. In the first instance decision of Mr. Justice Finkelstein, consideration was given as to whether a scheme of arrangement could include a bar on a claim against a third party. The judge commenced his consideration of that issue at paragraph 28 of his judgment. He noted that there was a real issue as to whether a scheme of arrangement could bar a claim against a third party. He stated that:

> *"The answer depends upon whether a scheme containing such a provision is, within the words of [the relevant statute], 'a compromise or arrangement....between a.... [company] and its creditors or any class of them'."*

And he said that that question raised two distinct points:

"(a) What is meant by a compromise or arrangement (neither being a defined term); and (b) If barring a claim amounts to, or may be an aspect of, either a compromise or an arrangement is it a compromise or arrangement between the company and its creditors?"

116. He stated that:

"When considering these points it is necessary to keep in mind that the words "compromise" or "arrangement" must be construed liberally."

He referred to a number of Australian and English decisions in that regard. He then turned, at paragraph 31, to note that there were some limitations on the meaning of "arrangement" and he referred to some authorities in that respect.

117. At paragraph 35, he addressed what he regarded as a difficult point, namely, whether or not a bar of a claim could be regarded as an aspect of a compromise or arrangement between a company and its creditors. He noted that there were, at that point in time, conflicting decisions on the point. He noted that the only Australian case was what he termed an "anti release" case was a case of *Re Buildmat (Australia) Pty. Ltd*. [1981] ACLR 689 ("*Re Buildmat*").

118. However, he went on to refer to the fact that in other jurisdictions, and in particular, in other common law jurisdictions, such as England and Wales, and in Ontario, the approach taken in *Re Buildmat* had not been followed. He said that where the point had been considered in those other jurisdictions, the Courts had adopted what he called a "pro release" approach. He referred to three cases, including the decision of Mr. Justice David Richards in *Re T & N Ltd. (No. 3)* [2007] 1 BCLC 563; a case from Singapore which he also described as a pro release case, *Daewoo Singapore Pte Ltd. v CEL Tractors* [2002] 2 LRC 66 and a decision from the Court of Appeal for Ontario in the case of *Re Metcalfe & Mansfield Alternative Investments II Corp* [2008] ONCA 587. Each of the those cases, he stated, were pro release cases.

119. At paragraph 55 of his judgment, Mr. Justice Finkelstein stated:

"Accepting that the approach to the construction of Section 411 should ensure that the section has a flexible operation, I have no doubt [..] that I should follow the approach in the pro release cases to which I have referred. In other words, provided that there is a sufficient nexus between a release and the relationship between the creditor and the scheme company, the scheme can validly incorporate the release. There is a sufficient nexus here for any number of reasons, including most importantly that the creditor's claims against the Opes companies and their claims against the banks largely (and in many cases completely) overlap, the schemes are in settlement of interlocking claims and in the absence of the release, none of the claims would be compromised."

120. I should say that I agree with the conclusion reached by Mr. Justice Finkelstein in that case on this issue. His conclusion was upheld by the Federal Court of Australia on appeal. It is necessary to refer to a small number of paragraphs from that judgment. At paragraph 67 on page 22 of the judgment of the Federal Court of Appeal, the Court stated as follows:

"A purported scheme of arrangement must involve some arrangement in the sense that is to be construed liberally. No narrow interpretation should be given to the expressions "compromise" or "arrangement". An arrangement within the meaning of s411 connotes some element of give and take. A proposal that conferred no benefit on creditors and constituted the mere confiscation of interests would not be an arrangement within the meaning of s 411. An arrangement must involve some bargain giving benefit to both sides. However, there is no reason to construe the term in s411 as restricting in any way the nature of the bargain which might be made between company and creditors, […] subject only to the additional requirement that the arrangement must be within the power of the company and not in contravention of the Corporations Act."

121. At paragraph 68, the Court stated:

"A scheme of arrangement between a company and its creditors, or class of creditors, is no more than a proposal to vary or modify the company's obligations in relation to its debts and liabilities owed to the creditors or class of creditors. There is nothing to prevent the company from posing, as part of the arrangement, a term to the effect that, in consideration of what the company has provided under the scheme, the creditors will discharge not only the debts and liabilities of the company but also the liabilities of, for example, sureties for the same debts and liabilities of company."

122. Then at paragraph 69, the Court stated:

"It is permissible to incorporate in a scheme of arrangement an involvement or participation by an outsider, being a person or entity who is not a party to a scheme as a company or creditor […]. Such arrangements are commonplace in relation to schemes involving takeovers. A scheme of arrangement made between a company and its creditors under s411 binds only the company and the creditors. Nevertheless, there is no reason why a bargain might not be struck between a company and creditors whereby the creditors are bound to enter into an arrangement with third parties. So long as there is some element of give and take, such that the creditors receive something in return for the benefit conferred on a third party, there is no reason in principle why that term could not be part of the scheme of arrangement as contemplated by s411."

123. I accept that these principles that are relevant to the exercise that I have to carry out in the present case.

124. A number of the so called pro release cases are referred to in the submissions of the Scheme Company in this case. Some of them have been touched on in the judgment of the Australian Courts in *Opes Prime*, namely *Re T & N Ltd. (No. 3)* [2007] 1 BCLC 563 ("*T & N*"). The principle was also considered and approved by the Court of Appeal in England in the case of *Re Lehman Brothers International (Europe) (in administration) (No. 1)* [2010] 1 BCLC 496 ("*Lehman Brothers*"). In that case, Lord Justice Patten, in giving the judgment of the Court, stated as follows (at paragraph 63):

"It seems to me entirely logical to regard the court's jurisdiction as extending to approving a scheme which varies or releases creditors' claims against the company on terms which requires them to bring into account and release rights of action against third parties designed to recover the same loss. The release of the such third party claims is merely ancillary to the arrangement between the company and its own creditors."

125. Having cited with approval the judgments in *Opes Prime* and the decision of Mr. Justice Richards in *T & N* and having at

paragraph 48 of his judgment quoted with approval a passage from the judgment of Mr. Justice Richards in *T & N*, Lord Justice Patten went on to set out the following conclusions at page 517, paragraph 65 of his judgment:

> *"It seems to me that an arrangement between a company and its creditors must mean an arrangement which deals with their rights inter se as debtor and creditor. That formulation does not prevent the inclusion in the Scheme of the release of contractual rights or rights of action against related third parties necessary in order to give effect to the arrangement proposed for the disposition of the debts and liabilities of the company to its own creditors. But it does exclude from the jurisdiction rights of creditors over their own property which is held by the company for their benefit as opposed to their rights in the company's own property held by them merely as security."*

126. Again, those principles are particularly relevant to the exercise that I have to undertake here. There are a number of other English cases to similar effect.

127. I turn now to look briefly at the provisions of Part 9 of the 2014 Act which replaced the old Section 201 of the 1963 Act to see the extent to which those principles can be applied and represent good law in this jurisdiction.

128. Section 450 of the 2014 Act refers, as I indicated earlier, to a compromise or arrangement being proposed between a company and, *inter alia*, its creditors or any class of them. The wording is very similar, if not identical to, the wording that was at issue in the Australian legislation considered in *Opes Prime* and in the English legislation considered in *T & N* and *Lehman Brothers*. All those cases accept that arrangements can include provision for the release of third party rights or obligations.

129. There was no attempt by the Oireachtas when enacting Part 9 of the 2014 Act to exclude third party releases from schemes of arrangement under that part or to define a compromise or arrangement in such a way as to exclude such releases. I agree that the principles and conclusions that we have seen from the decisions in *T & N* , *Lehman Brothers* and *Opes Prime* reflect the correct and proper interpretation of the relevant provisions of Part 9 of the 2014 Act and I am satisfied that it is appropriate to adopt the pro release interpretation referred to by Mr. Justice Finkelstein in the *Opes Prime* case and which is seen elsewhere in the authorities to which I have just referred, subject to any constitutional prohibition on my doing so and it is to that question that I now turn.

130. So what about the constitutional dimension? While there is some considerable controversy about the extent of the application of the constitutional rights contained in Article 40.3 and Article 43 of the Constitution to foreign corporations or corporate entities, it is not necessary to reach any concluded view on that issue in the present case, as the Scheme Company accepts for the purposes of this application that ESM, an American limited partnership, is entitled to protection from any unjust attack on its property rights under Article 40.3 of the Constitution. In my view, the requirement to obtain the sanction of the Court for a scheme of arrangement under Part 9, which sanction will not be granted if this scheme is unfair, inequitable, improperly coercive or unreasonable in the sense discussed earlier, combined with the requirement for a special majority at the relevant scheme meeting as a pre condition for such sanction under Section 453 of the Act, represents a fair, reasonable and proportionate balance by the Oireachtas of the various potentially competing interests involved in a scheme of arrangement. I do not believe that it is necessary to give a restrictive interpretation to the provisions of Part 9 of the 2014 Act. The involvement of the Court at the sanction stage, and indeed at the earlier stage provided for in Section 450 when summoning the scheme meetings, is sufficient to ensure the protection of any constitutional rights which may be involved, including any right to property or right of access to the court which may be engaged or potentially adversely affected in any scheme of arrangement. A balance has, therefore, been struck by the Oireachtas in the legislation which has provided for the important role of the court in terms of the sanctioning of a scheme. I note and agree with what was said in this regard by Mr. Justice McGovern in *Re Linen Supply*, which was an examinership case, in particular at paragraph 21 of his judgment in that case. Similar protections against the sanctioning of a Scheme which is not fair or equitable apply under Part 9 of the 2014 Act. I should add that I do not accept that there is any ambiguity or genuine doubt in Section 450 or elsewhere in Part 9 of the 2014 Act as to the matters which may be included in a compromise or arrangement proposed between a company and its creditors such as might require a strict interpretation of that provision or other provisions in Part 9.

131. Finally in this connection, I do not accept that the necessity for the releases contained in the Scheme has not been demonstrated. The Ambac Release Agreement is undoubtedly necessary having regard to the central involvement of Ambac as guarantor for a number of the classes of notes. I also accept that the Scheme Release Agreement is necessary to ensure that there is finality in relation to the affairs of the Scheme Company so that it may ultimately be wound up, as is the intention in the event that the Scheme is sanctioned, and so that there are no outstanding claims in circumstances where the dividends and payments provided under the Scheme are intended to cover and close off all such claims. It would make no commercial or legal sense to leave such claims hanging out there. I further note that schemes of arrangement often contain terms providing for the release of third parties from liabilities they may have or potentially have. The categories of third parties whose obligations or potential liabilities may be involved and which can present problems for or obstacles to a restructuring intended to be effected under a Scheme of Arrangement include guarantors as well as directors of the relevant Scheme company. This is clear from the leading text in the field, Pilkington on *Schemes of Arrangement in Corporate Restructuring*, (2nd edn. Sweet & Maxwell, 2017), from paragraph 9 001, p. 145 onwards. It is perfectly understandable, in my view, why the Scheme makes provision for both of the forms of release and specifically in this context for the Scheme release agreement.

132. I will deal separately with ESM's claims in relation to the New York proceedings.

133. In light of the foregoing, I reject all of the arguments advanced by ESM in support of its objection that a scheme of arrangement under Part 9 between a company and its creditors cannot include a provision providing for the release of third party claims. I am satisfied that, properly interpreted, the provisions of Part 9 can be interpreted so as to include such releases. Whether the Courts will ultimately sanction such a scheme will depend on the application of the test set out in the *Colonia* case and in the other cases referred to earlier.

(3) The New York Dimension

134. I now turn to consider the third and final set of objections advanced by ESM at the hearing. It is not entirely clear what objection is now being maintained by ESM under this heading as it has morphed and changed in the course of the affidavits, the written submissions and the oral submissions. As noted earlier, Dr. Meyer originally suggested that the Scheme, if proposed by the Scheme Company at all, ought to have been proposed and put forward in New York. I have rejected that contention. The Scheme is prepared in respect of an Irish company. All of the directors are Irish. All board meetings are held in Ireland. As I have held earlier and found earlier, the Irish courts clearly have jurisdiction to consider the sanctioning of the Scheme under Part 9 of the 2014 Act.

135. Next, reliance was placed by ESM on a number of grounds of objection set out and advanced in the affidavit of Mr. Bonner, a US lawyer, to the effect that the Scheme would be unlawful under New York law for various reasons. In his affidavit, Mr. Bonner suggested that the Scheme would be unlawful under New York law for effectively five reasons. Firstly, he said that the Scheme

company failed to conduct a robust market check to determine the market value of the notes and did not seek to negotiate the price of the ESM's tender offer. Secondly, he contends that the Scheme company entered into the lock up support agreement with the majority of Scheme creditors and this prevented the market check that the New York courts rely on to determine the actual intrinsic value of the securities. Thirdly, he contended that the lock up support agreement did not contain any "fiduciary out" clause. Fourthly, he contended that the Scheme is coercive in nature, providing higher consideration to those who sign up to the lock up support agreement. Fifthly, he said that price that the company had offered for ESM notes did not reflect the intrinsic value of those securities.

136. It seems to me that these issues do not really have to be addressed or considered in the course of this application before me. I note that it is contended on behalf of the Scheme Company, in an affidavit sworn on its behalf by Mr. Graulich, another American attorney, on 4th June 2019 (the third affidavit of Mr. Graulich) that in his view the fiduciary duties of a company and its directors are to be governed by the laws of the company's place of incorporation, which in the present case is Ireland and that this is the position under New York law. I do not have to decide this issue for the purpose of this application. However, in the event that it is necessary to offer a view in relation to Mr Bonner's contentions, I note the submissions advanced by the Scheme Company at paragraphs 49 - 53 of its written submissions. For brevity at this point and without repeating them, I agree that there is considerable merit to the submissions advanced in those paragraphs, and I accept them. Therefore I do not believe that Mr. Bonner has set out any good or valid reasons as to why the Scheme should not be approved on the basis set out or advanced by him in his affidavit.

137. I should also point out that as stated at paragraph 55 of the Scheme Company's written submissions, there are a number of cases decided by the English courts where those courts have sanctioned schemes of arrangement under equivalent statutory provisions to those contained in Part 9 which compromised New York governed debts conditional on Chapter 15 Recognition. The cases referred to there are *Re Magyar Telecoms BV* [2015] 1 BCLC 418; *Re Noble Group Ltd* [2018] All ER (D) 100; *Re Codere Finance (UK) Ltd* [2015] EWHC 3778 (Ch) and *Re Zlomerex International Financial SA* [2015] 1 BCLC 36.

138. As I have indicated, I accept the submissions advanced by the Scheme company in relation to these various points.

139. The written submissions of ESM to an extent repeat some of the points made by Mr. Bonner concerning the alleged unlawfulness of the Scheme under New York law. In particular, this is advanced at submission 1, paragraph 13, of ESM's written submissions. Submission 2 at paragraph 17 of those submissions then contends that if the Scheme is sanctioned by the court, ESM will be prevented from litigating its complaint before the New York court. This appeared to be the main point under the New York law heading advanced by ESM in its oral submissions to the Court, namely that it would be precluded from proceeding with its complaint in New York if the Scheme is sanctioned. In effect, this is largely a repetition of the second ground of objection relied on by ESM, on which I have just ruled.

140. It was further submitted by ESM that the Court should consider deferring sanctioning of the Scheme effectively to allow the New York complaint to be litigated in New York. However, I am not prepared to do that.

141. There appears to be agreement between the respective US lawyers, namely Mr. Bonner, who swore the affidavit on behalf of ESM, and Mr. Graulich who has sworn affidavits on behalf of the Scheme Company, that when seeking recognition of the Scheme, if sanctioned by the Court, which includes provision for the release of claims, including those the subject of the New York complaint filed by ESM against Ambac, under Chapter 15 of The Bankruptcy Code, the New York Court will not assess the position on a de novo basis and will only refuse to recognise the Scheme if it is manifestly contrary to US public policy. Mr. Bonner does not say that the Scheme, if sanctioned in its current terms, would be found to be manifestly contrary to United States public policy. Mr. Graulich expressly says at paragraph 20 of his second affidavit of the 24th April 2019 that the Scheme would not be found to be manifestly contrary to United States public policy.

142. I am not satisfied that ESM has demonstrated any good reason for me not to sanction the Scheme based on the existence of the New York complaint or any of the other grounds of objection advanced under this general heading. I regard it as significant that the complaint was only filed on 30th May 2019, i.e. last Thursday, more than four weeks after the Court gave its first directions in relation to convening of the Scheme meetings for the Scheme, which was on 24th April 2019, more than four weeks after the advertisements in respect of the Scheme meeting were published, including in The Financial Times (United States edition), which was on the 2nd May 2019, and notified to Scheme creditors through the DTC on the 30th April 2019, and more than a week after the Scheme meetings were held. I do not believe that there is any basis to adjourn the sanction hearing and I would query what the purpose of such an adjournment would be. I accept the case advanced by the Scheme Company that it is a matter of urgency that the Scheme be sanctioned and note that recognition is to be sought in New York with a hearing under Chapter 15 of The Bankruptcy Code scheduled in New York for next Tuesday, the 11th June 2019.

143. In ruling against this objection, I have also taken account of the issues considered earlier in my judgment, including the dividend and payment provided for in the Scheme, the amount which ESM paid for its notes in June 2018, the amount offered by ESM in its tender offer in late 2018 and the fact that this is not a case in which ESM will be making a loss on its notes, albeit that it may not be making as large a profit on those notes as it may have hoped for. I am satisfied that the Court has jurisdiction to deal with the sanction application and that it would not be appropriate for me not to defer the application. Therefore, I have proceeded to consider the sanction application. I reject all the objections raised by ESM under this heading.

Conclusions
144. In conclusion, before sanctioning the Scheme I must be satisfied that the preconditions in Section 453, subsection 2(a) and (b) have been satisfied. I have found that those conditions have been satisfied. I am required in accordance with the principles set out in the case law identified earlier, including the cases of *Colonia* and *Depfa*, to be satisfied that there was no coercion of the minority at the relevant Scheme meeting. I am so satisfied. I am also required to be satisfied that an honest and intelligent person acting reasonably in his or her own interests could support the Scheme. I am so satisfied.

145. The starting point is that the Scheme creditors have voted overwhelmingly in favour of the Scheme in the numbers and percentages referred to earlier. As sophisticated investors, it must be assumed that they have carefully considered all aspects of the Scheme and the financial return to them. I do not accept that there was any material deficiency in the information provided to them in the Scheme Circular. The financial return offered by the Scheme is, and I accept this, the net present value of the anticipated principal interest and is greater than the status quo and greater than the sum paid by ESM when it acquired the notes and offered by ESM in its tender offer.

146. I am also satisfied that it is clear on the evidence that the Scheme will bring certainty in circumstances where there is a real risk as to Ambac's ability to perform its obligations under the guarantees at the stated maturity date. I also accept that honest, intelligent and reasonable people of the type found in the class at issue would have concluded that such a risk existed.

147. While ESM has raised a number of objections to suggest that the Scheme is unfair and irrational and ought not to be sanctioned, I have not accepted any of those objections.

I accept the Scheme is fair and equitable to all of the Scheme Creditors and that it is one which an honest and intelligent person, acting in his or her own interests, would reasonably approve. Therefore I reject all of the grounds of objection raised by ESM and I will sanction the Scheme under Section 453(2) of the 2014 Act.

Bankruptcy
Deep Dive

US Bankruptcy Court Draws Guardrails as UK Plans Gain Traction

July 16, 2026, 5:00 AM EDT

Shred debt. Keep control. Skip bankruptcy.

A six-year-old UK restructuring plan is growing in popularity among financially distressed US companies as a way to cut debt while preserving equity and minimizing business disruption. The plan can keep companies publicly listed, can provide liability releases for nonbankrupt third parties, and is more confidential than Chapter 11 bankruptcy.

The approach falls under Part 26A of the UK's Companies Act. It has attracted businesses such as retailer Fossil Group and energy infrastructure company New Fortress Energy, both of which established UK affiliates before obtaining US recognition under Chapter 15.

But as the strategy gains traction, US bankruptcy courts should closely scrutinize cases involving newly created UK entities to ensure the process isn't used to circumvent US bankruptcy law, Judge Martin Glenn of the US Bankruptcy Court for the Southern District of New York wrote in an opinion July 14, recognizing New Fortress' overseas plan.

"The particular risk is that by establishing a UK debtor to file under Part 26 or Part 26A, a debtor may circumvent the requirements of the US Bankruptcy Code to disadvantage some creditors," Glenn wrote.

New Fortress' US approval followed Fossil's last fall. New Fortress used the UK process to reduce its funded debt from about $5.7 billion to less than $1 billion. An affiliate, NFE Brazil Newco Ltd., was incorporated in the UK in April.

"Will there be more? Unquestionably," James Peck, an international judge in Singapore and former Southern District of New York bankruptcy judge, said.

The plans are more likely to succeed if they have creditor support.

"The key to all of this is that the restructuring approach being pursued is one that creditors have participated in designing or evaluating and have overwhelmingly approved," Peck said.

Behind the Trend

Practitioners said these UK plans are attractive because they can be more surgical and less operationally disruptive than Chapter 11.

And because the proceedings aren't brought under the Insolvency Act, companies can avoid the bankruptcy stigma.

"You are going to start to see more deals like this, where companies go overseas because now there's more precedent in the UK for something like this," said Weil, Gotshal & Manges LLP's restructuring department co-chair Sunny Singh. Weil represented Fossil.

Part 26A includes a "cramdown" feature, which forces a plan on a dissenting class of creditors. It doesn't follow the US absolute priority rule.

Singh said courts are likely to be more skeptical of Part 26A in mass tort cases.

"It's different if you're a creditor with bond indentures and agreements that allow a scheme, versus somebody who was the victim of a mass tort, who didn't have contractual arrangements and wouldn't reasonably expect a restructuring in the UK," he said in an interview.

Chapter 11 has long been a go-to for foreign companies seeking bankruptcy protection because of features that are limited or unavailable under other regimes.

That trend still exists, said Matthew Czyzyk, head of Ropes & Gray's business restructuring group in London, who advised Fossil's noteholders. "But this was an instance of the opposite happening," he added.

Bitcoin mining company Argo Blockchain, based in England and operating in the US, pursued a Part 26A plan because it allowed the company to preserve existing equity, obtain limited third-party releases, and maintain its Nasdaq listing.

Argo's UK plan last year restructured $40 million of New York law-governed notes. In Fossil and Argo, key stakeholders held "baby bonds" primarily issued to retail investors.

"With these three cases, it's on people's radar more than it used to be, but it still takes the right case," said Daniel B. Besikof, a partner in Lowenstein Sandler LLP's bankruptcy and restructuring department, who represented Argo.

UK Connection

US companies can establish a UK connection by incorporating a new UK entity that agrees to be bound by the US company's debt.

Businesses can also amend debt documents to adopt English governing law or move the group's center of main interest to the UK.

When Part 26A is used to restructure a non-UK company's debt, Chapter 15 courts should closely scrutinize COMI to ensure the process isn't used unfairly to favor one group of creditors or achieve a result unavailable under Chapter 11, Glenn wrote.

Peck said UK restructuring plans are designed to produce better outcomes for stakeholders than the alternative likely outcomes, such as liquidation or Chapter 11.

Court Scrutiny

Courts are taking a closer look to ensure companies don't improperly impose plans on creditors while bypassing dissenting classes, said Phillip D. Taylor, a partner at Alston & Bird in London who worked on the first Part 26A plan in 2020 with Virgin Atlantic Airways Ltd.

The shift responded to earlier plans that were more aggressive toward out-of-the-money creditors, he said.

"Recent court of appeal cases made clear that you've got to engage with out-of-money creditors, you've to engage with everyone and try to do a fair deal," Taylor said. "If they are holding out unfairly, then fine, you can cram them down."

Part 26A cases including Waldorf Production, Thames Water, and Petrofac have tested the plan's limits and have increased the "evidential hurdle" on the company and supporting stakeholders seeking approval, Czyzyk said.

The restructuring plan, while typically cheaper and less resource-intensive than Chapter 11, has been criticized by some market participants as costly and less accessible to smaller companies. Still, it can offer a faster process than Chapter 11, Czyzyk said.

"Some people were saying, 'What's the place in the world for these restructuring plans given these broader dynamics?'" Czyzyk said. "The good news story is that it showed that the restructuring plan was fit for purpose despite the naysayers."

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:

NFE Global Holdings Limited, *et al.*,

Debtors in a Foreign Proceeding.

FOR PUBLICATION

Case No. 26-11268 (MG)

(Jointly Administered)

MEMORANDUM OPINION RECOGNIZING THE ENGLISH PROCEEDINGS AS FOREIGN MAIN PROCEEDINGS AND GRANTING RELATED RELIEF

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CHIEF UNITED STATES BANKRUPTCY JUDGE

The two foreign debtors in this chapter 15 case—NFE Global Holdings Limited, incorporated in 2021 in the U.K., and NFE Brazil Newco Ltd., incorporated in April 2026 in the U.K., are affiliates of New York-based New Fortress Energy Inc., a Delaware corporation. The two foreign debtors filed cases in the U.K. in March and April 2026 under Part 26A of the U.K. Companies Act 2006 seeking to implement debt swap plans designed to cut substantial debt from the New Fortress balance sheet while preserving a portion of existing equity holdings. Having succeeded in gaining approval of the plans in the U.K., the foreign debtors now seek recognition and enforcement of the Part 26A plans in the U.S. in this chapter 15 case. No objections were filed to the requested relief in this chapter 15 case. The Court has already entered an order granting the requested relief. In doing so the Court nevertheless indicated that it intended to issue an opinion explaining its reasoning.

Companies are increasingly seeking to take advantage of a foreign restructuring mechanism by which the companies seek to gain approval in the courts in the U.K. for plans under Part 26 (schemes of arrangement) or Part 26A (restructuring plans) and then to obtain recognition and enforcement of the plans in U.S. chapter 15 cases, particularly where the plans include modifications of New York-law-governed debt.[1] The U.K.-

[1] Where companies believe they need only a balance sheet restructuring rather than an operational restructuring, in which chapter 11 proceedings excel, the time and costs involved in pursuing the foreign court solution followed by a chapter 15 case is allegedly less.

approved plans—as is true in this case—often include releases of non-debtor affiliate guarantees of the original debt, as well as broad exculpation protection for the parties involved in the restructuring proceedings. The releases and exculpation provisions permissible under U.K.-law push the boundaries of available relief in a chapter 11 case. While at least one of the foreign debtors in this case was incorporated in the U.K. in 2021, the other foreign debtor was incorporated in the U.K. in April 2026 shortly before the U.K. proceedings were filed. Is "COMI tourism"—where a foreign debtor that is an affiliate of a U.S.-based (or other non-U.K.-based debtor) corporation was established specifically for the purpose of pursuing a foreign restructuring solution followed by a chapter 15 case—a basis to deny recognition and enforcement in a chapter 15 case? The Court has already entered its order recognizing and enforcing these foreign debtors' plans in this case. The Court obviously concluded that the foreign debtors in this case were entitled to the requested relief. While there is nothing in the text of chapter 15 that precludes recognition and enforcement in cases such as this, there are some cautionary principles that a chapter 15 court should consider before approving the requested relief.

The particular risk is that by establishing a U.K. debtor to file under Part 26 or Part 26A., a debtor may circumvent the requirements of the U.S. Bankruptcy Code to disadvantage some creditors. While not the case here, the Court discusses the issue in the context of these proceedings to describe the analytical framework that the Court applied before granting its approval.

I. **<u>BACKGROUND</u>**

Pending before the Court are the *Chapter 15 Petition for Recognition of a Foreign Proceeding* (ECF Doc. # 1) and the *Verified Petition for (I) Recognition of Foreign Main*

Proceeding, (II) Recognition of Foreign Representative, and (III) Related Relief under Chapter 15 of the Bankruptcy Code (the "Verified Petition" or "VP," ECF Doc. # 3) filed in the above-captioned chapter 15 cases (the "Chapter 15 Cases") by Christopher Boas as the authorized foreign representative (the "Foreign Representative") of the above-captioned foreign debtors (the "Debtors[2]") that are the subject of proceedings (the "English Proceedings") pending before the High Court of Justice of England and Wales (the "English Court") concerning two restructuring plans (collectively, the "Restructuring Plans") proposed pursuant to Part 26A of the Companies Act of 2006 (as amended, the "Companies Act") seeking recognition of the English Proceedings as "foreign main proceedings."

In support of the Verified Petition, the Debtors submitted (a) the *Declaration of Nicole Stephansen in Support of the Verified Petition for (I) Recognition of the Foreign Main Proceeding, (II) Recognition of Foreign Representative, and (III) Related Relief under Chapter 15 of the Bankruptcy Code* (the "Stephansen Declaration, ECF Doc. # 4); (b) the *Declaration of Christopher Boas in Support of the Verified Petition for (I) Recognition of the Foreign Main Proceeding, (II) Recognition of Foreign Representative, and (III) Related Relief under Chapter 15 of the Bankruptcy Code* (the "Boas Declaration," ECF Doc. # 5); and (c) the *Supplemental Declaration of Nicole Stephansen in Support of the Verified Petition for (I) Recognition of the Foreign Main Proceeding, (II) Recognition of Foreign Representative, and (III) Related Relief under Chapter 15 of*

[2] The Debtors and the last four digits of their foreign identification numbers are NFE Global Holdings Limited (9588) and NFE Brazil Newco Limited (1053). The address of NFE Global Holdings Limited's registered office is Suite 1, 7th Floor, 50 Broadway, London SW1H 0BL, United Kingdom, and the address of NFE Brazil Newco Limited's registered office is Suite 1, 7th Floor, 50 Broadway, London SW1H 0DB, United Kingdom.

the Bankruptcy Code (the "Supplemental Stephansen Declaration," ECF Doc. # 17). On June 19, 2026, the Debtors filed a revised proposed order (the "Proposed Order," ECF Doc. # 18).

No objections were filed. The Debtors filed a *Certificate of No Objection* (ECF Doc. # 19) on June 22, 2026.

Additionally, in response to the Court's *Order for Production of Expert Report* (ECF Doc. # 22) requesting that "the Foreign Representative shall file on the docket . . . any expert affidavits or reports submitted to the U.K. Court in connection with sanction of the Part 26A Plan regarding recognition of the Part 26A Plan in the Chapter 15 case," the Foreign Representative filed the *Notice of Filing of Expert Opinion* (ECF Doc. # 23). Attached as Exhibit A is the *Expert Opinion of Daniel M. Glosband* (the "Expert Report"), which is "the only expert opinion submitted to the English Court that addresses recognition of the Restructuring Plans in the Chapter 15 Cases."

The Foreign Representative also filed the *Notice of Filing of Relevant Alternative Report* (ECF Doc. # 27). Attached as Exhibit A is the *Relevant Alternative Report* (the "RAR") prepared by Alvarez and Marsal ("A and M").

For the following reasons, the Court **GRANTED** the Requested Relief and (i) recognized the English Proceedings as "foreign main proceedings"; (ii) recognized the Foreign Representative as the "foreign representative" of the Debtors; (iii) found that the Verified Petition meets the requirements of section 1515 of the Bankruptcy Code; and (iv) recognized the English Court's Sanction Order, giving full force to the Sanction Order and the Restructuring Plans, including the Plan Releases.

A. General Background

New Fortress Energy Inc. ("NFE" or the "Parent") is the ultimate parent of other direct and indirect subsidiaries (collectively the "Group") including the Debtors, NFE Global Holdings Limited ("NFE Global") and NFE Brazil Newco Limited ("NFE Brazil"). (VP ¶ 15.) The Group is an integrated gas-to-power energy infrastructure company that owns and operates natural gas and liquefied natural gas ("LNG") infrastructure, along with an integrated fleet of ships. (*Id.* ¶ 11.) Additionally, it builds modular LNG manufacturing facilities which can be deployed around the world and used to liquify natural gas. (*Id.*)

The Group's principal business activities are divided among two operating segments: (i) Terminals and Infrastructure and (ii) Ships. (*Id.* ¶ 12.) The Terminals and Infrastructure segment includes the entire production and delivery chain for LNG, spanning natural gas procurement and liquefaction to logistics, facilities, and conversion or development of natural gas-fired power generation. (*Id.*) The Group's Ships segment charters the Group's vessels under long-term or spot (short-term) arrangements with third parties in the LNG logistics industry. (*Id.*) In recent years, the Group has experienced financial headwinds brought on by an unfavorable pricing environment for LNG and significant capital expenditures for projects that have not come online within expected timeframes and budgets. (*Id.* ¶ 1.)

B. Corporate Structure

The Parent is a Delaware corporation with stock listed on the Nasdaq Global Select Market ("Nasdaq"). (Stephansen Decl. Ex. D ¶ 4.9.) Both Debtors are private companies limited by shares and incorporated under the laws of England and Wales. (VP

¶ 3.) The registered office of both NFE Global and NFE Brazil is Suite 1, 7th Floor, 50 Broadway, London SW1H 0BL, United Kingdom. (*Id.* ¶ 16.)

NFE Brazil was formed specifically for the purpose of promoting the restructuring of BrazilCo. (*Id.*) In furtherance of that purpose, NFE Brazil became a guarantor in respect of the obligations under the New 2029 Notes (as defined herein) on April 9, 2026. (*Id.*) The boards of both Debtors are comprised of four directors, one of whom is the Foreign Representative and a U.K. resident that does not sit on the board of any other Group entity. (*Id.*) In addition, the Debtors' books and records are maintained in the U.K., each Debtor maintains a bank account in the U.K., and Vistra Cosec Limited, a U.K. company, serves as the corporate secretary for both Debtors. (*Id.*)

C. Capital Structure

The Debtors have guaranteed external funded debt in a total outstanding principal amount of approximately $5.7 billion. (Boas Decl. ¶ 9.) NFE Global is an obligor on intercompany obligations with a total outstanding principal amount of $2.4 billion. (*Id.*) All of the below mentioned external funded debt and intercompany obligations (collectively, the "Plan Debt" and the holders of the debt, the "Plan Creditors") is in U.S. dollars and addressed by the Restructuring Plans, outlined below. (*Id.*) NFE Brazil is a guarantor on the New 2029 Notes (the "BrazilCo Plan Debt") and NFE Global is a guarantor on all other Plan Debt (the "CoreCo Plan Debt"). (*Id.*) The following table summarizes the Debtors' external funded debt:

Obligation	Principal Amount Outstanding	Collateral and Priority	Maturity Date
CoreCo Plan Debt			
2026 Legacy Notes	$510,879,63	Common Collateral (*Pari passu* first lien claim)	September 30, 2026
2029 Legacy Notes	$236,728,231	Common Collateral (*Pari passu* first lien claim)	March 15, 2029
R-1 Revolving Credit Facility	$100,000,000	Common Collateral FLNG 1 Collateral FLNG 2 Collateral Account Collateral (*Pari passu* first lien claims) Brazil Collateral (*Pari passu* second lien claim)	April 15, 2026
R-2 Revolving Credit Facility	$560,400,000	Common Collateral FLNG 1 Collateral FLNG 2 Collateral Account Collateral Brazil Collateral (*Pari passu* first lien claim) Brazil Collateral (*Pari passu* second lien claim)	October 15, 2027
Term Loan A	$294,999,563	Common Collateral FLNG 2 Collateral Account Collateral Brazil Collateral *(Pari passu* first lien claim) Brazil Collateral (*Pari passu* second lien claim)	July 19, 2027
Term Loan B	$1,266,077,800	Common Collateral FLNG 1 Collateral FLNG 2 Collateral Account Collateral (*Pari passu* first lien claim)	October 30, 2028
BrazilCo Plan Debt			
New 2029 Notes	$2,730,126,770	Brazil Collateral (*Pari passu* first lien claim)	November 15, 2029
Total	$5,699,211,827		

(*Id.*)

D. The Debtors' U.S. Assets

The Debtors have property in the U.S. in the form of a retainer (the "Retainer") held in an account maintained in New York by Skadden, Arps, Slate, Meagher & Flom

LLP ("Skadden"). (*Id.* ¶ 20.) Additionally, the Debtors are obligators on U.S. dollar-denominated debt that is governed by New York law, including the instruments related to the Legacy Notes, the Term Loan A Facility, the Term Loan B Facility, the Revolving Credit Facility, the Series I Intercompany Loan Facility, the Series II Intercompany Loan Facility, and the New 2029 Notes. (*Id.*)

E. Events Leading to the English Proceedings

1. Challenges Facing the Debtors' Business

The Group's liquidity position and ability to generate revenue from projects and customer contracts have been adversely impacted by permitting and construction delays and denials, the early termination of a FEMA contract in Puerto Rico, delays to certain scheduled power auctions in Brazil, fluctuations in natural gas feedstock, increases in cost of construction materials, swings in the shipping and freight markets, and environmental activist opposition. (VP ¶ 31.)

2. The 2024 Refinancing

On November 6, 2024, the Group entered into an exchange and subscription agreement with certain holders of its outstanding 2026 Legacy Notes and 2029 Legacy Notes, which related to a series of transactions intended to extend the maturity profile of the Group's indebtedness and enhance liquidity. (*Id.* ¶ 33.) Pursuant to this agreement, NFE Financing (i) sold approximately $1.21 billion in aggregate principal amount of New 2029 Notes and (ii) issued approximately $1.52 billion in aggregate principal amount of New 2029 Notes in a dollar-for-dollar exchange for a portion of the Group's 2026 Legacy Notes and 2029 Legacy Notes. (*Id.*) The collateral provided in connection with securing the New 2029 Notes consisted of NFE Financing's interest in (i) approximately 45% of the Group's Brazilian business; (ii) proceeds of NFE Financing's interest in the Series II Intercompany Loan Facility; (iii) the Brazilian Intercompany Loan Facility (which in turn is secured by the Brazilian Parent's approximately 55% equity interest in the Group's Brazil business and its interest in the proceeds of the Series I Intercompany Loan Facility); and (iv) land in Wyalusing, Pennsylvania owned by Bradford Partners, guarantor for the New 2029 Notes (the "PA Land"). (*Id.*) The Group utilized proceeds from the subscription transactions to redeem in full the outstanding aggregate principal amount of such notes. (*Id.*)

3. <u>The Restructuring Support Agreement</u>

In June and July 2025, the Group engaged restructuring professionals, including Skadden and Houlihan Lokey Capital, Inc., to explore possible restructuring transactions. (Boas Decl. ¶ 21.) In October 2025 the Group's advisors presented the Group's key creditors with the terms of a proposed restructuring that spun off the Group's Brazilian business. (*Id.*) After lengthy negotiations, on March 17, 2026, the Parent, NFE Global, certain other members of the Group, and members of an ad hoc group of New 2029 Noteholders, certain TLA Lenders, members of an ad hoc group of TLB Lenders, members of an ad hoc group of RCF Lenders, and members of an ad hoc group of 2026 Legacy Noteholders and 2029 Legacy Noteholders (collectively, the "RSA Parties") entered into the RSA which sets forth the terms of a restructuring of the groups principal funded debt obligations. (*Id.* ¶ 22.) The RSA was agreed to by 100% of the RCF lenders and TLA lenders and approximately 97% of the TLB lenders, 85% of the 2026 Legacy Noteholders, 87% of the 2029 Legacy Noteholders, and 99% of the new 2029 Noteholders. (*Id.*) NFE Brazil acceded to the RSA on April 9, 2026. (*Id.*) Pursuant to the RSA, the RSA Parties have agreed to support the Restructuring Plans and forbear from exercising remedies while the RSA is in effect. (*Id.*)

F. The Restructuring Plans

The Restructuring will (i) reduce the Group's funded debt owed to creditors outside the Group from \$5.7 billion to less than \$1 billion, (ii) exchange existing debt obligations for a combination of new debt and preferred and common equity (the "Plan Consideration"), and (iii) separate the Group into two independent companies: one company comprising the Group's Brazilian operations and the PA Land ("BrazilCo"), which will be owned by certain of the Group's creditors, and another company comprising the Group's remaining operations ("CoreCo"), which will become 65% owned by the Group's creditors, while existing shareholders retain 35% (pre-dilution from the MIP and the convertible preferred equity being issued as Plan Consideration). (VP ¶ 2.) The Restructuring Plans will bind all Plan Creditors and release the obligations of the Group under the instruments governing the debt being restructured by the Restructuring Plans. (*Id.*)

The Debtors seek to effectuate the restructuring plan pursuant to Part 26A of the Companies Act. (Boas Decl. ¶ 24.) The key terms of the Restructuring Plans are described below:

Key Terms of the Restructuring Plans	
Overview	The Restructuring Plans will provide for the following: - The Group will separate into two independent companies: (i) New BrazilCo Parent and its direct and indirect subsidiaries ("BrazilCo Group"), and (ii) NFE and its direct and indirect subsidiaries other than BrazilCo Group (collectively, "CoreCo Group"). - Obligations under the 2026 Legacy Notes, 2029 Legacy Notes, Term Loan A Agreement, Term Loan B Agreement, Revolving Credit Facility Agreement, New 2029 Notes, and Intercompany Credit Agreements will be exchanged (in each case on a ratable basis), as applicable, for BrazilCo Common Equity, New CoreCo Term Loans, CoreCo Preferred Stock, CoreCo Common Stock, the FLNG 2 Term Loans, and/or the FLNG 2 Preferred Equity. - NFE, as borrower, and each other CoreCo Group entity, as a guarantor shall enter into a senior secured, first-priority term loan credit facility for CoreCo Group in accordance with the New CoreCo Credit Facility Term Sheet. All letters of credit issued under the existing Letter of Credit Facility or Revolving Credit Facility will be backstopped, rolled into, or replaced by letters of credit issued under separate new fully committed letter of credit facilities for each of CoreCo Group and BrazilCo Group (or, in the case of CoreCo Group, remain outstanding under an amended, amended and restated, or otherwise modified Letter of Credit Facility Agreement). - BrazilCo Group shall enter into one or more financing arrangements to provide liquidity for New BrazilCo on or prior to the date on which the conditions precedent to the Restructuring are satisfied or duly waived and the Restructuring has been fully implemented (the "Restructuring Effective Date"). Local Brazilian Debt Facilities shall, at the election of the Company Parties and with the consent of the majority of the ad hoc group of certain unaffiliated holders of New 2029 Notes represented by Paul Weiss, Rifkind, Wharton & Garrison LLP and Perella Weinberg Partners LP, be refinanced in full or remain outstanding on their existing terms (subject to the elimination of the NFE corporate guarantee and any other obligations tied to CoreCo). - Existing NFE Stockholders shall retain shares of NFE's common stock representing 35 percent of the CoreCo Common Stock issued and outstanding as of the Restructuring Effective Date, immediately before giving effect to the CoreCo MIP or any conversion of the CoreCo Preferred Stock into CoreCo Common Stock.

Plan Consideration	Pursuant to the Restructuring Plans, the Plan Creditors will release their existing Plan Debt claims against the Group in return for Plan Consideration as set forth below.	
	Legacy Notes	CoreCo Common Stock CoreCo Preferred Stock
	New 2029 Notes	BrazilCo Common Equity
	Series I Intercompany Loan Facility	CoreCo Common Stock CoreCo Preferred Stock
	Series II Intercompany Loan Facility	CoreCo Common Stock CoreCo Preferred Stock
	R-1 Revolving Credit Facility	CoreCo Common Stock CoreCo Preferred Stock New CoreCo Term Loans FLNG 2 Term Loans FLNG 2 Preferred Equity
	R-2 Revolving Credit Facility	CoreCo Common Stock CoreCo Preferred Stock New CoreCo Term Loans FLNG 2 Term Loans FLNG 2 Preferred Equity RCF-2 / TLA BrazilCo Equity Pool
	Term Loan A	CoreCo Common Stock CoreCo Preferred Stock New CoreCo Term Loans FLNG 2 Term Loans FLNG 2 Preferred Equity RCF-2 / TLA BrazilCo Equity Pool
	Term Loan B	CoreCo Common Stock CoreCo Preferred Stock New CoreCo Term Loans FLNG 2 Term Loans FLNG 2 Preferred Equity
Certain Shareholder Approvals	The Company shall, in accordance with the Restructuring Milestones and the other provisions of the RSA, obtain the approval of holders of a majority of its existing common stock to, among such other matters as the Company and the Majority Supporting Creditors may determine advisable, (a) issue greater than 20% of its existing common stock, (b) amend its organizational documents to, among other things, authorize additional shares of common stock, (c) grant NFE's board of directors authority to effect a reverse stock split, and (d) approve the issuance of shares in respect of the CoreCo MIP, in each case, as required by applicable securities laws and exchange rules.	
Releases	The Restructuring Plans and the Transaction Implementation Deed provide for the Plan Releases. With effect on and from the Restructuring Effective Date, each "Plan Party" (defined as each of the Plan Companies, each Undertaking Party[6] and each Plan Creditor) irrevocably, unconditionally, fully and absolutely waives, releases and forever discharges (i) any and all actions, proceedings, claims, damages, counterclaims, complaints, liabilities, liens, rights, demands and set-offs against each Released Party, whether	

	present or future, prospective or contingent, of whatsoever nature and howsoever arising, whether in law or in equity, in contract (including, but not limited to, breaches or non-performance of contract), in statute or in tort (including, but not limited to, negligence and misrepresentation) or in any other manner whatsoever, breaches of statutory duty, for contribution, or for interest and/or costs and/or disbursements, whether or not for a fixed or unliquidated amount, whether filed or unfiled, whether asserted or unasserted, whether or not presently known to the parties or to the law, in each case, that it ever had, may have or hereafter can, shall or may have, arising out of actions, omissions or circumstances on or prior to the Restructuring Effective Date against each and any Released Party (as defined below) whatsoever or howsoever arising (and notwithstanding any subsequent facts or information becoming known following the Restructuring Effective Date), in relation to or arising directly or indirectly out of or in connection with (a) the negotiation, preparation, sanction or implementation of the Plans and/or the Restructuring or (b) the Plan Claims (including the negotiation, preparation, sanction, execution or implementation of any Implementation Documents); and (ii) all rights, title and interest it has in the Plan Claims, and all Liabilities owed by a Group Company to any Plan Party in relation to such Plan Claims. - Released parties (the "Released Parties" each individually a "Released Party") include: (a) each of the Plan Companies and each member of the Group, and their respective direct and indirect subsidiaries from time to time; (b) the Plan Creditors party to or bound by the Plans and each Nominee (as applicable); (c) each Undertaking Party; (d) the Released Advisors,8 each Advisor Released Person,9 and any person acting on the instructions of the foregoing in connection with the Plans or the Restructuring; (e) each Affiliate of the persons listed in (a)-(d) above; and (f) each of the respective officers, directors, employees, partners, executives and agents of the persons listed in (a)- (e) above. - The Plan Releases are subject to customary carve-outs, including for: (i) the Excluded Liabilities (as defined below); (ii) rights arising under or in connection with the Implementation Documents; and (iii) claims which may arise or accrue in relation to acts, omissions or circumstances occurring after the Restructuring Effective Date. - Excluded liabilities ("Excluded Liabilities") include liabilities: (i) arising from criminal acts, fraud, gross negligence or willful misconduct, as determined by a judgment issued by a court of competent jurisdiction; (ii) arising from a Released Advisor's duty of care to its client; (iii) of accounting, restructuring, or tax advisors subject to reliance letters; (iv) of outstanding professional advisor fees and costs properly incurred in connection with the Restructuring; (v) created by the Implementation Documents, the Restructuring Plans, or ancillary documents; (vi) indemnity or reimbursement obligations owed by lenders to their respective agents under the relevant facility agreements; (vii) in the case of a Group Company, liabilities of directors or Group Advisors arising from

	negligence, default, or breach of duty, or that would be available upon the insolvency of such Group Company; and (viii) of one Group Company to another Group Company that is expressly not released under the terms of the Separation Agreement or any other Implementation Document. - Each Plan Party also undertakes not to commence or continue any proceedings against any Released Party in respect of the released claims. Pursuant to the Restructuring Plans, NFE Global Holdings Limited shall, on behalf of itself and the CoreCo Plan Creditors, and NFE Brazil Newco Limited shall, on behalf of itself and the BrazilCo Plan Creditors, enter into the releases on the terms set out in the Transaction Implementation Deed.

(*Id.* ¶ 23.)

G. The English Proceedings

On March 24, 2026 and April 10, 2026, respectively, NFE Global and NFE Brazil each formally commenced the English Proceedings. (VP ¶ 37.) On April 17, 2026, the board of directors of each of the Debtors adopted resolutions appointing Christopher Boas as the Foreign Representative. (*Id.* ¶ 47.) The convening hearing in respect of the Restructuring Plans (the "Convening Hearing") was held on May 14, 2026. (*Id.*)

While certain creditors had previously threatened to object to the Restructuring Plan and make a disclosure application at the Convening Hearing, at the Convening Hearing they did not pursue either an objection or disclosure application. (*Id.* ¶ 41.) On May 14, 2026, the English Court made an order (the "Convening Order"), among other things, confirming the Foreign Representative's appointment, convening meetings of Plan Creditors to consider approval of the Restructuring Plans (the "Plan Meetings"), and scheduling a hearing to consider sanctioning of the Restructuring Plans for June 18, 2026 (the "Sanction Hearing"). (*Id.* ¶ 3.) In accordance with the terms of the Convening Order, the Debtors made available to all Plan Creditors a notice of the Plan Meetings and the Explanatory Statement on the Information Agent's website, and notices of the same were distributed to Plan Creditors. (*Id.* ¶ 42.)

At the Sanction Hearing, the Debtors walked the English Court through the Plan Releases and the English Court considered whether they were appropriate. (Supp. Stephansen Decl. ¶ 10.) No Plan Creditor appeared to object to the Plan Releases or otherwise oppose sanction of the Restructuring Plans. (*Id.*) The English Court sanctioned the Restructuring Plans including the Plan Releases as proposed. (*Id.*)

H. The Relevant Alternative Report

The Foreign Representative filed the Relevant Alternative Report prepared by A and M outlining the projected recovery under the relevant alternative (the "RA") to obtaining chapter 15 recognition in this Court. (RAR at 14.) A and M indicates that under the RA, CoreCo would file for chapter 11 whereas BrazilCo would not and that business units ("BUs") are assumed to be sold via merger and acquisition transactions to maximize value. (*Id.*) A and M compared creditor recovery under the Restructuring Plans (RPs) against the RA, as outlined below:

Plan 1 CoreCo – RA vs. RP									
$m	LCF	RCF1	RCF2	TLA	TLB	26s	29s	S1	S2
RA	85	57	342	102	687	68	32	157	231
RP	Excl.	91	561	184	1,109	137	65	320	471
Variance	Excl.	34	219	82	422	70	33	163	240
RA	57%	54%	57%	32%	50%	13%	13%	13%	13%
RP	Excl.	86%	94%	58%	81%	26%	26%	26%	26%
Variance	Excl.	32%	37%	26%	31%	13%	13%	13%	13%

Plan 2 BrazilCo – RA vs. RP	
$m	New 29s
RA	593
RP	1,177
Variance	584
RA	18%
RP	35%
Variance	18%

(RAR at 16.) All Plan Creditors receive a better outcome under each Restructuring Plan compared to the RA. (*Id.*)

I. Plan Voting

The Debtors held Plan Meetings on June 15, 2026 and the Restructuring Plans were approved with nearly unanimous consent, with unanimous votes in favor obtained in six out of the seven classes. (Supp. Stephansen Decl. ¶ 8.) The remaining class received a near-unanimous 99.84% vote in favor. (*Id.*) Only one Plan Creditor (holding less than 0.1% of the total Plan Debt) voted against one of the Restructuring Plans. (*Id.*) The turnout in each class was very high (99% to 100% by value across all classes, save for a single class where the turnout was 89.69% by value). (*Id.*) See below:

Class	% turnout (by value)	% voting in favor (of those who cast a vote, by value)
CoreCo Plan		
R-1 Lenders	100%	100%
R-2 Lenders	99.89%	100%
TLB Lenders	99.89%	100%

TLA Lenders	100%	100%
Legacy Noteholders	89.69%	99.89%
Series I and II Lenders	100%	100%
BrazilCo Plan		
2029 New Noteholders	99.67%	100%

(*Id.*)

The Plan Creditors were afforded extensive notice of, and multiple opportunities to review, consider, and object to, the Restructuring Plans and the Plan Releases. (*Id.* ¶ 9.) In particular, Plan Creditors were entitled to be heard with respect to the Restructuring Plans at both the Convening Hearing and the Sanction Hearing. (*Id.*) Plan Creditors received formal notice of the Plan Releases through multiple documents and proceedings and were provided with contact information for the Information Agent and the Debtors' advisors to direct any questions regarding the Restructuring Plans, including the Plan Releases. (*Id.* ¶ 10.) These materials and proceedings include the RSA, the Convening Hearing, the Explanatory Statement which serves a function comparable to that of a disclosure statement required under section 1125 of the Bankruptcy Code, the Plan Meetings, and the Sanction Hearing. (*Id.*) Further, the Restructuring is the result of a months-long, hard fought negotiation between the Debtors and the Plan Creditors, with creditors organizing into groups and retaining sophisticated advisors before ultimately accepting the terms of Plan Releases. (*Id.* ¶ 13.) The Foreign Representative characterizes the supporting creditors (the "Supporting Creditors") subject to the Plan Releases as "sophisticated investors who have had ample notice and opportunity to review and understand the terms of the Restructuring Plans, including the Plan Releases, and who have independently determined to support the Restructuring." (*Id.* ¶ 15.)

II. LEGAL ARGUMENT

Recognition of the English Proceedings in these chapter 15 Cases is a condition precedent to the effectiveness of the Restructuring, and failure to obtain an order approving recognition is a termination event under the RSA. (VP ¶ 46.) The Foreign Representative commenced these chapter 15 cases to obtain recognition of the English Proceedings and to give full force and effect to the Sanction Order and the Restructuring Plans, including the Plan Releases. (*Id.* ¶ 49.) The Foreign Representative argues that the Debtors satisfy the requirements, outlined below.

A. The Debtors Meet the General Eligibility Requirements of Section 109(a) of the Bankruptcy Code

The Foreign Representative notes that the Debtors have an interest in funds deposited with Skadden as a retainer for services held in a client trust account in New York. (*Id.* ¶ 55.) Furthermore, the Debtors are obligors on U.S. dollar denominated debt, governed by New York law and containing New York law forum selection clauses. (*Id.*) The retainer and the New York law-governed indebtedness are independent bases for jurisdiction and satisfy the "property" requirement of section 109(a) of the Bankruptcy Code. (*Id.*)

B. The Requirements of Section 1517(a) of the Bankruptcy Code are Satisfied

1. The English Proceedings are foreign main proceedings or, in the alternative, foreign nonmain proceedings, within the meaning of Section 1502 of the Bankruptcy Code.

The Foreign Representative argues that the English Proceedings meet the definition of "foreign proceedings" because (i) the Debtors commenced the English

Proceedings pursuant to Part 26A of the Companies Act, (ii) the English Proceedings are being overseen by the English Court in England and are being conducted pursuant to laws relating to insolvency or the adjustment of debts, (iii) the English Proceedings are collective in nature as they take into account the rights of all Plan Creditors, and (iv) the English Proceedings will facilitate the Restructuring of the Debtors as the implementation of the Restructuring Plans will address the Group's liquidity and operational challenges, while providing runway for the Group's portfolio of development projects and opportunities that are expected to generate significant revenue and liquidity in the future. (Boas Decl. ¶ 29.)

The Foreign Representative argues that because the Debtors' registered office is in England, there is a presumption that England is the COMI for the Debtors. Additional factors supporting the COMI analysis include: the Debtors are private companies limited by shares incorporated under the laws of England and Wales; the Debtors' books and records are maintained in England; each Debtor maintains bank accounts in England; a U.K. company (Vistra Cosec Limited) serves as the corporate secretary for both Debtors; and the Foreign Representative is an English citizen and resident and serves as a director of both Debtors. (*Id.* ¶ 31.)

Creditor expectation is also considered when making a COMI determination. (*Id.* ¶ 32.) The Debtors' COMI in England has been consistently ascertainable to third parties, and Plan creditors have supported the Restructuring Plans with 97% of the holders of the groups funded debt signing the RSA. (*Id.*) The Plan Creditors were aware they were entering into a restructuring with U.K. incorporated Debtors that would propose the restructuring plans in England, and that English law governed several key agreements. (*Id.* ¶¶ 33-34.) The English Court held a Convening hearing and Sanction Hearing and has exclusive jurisdiction to hear and determine any proceeding and to settle any dispute in connection with the Restructuring Plans. (*Id.* ¶ 38.)

The Debtors engaged a U.K. based information agent located in London named Kroll Issuer Services Limited to serve as the information agent for the English Proceedings (the "Information Agent"). (*Id.* ¶ 40.) The Information Agent is responsible for communicating with plan creditors, distributing restructuring documentation, and fielding queries from plan creditors.

The Foreign Representative argues that because Recognition is a condition precedent to the effectiveness of the RSA, failure to recognize the English Proceedings would (i) jeopardize the overall transaction contemplated by the RSA (ii) lead to an alternative that destroys value (iii) upset creditor expectations and (iv) undermine these highly consensual restructuring transactions designed to de lever the group and facilitate corporate renewal. (*Id.* ¶ 41.)

The Foreign Representative argues in the alternative that the English Proceedings are considered foreign nonmain proceedings. (*Id.* ¶ 42.)

2. <u>The Chapter 15 Cases were commenced by a duly authorized foreign representative</u>

The Foreign Representative in this case is an individual who has been duly appointed by each of the Debtors' governing bodies to act as the foreign representative on behalf of the Debtors in connection with the English Proceedings and, pursuant to the Convening Order, the Foreign Representative was recognized as such by the English Court. (VP ¶ 90.) Accordingly, the Foreign Representative argues that he is a "foreign representative" within the meaning of section 101(24) of the Bankruptcy Code. (*Id.*)

C. Enforcement of the Restructuring Plans, Including the Plan Releases, and the Sanction Order is Proper

The Foreign Representative argues that recognition of the English Proceedings, enforcement of the Restructuring Plans (including the Plan Releases) and Sanction Order, and the issuance of an injunction enforcing the terms thereof in the United States is necessary to ensure that the Restructuring Plans, which have the support of the vast majority of the Plan Creditors, can be implemented without disruption or adverse actions being brought within this Court's jurisdiction. (Boas Decl. ¶ 47.) Otherwise, certain Plan Creditors could thwart the purpose of the Restructuring by commencing action in the United States for issues that have already been litigated. (*Id.* ¶ 48.)

The Foreign Representative states that the implementation of the Restructuring Plans will result in the Plan Creditors receiving the Plan Consideration, which is preferable to liquidation because liquidation would likely result in a substantially lower return to Plan Creditors as compared to the Plan Consideration. (*Id.* ¶ 49.) The Restructuring Plans will result in the same compromise or arrangement between the Debtors and each Plan Creditor as other similarly situated Plan Creditors. (*Id.*)

As to the Plan Releases, the Foreign Representative argues that they are more narrowly tailored than releases approved in other chapter 15 cases. (*Id.* ¶ 51.) The Plan Releases comprise only (i) an exculpation of acts taken in connection with the negotiation, preparation, sanction or implementation of the Restructuring Plans and/or the Restructuring and (ii) releases of Group entities and related parties from claims arising from or related to the Plan Debt. (*Id.*) Such releases are also subject to customary carve-outs, including for: (i) the Excluded Liabilities; (ii) rights arising under the Implementation Documents; and (iii) claims which may arise or accrue in relation to acts, omissions or circumstances occurring after the Restructuring Effective Date. (*Id.*) The Foreign Representative argues the Plan Releases are "necessary and fundamental" to the Restructuring Plans because they provide a mechanism for the Plan Creditors to release their claims against the Parent, the Debtors, and the other Released Parties in exchange for the Plan Creditors receiving their Plan Consideration. (*Id.* ¶ 52.)

III. LEGAL STANDARD: FOREIGN PROCEEDING RECOGNITION

A. Eligibility to File under Chapter 15

"Foreign debtors seeking relief under chapter 15 must satisfy the debtor eligibility requirements set forth in section 109(a) of the Bankruptcy Code." *In re Servicos de Petroleo Constellation S.A.*, 600 B.R. 237, 268 (Bankr. S.D.N.Y. 2019). Section 109(a) provides that "only a person that resides or has a domicile, a place of business, or property in the United States, or a municipality, may be a debtor" under the Code. 11 U.S.C. § 109(a). Where a foreign debtor does not have a place of business in the United States, the question often arises whether the foreign debtor has "property in the United States" as a condition precedent to eligibility under section 1517. *See In re Cell C Proprietary Ltd.*, 571 B.R. 542, 550–52 (Bankr. S.D.N.Y. July 27, 2017). Section 109(a) does not address how much property must be present or when or how long property must have a situs in the United States. As this Court explained in *In re U.S. Steel Canada Inc.*, 571 B.R. 600 (Bankr. S.D.N.Y. July 31, 2017):

> Some courts, including this one, have held that an undrawn retainer in a United States bank account qualifies as property in satisfaction of section 109(a). *See, e.g.*, *In re Octaviar Admin. Pty Ltd.*, 511 B.R. 361, 372–73 (Bankr. S.D.N.Y. 2014) ("There is a line of authority that supports the fact that prepetition deposits or retainers can supply 'property' sufficient to make a foreign debtor eligible to file in the United States.") (citing *In re Cenargo Int'l PLC*, 294 B.R. 571, 603 (Bankr. S.D.N.Y. 2003)); *see also In re Berau Capital Resources Pte Ltd.*, 540 B.R. 80, 82 (Bankr. S.D.N.Y.

> 2015) ("The Court is satisfied that the retainer provides a sufficient basis for eligibility in this case."); *In re Global Ocean Carriers Ltd.*, 251 B.R. 31, 39 (Bankr. D. Del. 2000) (holding that a $400,000 retainer paid on behalf of the debtors to bankruptcy counsel in that case qualifies as sufficient property in the United States under section 109(a)).
>
> Further, "[c]ontracts create property rights for the parties to the contract. A debtor's contract rights are intangible property of the debtor." *Berau Capital*, 540 B.R. at 83 (citing *U.S. Bank N.A. v. Am. Airlines, Inc.*, 485 B.R. 279, 295 (Bankr. S.D.N.Y. 2013), *aff'd*, 730 F.3d 88 (2d Cir. 2013)). Those property rights can be and typically are tied to the location of the governing law of the contract. *See id*. at 84 (holding that the situs of intangible property rights governed by New York law was New York). Accordingly, debt subject to a New York governing law clause and a New York forum selection clause constitutes property in the United States. *See In re Inversora Eléctrica de Buenos Aires S.A.*, 560 B.R. 650, 655 (Bankr. S.D.N.Y. 2016) ("[D]ollar-denominated debt subject to New York governing law and a New York forum selection clause is independently sufficient to form the basis for jurisdiction.") (citation omitted); *Berau Capital*, 540 B.R. at 84 ("The Court concludes that the presence of the New York choice of law and forum selection clauses in the Berau indenture satisfies the section 109(a) 'property in the United States' eligibility requirement.") (footnote omitted).

Id. at 610; *see also Servicos de Petroleo Constellation S.A.*, 600 B.R.at 269 ("This Court has previously held that a debtor's contract rights, including rights pursuant to debt that is governed by New York law and contains a forum-selection clause, constitute intangible property of the debtor in New York for purposes of section 109(a)."); *Berau Capital*, 540 B.R. at 84 ("The Court concludes that the presence of the New York choice of law and forum-selection clauses in the *Berau* indenture satisfies the section 109(a) 'property in the United States' eligibility requirement."); *In re Suntech Power Holdings Co.*, 520 B.R. 399, 412-13 (Bankr. S.D.N.Y. 2014) (concluding that establishment of a bank account in New York prior to commencement of the chapter 15 proceeding was sufficient to satisfy section 109(a)); *In re Paper I Partners, L.P.*, 283 B.R. 661, 674 (Bankr. S.D.N.Y. 2002) (finding that debtors' maintenance of original business documents in the United States constituted "property in the United States" under section 109); *Wallach v. Nowak (In re*

Sherlock Homes of W.N.Y., Inc.), 246 B.R. 19, 23-24 (Bankr. W.D.N.Y. 2000) (stating that listing contracts between the debtor/broker dealer and prospective sellers bestowed contractual rights upon the parties and the contract rights were assets of the debtor); *Slater v. Town of Albion (In re Albion Disposal, Inc.)*, 217 B.R. 394, 407-08 (W.D.N.Y. 1997) (noting that "it is well-established . . . that a debtor's contractual rights—including rights arising under post-petition contracts—are included in the property of the estate").

B. Proper Venue for Chapter 15

28 U.S.C. § 1410 governs venue for cases under chapter 15, and provides that chapter 15 proceedings may be

> commenced in the district court of the United States for the district—(1) in which the debtor has its principal place of business or principal assets in the United States; (2) if the debtor does not have a place of business or assets in the United States, in which there is pending against the debtor an action or proceeding in a Federal or State court; or (3) in a case other than those specified in paragraph (1) or (2), in which venue will be consistent with the interests of justice and the convenience of the parties, having regard to the relief sought by the foreign representative.

28 U.S.C. § 1410. Section 1410 establishes a "hierarchy of choices." 1 ALAN N. RESNICK & HENRY J. SOMMER, COLLIER ON BANKRUPTCY ¶ 4.04[1] (16th ed. 2014) ("Collier") (quoting H.R. REP. NO. 109–31, at 119 (2005)). "If the debtor maintains its principal place of business or principal assets in the United States in a particular district, venue must be placed in that district; if not, we turn to subparagraph two. If there is no litigation pending against the debtor in a district, subparagraph three then applies." *Suntech Power Holdings*, 520 B.R. at 414.

C. Recognition of a Foreign Proceeding under Section 1517

In seeking recognition of a foreign proceeding under 11 U.S.C. § 1517, a party must make a showing that:

> (1) The foreign proceeding constitutes a foreign proceeding (either main or nonmain) as are defined under section 1502;
> (2) The foreign representative applying for recognition is a person or body; and
> (3) the petition meets the requirements of section 1515.

11 U.S.C. § 1517(a)(2)-(3).

1. <u>1517(a)(1): Foreign Main Proceeding Recognition</u>

Section 1517(a) distinguishes between "foreign main" and "foreign nonmain" proceedings. Section 1517(b) establishes conditions for recognition of each. In relevant part, section 1517(b)(1) states that a foreign proceeding shall be recognized "as a foreign main proceeding if it is pending in the country where the debtor has the center of its main interests." 11 U.S.C. § 1517(b)(1).

a. "<u>Foreign Proceeding</u>"

Section 101(23) defines a "foreign proceeding" as:

> [A] collective judicial or administrative proceeding in a foreign country, including an interim proceeding, under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation.

11 U.S.C. § 101(23).

Based on this definition, courts have held that a "foreign proceeding" requires:

> (i) [the existence of] a proceeding;
> (ii) that is either judicial or administrative;
> (iii) that is collective in nature;
> (iv) that is in a foreign country;
> (v) that is authorized or conducted under a law related to insolvency or the adjustment of debts;
> (vi) in which the debtor's assets and affairs are subject to the control or supervision of a foreign court; and
> (vii) which proceeding is for the purpose of reorganization or liquidation.

See Armada (Singapore) Pte Ltd. v. Shah (*In re Ashapura Minechem Ltd.*), 480 B.R. 129, 136 (S.D.N.Y. 2012) (*citing In re Betcorp Ltd.*, 400 B.R. 266, 277 (Bankr. D. Nev. 2009)); *see also In re Overnight & Control Com'n of Avánzit, S.A.*, 385 B.R. 525, 532–36 (Bankr. S.D.N.Y 2008) (discussing factors).

b. *Center of Main Interest ("COMI")*

While not defined by the Bankruptcy Code, the Code does presume "the debtor's registered office . . . to be the [debtor's COMI]." *Id.* § 1516(c); *see also In re Bear Stearns High–Grade Structured Credit Strategies Master Fund, Ltd.*, 374 B.R. 122, 130 (Bankr. S.D.N.Y. 2007), *aff'd,* 389 B.R. 325 (S.D.N.Y. 2008). The presumption can be overcome when making this determination. *See, e.g.*, *id.* (stating that "the COMI presumption may be overcome particularly in the case of a 'letterbox' company not carrying out any business" in the country where its registered office is located) (internal citation omitted). A debtor's COMI is determined based on the location of the debtor at the time of *filing* of the chapter 15 petition, not the historic operational activity of the debtor. *Morning Mist Holdings Ltd. v. Krys (In re Fairfield Sentry Ltd.)*, 714 F.3d 127, 137 (2d Cir. 2013).

In order to determine if the registered office presumption has been overcome, courts within this district have applied a list of non-exclusive factors (the "*SPhinX* factors") to determine a debtor's COMI. Those factors are: (i) the location of the debtor's headquarters; (ii) the location of those who actually manage the debtor; (iii) the location of the debtor's primary assets; (iv) the location of the majority of the debtor's creditors or a majority of the creditors who would be affected by the case; and (v) the jurisdiction whose law would apply to most disputes. *In re Fairfield Sentry Ltd.*, 714 F.3d at 137 (citing *In re SPhinX, Ltd.*, 351 B.R. 103, 117 (Bankr. S.D.N.Y. 2006)). The Court in *SPhinX*, however, was clear to say that the factors should not be applied "mechanically": rather, "they should be viewed in light of chapter 15's emphasis on protecting the reasonable interests of parties in interest pursuant to fair procedures and the maximization of the debtor's value." *SphinX*, 351 B.R. at 117.

When determining the "location of those who actually manage the debtor," courts consider more than the location of the board of directors of the debtor in isolation, and their analysis of the location of management is somewhat flexible to reflect the realities of the management of a particular business. For example,

> The headquarters of a corporate entity is more than the location of its board of directors. The term headquarters, or head office, contemplates the place where the primary management of an entity's business is undertaken. Management of a corporate entity includes all relevant business functions, such as the financial, administrative, marketing, information technology, investment, and legal functions. Other functions may be relevant depending on the nature of the debtor's business. Here, because [the debtor] operated as an insurance company, actuarial tasks, underwriting, and claims adjustment should be considered.

In re British Am. Ins. Co. Ltd., 425 B.R. 884, 911 (Bankr. S.D. Fla. 2010).

In addition to these factors, courts can also examine what the reasonable expectation of third parties and creditors, and whether there is any "objective evidence that could provide interested parties with notice that a debtor's COMI was in a particular jurisdiction other than the place of its registered office." *In re Olinda Star Ltd.*, 614 B.R. 28, 44 (Bankr. S.D.N.Y. 2020) (citing *Servicos de Petroleo Constellation*, 600 B.R. at 274). While creditor support can also be considered, it "only goes so far . . . the bankruptcy court still has the duty to make its own COMI determination." *In re Sunac China Holdings Ltd.*, 656 B.R. 715, 733 (Bankr. S.D.N.Y. 2024); *see also In re Suntech*

Power Holdings Co., Ltd., 520 B.R. 399, 420 (Bankr. S.D.N.Y. 2014) (finding a COMI despite creditor objections).

2. <u>Foreign Nonmain Proceeding</u>

If the requirements for a foreign main proceeding are not met, a foreign proceeding can still be recognized as a nonmain proceeding if the debtor has an "establishment" in the country, defined as "any place of operations where the debtor carries out a nontransitory economic activity." 11 U.S.C. § 1502. This requires a showing that the location constitutes "a seat for local business activity of the debtor . . . more than mere incorporation and record-keeping and more than just the maintenance of property." *In re Creative Fin. Ltd.*, 543 B.R. 498, 520 (Bankr. S.D.N.Y. 2016) (quoting *In re Bear Stearns*, 374 B.R. at 131).

3. <u>1517(a)(2): Foreign Representative Recognition</u>

The term "foreign representative" is defined in section 101(24) of the Bankruptcy Code as follows:

> [A] person or body, including a person or body appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of such foreign proceeding.

11 U.S.C. § 101(24).

4. <u>1517(a)(3): Section 1515 Requirements</u>

Per the Bankruptcy Code, an order of recognition shall be entered if the foreign representative meets the requirements of section 1515 in applying for recognition. 11 U.S.C. § 1517(a)(2)–(3). The requirements provided by section 1515 include presentation of:

> (1) a certified copy of the decision commencing the foreign proceeding and appointing the foreign representative;
> (2) a certificate from the foreign court affirming the existence of the proceeding and appointment of the representative; or
> (3) in the absence of (1) or (2), evidence which the court deems sufficient to confirm the existence of the foreign proceeding and appointment of the foreign representative.

Id. § 1515(b). The petition must also be accompanied by a statement identifying all known foreign proceedings with respect to the debtor, *id.* § 1515(c), and if applicable, a translation of the evidentiary materials into English, *id.* § 1515(d). The Court is entitled to presume the authenticity of such documents filed in connection with a chapter 15 petition. *Id.* § 1516(b).

D. Automatic Relief Under Section 1520

Section 1520(a) of the Bankruptcy Code sets forth a series of statutory protections that automatically result from the recognition of a foreign main proceeding, including the application of the protection afforded by the automatic stay under section 362(a) of the Bankruptcy Code to the Debtor and its property located within the territorial jurisdiction of the United States. *See* 11 U.S.C. § 1520(a).

E. Application of Section 1521 Stay to Debtor and Non-Debtors

There is not a reciprocal automatic stay placed on non-debtors in interest. Courts may grant relief under section 1521 of the Bankruptcy Code, which allows a court to grant a foreign representative "any appropriate relief" where necessary to effectuate the purpose of chapter 15 and to protect the debtor's assets or creditors' interests. 11 U.S.C. § 1521. This includes section 1521(a)(7), which allows a court to "grant[] any additional relief that may be available to a trustee, except for relief available under sections 522, 544, 545, 547, 548, 550, and 724(a)." *Id.* Courts have in turn utilized section 105(a) of the Bankruptcy Code, which allows for the court to "issue any order, process or judgment that is necessary or appropriate to carry out the provisions of [title 11]," 11 U.S.C. § 105(a), to apply the stay to third parties when "a claim against the non-debtor will have an immediate adverse economic consequence for the debtor's estate." *Queenie, Ltd. v. Nygard Int'l*, 321 F.3d 282, 287 (2d Cir. 2003).

F. Section 1522(a) May Limit Relief Available Under Section 1521

In granting relief under section 1521, the court must also adhere to section 1522(a), which permits the Court to grant relief only if the interests of creditors are "sufficiently protected." "Sufficient protection" embodies "three basic principles: 'the just treatment of all holders of claims against the bankruptcy estate, the protection of U.S. claimants against prejudice and inconvenience in the processing of claims in the [foreign] proceeding, and the distribution of proceeds of the [foreign] estate substantially in accordance with the order prescribed by U.S. law.'" *In re Odebrecht Engenharia e Construcao S.A. - Em Recuperacao Jud.*, 669 B.R. 457, 474 (Bankr. S.D.N.Y. 2025) (citing *In re Atlas Shipping A/S*, 404 B.R. 726, 741 (Bankr. S.D.N.Y. 2009)); *see also In re Asbestos Corp. Ltd.*, 674 B.R. 855, 874–76(Bankr. S.D.N.Y. 2025).

Section 1522(a) is particularly relevant in cases in which a foreign sanctioned plan allegedly discriminates as to some creditors. For example, in *In re Mega Newco Ltd.,* No. 24-1203 (MEW), 2025 WL 601463, * 1 (Bankr. S.D.N.Y. Feb. 24, 2025), in concluding that the U.K. Scheme of Arrangement that modified the New York law-governed debt of the newly-created English affiliate of a Mexican company should be recognized and enforced in a chapter 15 case, my colleague, Judge Michael Wiles explained:

> Clearly, the structure before me could be used in another case as a way of frustrating and thwarting the legitimate expectations of creditors. This case, however, involves no such frustration or thwarting of creditor rights. Mega Newco was formed, and the English Scheme Proceeding was pursued, for laudable objectives. The Scheme of Arrangement will enable a broader restructuring to be accomplished efficiently and thereby will enhance all parties' recoveries. It will also maximize the value of the underlying businesses. In these respects, the enforcement of the Scheme of Arrangement is fully consistent with the stated purposes of Chapter 15.
>
> In addition, the procedures that the parties have followed were not implemented in any way that took unfair advantage of the holders of the U.S. Notes. The whole process was worked out with the involvement and consent of the affected creditors, and not for the purpose of harming them or of thwarting their expectations. The Noteholders and their Indenture Trustee are aware of the basis on which U.K. jurisdiction has been asserted and have not objected to it. There similarly is not a single objection to the recognition of the U.K. proceeding or the enforcement of the U.K. order.
>
> If COMI manipulation is a matter of concern because of the risk that creditors' rights and expectations might be thwarted, then one of the main factors I ought to consider, in deciding whether such a manipulation has occurred, is whether the affected creditors have asserted any objection. *See In re SPhinX, Ltd.*, 351 B.R. 103, 117 (Bankr. S.D.N.Y. 2006) (holding that COMI determinations should not be made "mechanically," that COMI should be assessed "in light of chapter 15's emphasis on protecting the reasonable interests of parties in interest pursuant to fair procedures and the maximization of the debtor's value," that creditors presumably are in the best position to determine whether their own expectations are being thwarted, and therefore that "one generally should defer . . . to the creditors' acquiescence in or support of a proposed COMI"). Ironically, the only thing that would thwart creditor expectations in the case before me would be if I were to decline to enforce the English Court Order. It would be absurd for me to thwart the creditors' constructive desires and expectations in the guise of supposedly protecting them.

Judge Wiles echoed what I had explained earlier in Transcript of Hearing at 21–22 of 25, *In re Codere Fin. 2 (UK) Ltd.*, (No. 20-12151 (MG), ECF Doc. # 13), (Bankr. S.D.N.Y. Oct. 9, 2020), in recognizing and enforcing a U.K. Scheme of Arrangement for a Spanish gaming company that created a new English affiliate to promote the scheme:

> In order to obtain relief under Section 1521(a), and as in prior opinions of mine, recognizing and enforcing a scheme of arrangement is quite common under 1521(a) and 1507. But such relief can only be granted "only if the

> interests of creditors and other interested entities, including the debtor, are sufficiently protected." That's the test set out in Section 1522(a).
>
> On the record here I conclude that the requirement of 1522(a) has been satisfied, and for that reason and the others that I've described I'm going to go ahead and approve recognition of this as a foreign main proceeding and approve the recognition enforcement of the English scheme of arrangement.
>
> I made clear on the record . . . I've only done this in light of what I've described as the lack of objections and overwhelming support, . . . that the interest of creditors and other interested entities are sufficiently protected here. If faced with another case where an entity newly created in the U.K. solely for the purposes of accomplishing a scheme of arrangement, I would view it as essential to review all of the other factors that I've considered here.
>
> I've already addressed the issue about . . . the presumption is that the COMI of this entity is in the U.K., but Collier certainly raises the question whether the Court should look at how a group of companies is managed in order to determine the COMI. That's at 1 Collier, paragraph 13.04.
>
> And so, while the presumption may be established that the COMI of this entity is in the U.K., it doesn't necessarily automatically follow that that should be recognized as the COMI, and I would only note that if the COMI of this entity wasn't in the U.K. I don't think the Court could determine that it—that the U.K. proceeding is a non-main proceeding.

Section 1522(a) has also been applied to bar relief where a foreign plan expressly conflicts with relief under the Bankruptcy Code. In *Jaffe v. Samsung Electronics Co.*, 737 F.3d 14 (4th Cir. 2013), the court addressed a German court-approved plan, consistent with applicable German law, which terminated a patent license granted by the German debtor for a U.S. patent to a U.S. licensee. The German debtor then sought recognition and enforcement of the German plan in the U.S., including the patent license termination, in a chapter 15 case. *Id.* at 19-20. The Fourth Circuit invalidated the license termination, applying sections 1522(a) and 365(n) of the Code. *Id.* at 31. Section 365(n)(1)(B) provides that if a debtor terminates an executory contract that licenses intellectual property, the licensee retains the right to enforce the license (subject to certain limitations). The court held that U.S. licensee was not sufficiently protected under section 1522(a). *Id.* at 30. "The bankruptcy court, however, may only grant discretionary relief under § 1521 if it determines that 'the interest of the creditors and other interested entities, including the debtor, are sufficiently protected." *Id.* at 24

The point here is that a chapter 15 court, before enforcing provisions of a foreign plan, must carefully scrutinize the plan, and determine whether any foreign plan provisions conflict with applicable provisions of U.S. or state law. As already stated, no objections were raised in this case, and the Court's scrutiny of the Plans has not found any provisions of the Restructuring Plans that appear problematic.

G. Section 1506 Requirements

Any relief that is appropriate under sections 1507, 1517, 1520, or 1521 still must not run afoul of section 1506. Section 1506 precludes any relief requested under the provisions in chapter 15 that is "manifestly contrary to the public policy of the United States." 11 U.S.C. § 1506. S*ee, e.g., In re Ephedra Prods. Liab. Litig.*, 349 B.R. 333, 336 (S.D.N.Y. 2006) (stating that the public policy exception embodied in section 1506 should be "narrowly interpreted, as the word 'manifestly' in international usage restricts the public policy exception to the most fundamental policies of the United States") (citing H.R.Rep. No. 109–31(I), at 109, *reprinted in* 2005 U.S.C.C.A.N. 88, 172) (grammatical changes omitted). The public policy exception should only be invoked "under exceptional circumstances concerning matters of fundamental importance for the United States." *In re Black Gold S.A.R.L.*, 635 B.R. 517, 528 (B.A.P. 9th Cir. 2022) (collecting cases). In evaluating this "narrow" exception, courts consider whether the foreign "insolvency laws or procedural protections for creditors" are "repugnant" to U.S. law, not the "misconduct or bad faith" of petitioners. *Id.* at 530.

Congress provided courts additional instructions when interpreting the phrase "manifestly" in the context of section 1506, noting "[t]he word 'manifestly' in international usage restricts the public policy exception to the most fundamental policies of the United States," which is the standard meaning ascribed to the term "manifestly" in international law when describing a nation's public policy. H.R.Rep. No. 109–31(I), at 109, *as reprinted in* 2005 U.S.C.C.A.N. 88, 172; *Ephedra Prods. Liab. Litig.*, 349 B.R. at 336. Moreover, the official Guide to the Enactment of the Model Law on Cross–Border Insolvency expressly states that

> [t]he purpose of the expression "manifestly," used also in many other international legal texts as a qualifier of the expression "public policy," is to emphasize that public policy exceptions should be interpreted restrictively and that article 6 is only intended to be invoked under exceptional circumstances concerning matters of fundamental importance for the enacting State.

GUIDE TO ENACTMENT OF THE UNCITRAL MODEL LAW ON CROSS–BORDER INSOLVENCY, ¶ 89, U.N. Doc A/CN.9/442 (1997). The House Judiciary Committee noted that the Guide "should be consulted for guidance as to the meaning and purpose of chapter 15's provisions." H.R.Rep. No. 109–31(I), at 106 n. 101, *as reprinted in* 2005 U.S.C.C.A.N. 169 n. 101; *see also Ephedra Prods. Liab. Litig.*, 349 B.R. at 336.

In order to determine if foreign proceedings are "manifestly contrary to the public policy of the United States," federal courts have considered whether a foreign proceeding lacked certain common elements of American practice. *In re ARD Fin., S.A.*, No. 25-12794 (MG), 2026 WL 817458, at *17 (Bankr. S.D.N.Y. Mar. 25, 2026). "As Judge Rakoff noted in *Ephedra.*, as early as 1895, the Supreme Court held that a foreign judgment should generally be accorded comity if 'its proceedings are according to the course of a civilized jurisprudence,' *i.e.*, fair and impartial." *Id.* at 336 (quoting *Hilton v. Guyot,* 159 U.S. 113, 205-06 (1895)); *see also In re Asbestos Corp. Ltd.*, 2025 WL 3023332, at *7. The Second Circuit reaffirmed this approach in *Ackermann v. Levine*, 788 F.2d 830 (2d Cir. 1986), noting the "narrowness of the public policy exception to enforcement . . . of foreign judgments," adding that, "[a]s Judge Cardozo so lucidly observed: 'We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home.'" *Ackermann*, 788 F.2d at 842 (quoting *Loucks v. Standard Oil Co. of New York*, 224 N.Y. 99, 111 (1918)).

IV. LEGAL STANDARD: PLAN RECOGNITION

A. Relief Under Sections 1521 & 1507 of the Code

Courts in this district have previously noted that chapter 15 of the Bankruptcy Code adopted the substance and most of the text of the United Nations Commission on International Trade Law ("*UNCITRAL* ") Model Law on Cross–Border Insolvency and provides a framework for recognizing and giving effect to foreign insolvency proceedings. *Morning Mist Holdings Ltd. v. Krys (In re Fairfield Sentry Ltd.)*, 714 F.3d at 132; *In re Rede Energia S.A.*, 515 B.R. 69, 89–90 (Bankr. S.D.N.Y. 2014). A central tenet of chapter 15 is the importance of comity in cross-border insolvency proceedings. *In re Cozumel Caribe S.A. de C.V.*, 482 B.R. 96, 114–15 (Bankr.S.D.N.Y.2012). If a foreign case is recognized as a foreign main proceeding, as it was here, certain relief automatically goes into effect pursuant to section 1520, and, under section 1521, a bankruptcy court may grant "any appropriate relief" in order to "effectuate the purpose of this chapter [15] and to protect the assets of the debtor or the interests of the creditors." 11 U.S.C. § 1521(a).

Relief under section 1521(a) is discretionary. "The discretion that is granted is 'exceedingly broad,' since a court may grant 'any appropriate relief' that would further the purposes of chapter 15 and protect the Debtor's assets and the interests of creditors," provided that the interests of creditors and other interested entities are sufficiently protected. *In re Olinda Star Ltd.*, 614 B.R. at 46 (quoting *In re Atlas Shipping A/S*, 404 B.R. at 740). This Court has held that "sufficient protection" is embodied by three basic principles: "the just treatment of all holders of claims against the bankruptcy estate, the protection of U.S. claimants against prejudice and inconvenience in the processing of claims in the [foreign] proceeding, and the distribution of proceeds of the [foreign] estate substantially in accordance with the order prescribed by U.S. law." *In re Olinda Star Ltd.*, 614 B.R. at 46 (quoting *In re Atlas Shipping A/S*, 404 B.R. at 740).

The Court may also grant relief under section 1507(a) of the Code in addition to the types of relief enumerated in section 1521. Section 1507 authorizes the Court to grant any "additional assistance" available under the Bankruptcy Code or under "other laws of the United States," provided that such assistance is consistent with the principles of comity and satisfies the fairness considerations set forth in section 1507(b). *In re Toft*, 453 B.R. 186, 190 (Bankr. S.D.N.Y. 2011). *See also In re Agrokor d.d.*, 591 B.R. 163, 188–89 (Bankr. S.D.N.Y. 2018) (holding that relief under section 1507 may only be granted when "such assistance is consistent with the principles of comity and satisfies the fairness considerations set forth in section 1507(b)") (quoting *In re Rede Energia S.A.*, 515 B.R. at 90.

Additionally, this Court has repeatedly noted that "[t]he interplay between the relief available under sections 1507 and 1521 is far from clear." *In re Avanti Comm'n Grp. PLC*, 582 B.R. 603, 615–16 (Bankr. S.D.N.Y. 2018). The Fifth Circuit in *Ad Hoc Grp. of Vitro Noteholders v. Vitro SAB De CV (In re Vitro S.A.B. de CV)*, 701 F.3d 1031, 1054 (5th Cir. 2012), instructed courts to

> first consider the specific relief enumerated under § 1521(a) and (b). If the relief is not explicitly provided for there, a court should then consider . . . § 1521's grant of any appropriate relief . . . [which is] relief previously available under Chapter 15's predecessor, § 304. Only if a court determines that the requested relief was not formerly available under § 304 should a court consider whether relief would be appropriate as "additional assistance" under § 1507.

701 F.3d at 1054.

B. Third Party Releases and Exculpations in Chapter 15

1. <u>Third-Party Releases of Affiliate Non-Debtor Guaranties in Chapter 15 Cases Are Enforceable</u>

It is commonplace for Part 26 schemes and Part 26 plans to include releases of affiliate guarantees of the debt that is being restructured. For any creditors that have voted in favor of the plan, the releases are wholly consensual. But for creditors who have voted against the approved plan or who have not voted, the releases are nevertheless effective. If so-called 'ricochet" claims against affiliate guarantors remained possible, the schemes or plans would fail. *See, e.g., In re Avanti Comm'n Group PLC*, 682 B.R. at 615–19; *see also In re Ocean Rig UDW Inc.*, 570 B.R. 687 (Bankr. S.D.N.Y. 2017) (recognizing and enforcing scheme of arrangement that released affiliate guarantees); *In re Towergate Fin. plc*, Case No. 15–10509–SMB (Bankr. S.D.N.Y. Mar. 27, 2015) (ECF Doc. # 16); *In re New World Res. N.V.*, Case No. 14-12226-SMB (Bankr. S.D.N.Y. Sept. 9, 2014) (ECF Doc. # 20); *In re Sino–Forest Corp.*, 501 B.R. 655, 665 (Bankr. S.D.N.Y.

2013) (enforcing foreign plan containing third-party releases); *In re Magyar Telecom B.V.*, Case No. 13-13508-SHL, 2013 WL 10399944 (Bankr. S.D.N.Y. Dec. 11, 2013) (ECF Doc. # 26); *In re Metcalfe & Mansfield Alt. Inv.*, 421 B.R. 685, 696 (Bankr. S.D.N.Y. 2010) (concluding that "principles of enforcement of foreign judgments and comity in chapter 15 cases strongly counsel approval of enforcement in the United States of the third-party non-debtor release and injunction provisions included in the Canadian Orders, even if those provisions could not be entered in a plenary chapter 11 case.")

2. Exculpation Provisions in Chapter 15 Cases Are Enforceable

"Exculpation provisions are designed to 'insulate court-supervised fiduciaries and some other parties from claims that are based on actions that relate to the restructuring.'" *In re Genesis Glob. HoldCo, LLC*, 660 B.R. 439, 527 (Bankr. S.D.N.Y. 2024) (quoting *In re Aegean Marine Petroleum Network Inc*., 599 B.R. 717, 720 (Bankr. S.D.N.Y. 2019)). Most of the law in this district regarding exculpation clauses has developed in chapter 11 cases but is equally applicable in chapter 15 cases where the issue is whether to enforce exculpation provisions included in plans sanctioned by foreign courts. The plans sanctioned in this case by the U.K. court include exculpation provisions which carve-out from protection acts involving fraud or gross negligence.

"It is well settled that an exculpation clause approved at confirmation may exculpate estate fiduciaries like a committee, its members, and estate professionals for their actions in the bankruptcy case except where those actions amount to willful misconduct or gross negligence." *In re LATAM Airlines Grp. S.A*., No. 20-11254 (JLG), 2022 WL 2206829, at *50 (Bankr. S.D.N.Y. June 18, 2022) (citations omitted). Such provisions in chapter 11 plans are "not uncommon" and are generally permissible "so long as they are properly limited and not overly broad." *Id*. at *49 (quoting *In re Nat'l Heritage Found., Inc*., 478 B.R. 216, 233 (Bankr. E.D. Va. 2012)).

Generally, it has been recognized that:

> [A] proper exculpation provision is a protection not only of court-supervised fiduciaries, but also of court-supervised and court-approved transactions. If this Court has approved a transaction as being in the best interests of the estate and has authorized the transaction to proceed, then the parties to those transactions should not be subject to claims that effectively seek to undermine or second-guess this Court's determinations. In the absence of gross negligence or intentional wrongdoing, parties should not be liable for doing things that the Court authorized them to do and that the Court decided were reasonable things to do.

Aegean Marine Petroleum Network, 599 B.R. at 721.

In the chapter 11 context, "in general, exculpated parties who are not estate fiduciaries are entitled to benefit from a broad exculpation provision where they have been actively involved in all aspects of the Chapter 11 Cases and have made significant contributions to the success of the cases." *In re Wythe Berry Fee Owner LLC*, No. 22-11340 (MG), 2024 WL 2767121, at *13 (Bankr. S.D.N.Y. May 29, 2024) (cleaned up). This Court in *Wythe Berry* exculpated a creditor group, among others, because its participation "was instrumental to the Debtor formulating a plan on an expedited basis, and their support was essential to the successful negotiation of the Plan" and related agreements. *Id.* (cleaned up). And while the exculpation reached beyond the set of estate fiduciaries, it still was limited just to "court-supervised and court-approved transactions." *Aegean Marine Petroleum Network*, 599 B.R. at 721. *See KG Winddown, LLC,* Case No. 20-11723 (MG) (Bankr. S.D.N.Y. 2020) (ECF Doc. # 494) (permitting exculpation of purchaser as non-estate fiduciary); *Genco Shipping & Trading Ltd.*, Case No. 14-11108 (SHL) (Bankr. S.D.N.Y. July 2, 2014) (ECF Doc. # 322) (approving exculpation provision in plan providing exculpation for non-estate fiduciaries); *In re Residential Cap.*

LLC, Case No. 12-12020 (MG), 2013 WL 12161584, at *13 (Bankr. S.D.N.Y. Dec. 11, 2013) (order confirming plan that contained exculpations for parties "instrumental to the successful prosecution of the Chapter 11 Cases or their resolution pursuant to the Plan, and/or provided a substantial contribution to the Debtors")

"In determining whether to approve exculpation provisions, courts also consider whether the beneficiaries of the exculpation participated in good faith in negotiating the plan and bringing it to fruition, and whether the provision is integral to the plan . . . . Courts in this and other districts have approved exculpation provisions . . . for estate fiduciaries and non- estate fiduciaries." *In re: Klaynberg*, No. 22-10165 (MG), 2023 WL 5426748, at *17–18 (Bankr. S.D.N.Y. Aug. 22, 2023). Finally, courts in the Second Circuit allow exculpation provisions so long as they apply to post-petition conduct and explicitly exclude gross negligence and willful misconduct. *Id*. ("Courts in the Second Circuit have held that [exculpation provisions] . . . are appropriate when confined to postpetition activity and explicitly exclude gross negligence and willful misconduct.").

Additionally, courts in this district have exculpated behavior that occurred after the effective date of a plan of reorganization when that behavior was "authorized by bankruptcy courts to carry out the bankruptcy process." *See In re Ditech Holding Corp.*, No. 19-10412 (JLG), 2021 WL 3716398, at *9 (Bankr. S.D.N.Y. Aug. 20, 2021); *In re Aegean Marine Petroleum Network Inc.*, 599 B.R. at 721 ("I think that a proper exculpation provision is a protection not only of court-supervised fiduciaries, but also of court supervised and court-approved transactions . . . . In the absence of gross negligence or intentional wrongdoing, parties should not be liable for doing things that the Court authorized them to do and that the Court decided were reasonable things to do."); *In re*

Granite Broad. Corp., 369 B.R. 120, 139 (Bankr. S.D.N.Y. 2007) (approving exculpation clause "for actions in connection, related to, or arising out of the Reorganization Cases," noting that the language "generally follows the text that has become standard in this district and is sufficiently narrow to be unexceptional" and that "the Plan provides exculpation only for acts or omissions in connection with the Plan and the bankruptcy cases. It requires, in effect, that any claims in connection with the bankruptcy case be raised in the case and not be saved for future litigation."); *In re Flushing Hosp. & Med. Ctr.*, 395 B.R. 229, 235 (Bankr. E.D.N.Y. 2008) ("It is apparent that the exculpation provisions quoted above are not limited to pre-effective date claims. By their terms, these provisions apply to 'any act or omission in connection with, or arising out of . . . the administration of the Plan.' Adopting [the objector's] interpretation would render the 'administration of the Plan' clause meaningless, because conduct during the administration of the Plan necessarily occurs after the effective date of the Plan.").

V. DISCUSSION: FOREIGN PROCEEDING RECOGNITION

A. Eligibility Under Section 109(a) of the Code

Courts have consistently held that section 109(a) is a low bar for chapter 15 eligibility and a retainer held in a client trust fund is sufficient to establish eligibility. *In re B.C.I. Finances Pty Ltd.*, 671 B.R. 669, 676 (Bankr. S.D.N.Y. 2025); *see also In re Iovate Health Scis. Int' Inc.*, 673 B.R. 516, 526-27 (Bankr. S.D.N.Y. 2025); *ARD Fin., S.A.*, 2026 WL 817458, at *18. The Debtors must have an interest in the funds to qualify under section 109(a), but "[i]t is not relevant who paid the retainer, so long as the retainer is meant to cover the fees of the attorneys for all the Debtors." *Glob. Ocean Carriers*

Ltd., 251 B.R. at 39; *see also In re JPA No. 111 Co., Ltd.*, No. 21-12075 (DSJ), 2022 WL 298428, at *6 (Bankr. S.D.N.Y. Feb. 1, 2022).

The Debtors have property in the United States in the form of a Retainer held in an account maintained in New York by Skadden. (Boac Decl. ¶ 20.) Additionally, the Debtors are obligators on U.S. dollar-denominated debt that is governed by New York law, including the instruments related to the Legacy Notes, the Term Loan A Facility, the Term Loan B Facility, the Revolving Credit Facility, the Series I Intercompany Loan Facility, the Series II Intercompany Loan Facility, and the New 2029 Notes. (*Id.*) These satisfy the "property in the United States" requirement for eligibility under section 109(a). *See In re Avanti Comm'n Grp. PLC*, 582 B.R. at 619 (holding that a foreign debtor was eligible to be a debtor under section 109(a) of the Bankruptcy Code because of (a) an interest in the U.S. counsel's retainer account and (b) an instrument government by New York law). Accordingly, section 109(a) of the Code is satisfied.

B. The English Proceedings are Foreign Main Proceedings

1. <u>The English Proceedings are "Foreign Main Proceedings" under section 1517(a)(1)</u>

The Foreign Representative has sufficiently demonstrated that the English Proceedings are "foreign main proceedings" within the meaning of section 1517 of the Code. Section 1517 provides that "(1) such foreign proceeding . . . is a foreign main proceeding or foreign nonmain proceeding within the meaning of section 1502; (2) the foreign representative applying for recognition is a person or body; and (3) the petition meets the requirements of section 1515." 11 U.S.C. § 1517(a).

Section 101(23) of the Code defines "foreign proceeding" as follows:

> a collective judicial or administrative proceeding in a foreign country, including an interim proceeding, under a law relating to insolvency or

> adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation.

11 U.S.C. § 101(23).

The Foreign Representative contends that the English Proceedings meet this criteria because (i) the Debtors commenced the English Proceedings pursuant to Part 26A of the Companies Act, (ii) the English Proceedings are being overseen by the English Court in England and are being conducted pursuant to laws relating to insolvency or the adjustment of debts, (iii) the English Proceedings are collective in nature as they take into account the rights of all Plan Creditors, and (iv) the English Proceedings will facilitate the Restructuring of the Debtors as the implementation of the Restructuring Plans will address the Group's liquidity and operational challenges, while providing runway for the Group's portfolio of development projects and opportunities that are expected to generate significant revenue and liquidity in the future. (Boas Decl. ¶ 29.) Accordingly, the English Proceedings qualify as "foreign proceedings."

2. <u>The Debtors' COMI is England</u>

The Debtors' COMI is located in England. Both Debtors are private companies limited by shares and incorporated under the laws of England and Wales. (VP ¶ 3.) Both NFE Global and NFE Brazil have their registered office at Suite 1, 7th Floor, 50 Broadway, London SW1H 0BL, United Kingdom. (*Id.* ¶ 16.) The Foreign Representative has demonstrated that each of the Debtors has a registered office located in England and each is entitled to the presumption under section 1516(c) that the location of their registered office is also its center of main interest.

There appears to be nothing in the record to refute the COMI presumption. Additional supporting factors include that the Debtors' books and records are maintained in England; each Debtor maintains bank accounts in England; a U.K. company (Vistra Cosec Limited) serves as the corporate secretary for both Debtors; and the Foreign Representative is an English citizen and resident and serves as a director of both Debtors. (Boas Decl. ¶ 31.)

Therefore, the Debtors' COMI is in England, and the Court recognized the English Proceedings as "foreign main proceedings" pursuant to section 1502(4) and 1517(b)(1) of the Code.

C. The Public Policy Exception Does Not Bar Recognition

The English Proceedings are not fundamentally contrary to U.S. public policy. Succeeding on a public policy argument in an attempt to deny recognition is a high bar. Courts have noted that "even the absence of certain procedural or constitutional rights will not itself be a bar under [Section] 1506." *In re PT Bakrie Telecom Tbk*, 628 B.R. 859, 871 (Bankr. S.D.N.Y. 2021) (quoting *In re OAS S.A.*, 533 B.R. 83, 104 (Bankr. S.D.N.Y. 2015)).

On April 17, 2026, the board of directors of each of the Debtors adopted resolutions appointing Christopher Boas as the Foreign Representative. (VP ¶ 47.) The Convening Hearing was held on May 14, 2026. (*Id.*) While certain creditors had previously threatened to object to the Restructuring Plan and make a disclosure application at the Convening Hearing, at the Convening Hearing they did not pursue either an objection or disclosure application. (*Id.* ¶ 41.) On May 14, 2026, the English Court made the "Convening Order, among other things, confirming the Foreign Representative's appointment and convening the Plan Meetings. (*Id.* ¶ 3.) In accordance with the terms of the Convening Order, the Debtors made available to all Plan

Creditors a notice of the Plan Meetings and the Explanatory Statement on the Information Agent's website, and notices of the same were distributed to Plan Creditors. (*Id.* ¶ 42.)

Additionally, the RSA was agreed to after lengthy negotiations by 100% of the RCF lenders and TLA lenders and approximately 97% of the TLB lenders, 85% of the 2026 Legacy Noteholders, 87% of the 2029 Legacy Noteholders, and 99% of the new 2029 Noteholders. (Boas Decl. ¶ 22.)

In light of the lack of objections, opportunity for creditors to be heard, notice process, and overwhelming creditor support after a lengthy negotiation process, the English Proceedings provided for a fundamentally fair process that accords with due process standards in the United States.

D. The Debtors Have Satisfied the Additional Requirements of Section 1517 and Rule 1007

The Debtors have satisfied section 1517(a) of the Code, which requires the foreign representative that seeks recognition to be a "person or body." *See* 11 U.S.C. § 1517(a)(2). The foreign representative is a "person" as defined by section 101(41) of the Code.

On April 17, 2026, the board of directors of each of the Debtors adopted resolutions appointing Christopher Boas as the Foreign Representative. (VP ¶ 47.) On May 14, 2026, the English Court made the Convening Order, among other things, confirming the Foreign Representative's appointment. (*Id.* ¶ 3.)

As such, the Foreign Representative in this case is an individual who has been (1) duly appointed by each of the Debtors' governing bodies to act as the foreign representative on behalf of the Debtors in connection with the English Proceedings and, (2) pursuant to the Convening Order, the Foreign Representative was recognized as such by the English Court. (*Id.* ¶ 90.) Accordingly, Christopher Boas is a "foreign representative" as defined under the Bankruptcy Code.

E. The Court Need Not Consider Recognition as a Foreign Nonmain Proceeding

Because the Court has concluded that the COMI of each chapter 15 Debtor is England and therefore that the English Proceeding constitutes a foreign main proceeding, the Court need not assess whether to grant recognition of the English Proceeding as a foreign nonmain proceeding pursuant to section 1517(b)(2) of the Code.

VI. DISCUSSION: PLAN RECOGNITION

U.S.-based companies are increasingly seeking to accomplish a financial restructuring by establishing U.K.-based affiliates that file proceedings under Part 26 or Part 26A in the U.K., and if the U.K. plans are sanctioned, then filing a chapter 15 in the U.S. *See, e.g.*, Order Granting Petition for (I) Recognition of Foreign Main Proceeding, (II) Recognition of Foreign Representative, and (III) Related Relief under Chapter 15 of the Bankruptcy Code at 8 of 9, *In re Fossil (UK) Glob. Servs. Ltd.*, (No. 25-90525 (CML), ECF Doc. # 39) (Bankr. S.D. Tex. Nov. 12, 2025) (granting recognition and enforcement of the Part 26A plan of the recently established U.K. affiliate of Fossil Group International, a company incorporated and based in the U.S.) *See also In re Mega Newco Ltd.*, , 2025 WL 601463, at * 4 (recognizing and enforcing an English scheme of arrangement of a Mexican company that created an English "scheme" company that modified the Mexican company's debt governed by New York law); Tr. Hr'g at 21–22, *In re Codere Fin.*, (No. 20-12151, ECF Doc. # 13) (recognizing and enforcing the scheme of arrangement that modified New York-law governed debt for a Spanish gaming company that established a new U.K. company as the scheme company).

While the Court does not disagree with the outcomes in *Fossil*, *Mega Newco*, or *Codere,* the Court is particularly sensitive to "bankruptcy tourism" and concerned by the opportunity for its abuse via COMI manipulation.

A. Risks of COMI Manipulation

Part 26 of the U.K. law (dealing with schemes of arrangement) and Part 26A (dealing with restructuring plans permitting cross-class cramdown) allow companies to restructure tranches of debt within a capital structure without putting an entire company into a costly and time-consuming chapter 11 case. Both approaches require approval of 75% in value of voting classes to obtain approval of the schemes or plans. To the credit of U.K. courts, they have carefully scrutinized the schemes and plans. The risk, however, is that by establishing an affiliate in the U.K. to file under Part 26 or Part 26A., a Debtor may circumvent the requirements of the U.S. Bankruptcy Code to disadvantage some creditors.

Eligibility to file a Part 26 or Part 26A proceeding in the U.K. is not based on COMI, but rather on "sufficient connection" of the plan company. COMI is the only basis for recognition and enforcement for cross border cases under chapter 15. "Sufficient connection" and "COMI" are not the same standards. In *In re Fossil*, the sufficient connection test was satisfied in the U.K. by changing the governing law of the debt from New York law to English law. If the U.S. court then declined to recognize the COMI in the U.K. of the plan company, the restructuring would fail.

In *In re Fossil*, the order entered by the Houston Bankruptcy Court does not analyze the issue of COMI. *See* Order, *In re Fossil (UK) Glob. Servs. Ltd.*, (No. 25-90525, ECF Doc. # 39) (entering an order concluding without analysis that "The U.K.

Proceeding is pending in England, where the Foreign Debtor has its 'center of main interests' as referred to in section 1517(b)(1) of the Bankruptcy Code"). In *In re Mega Newco Ltd.*, the court cautioned against allowing this structure in all cases, because the "ordinary predicate for chapter 15 relief could be stripped of meaning." *In re Mega Newco Ltd.*, 2025 WL 601463, at *3. Judge Wiles explained:

> Any debtor company could restructure its obligations anywhere it chose without even subjecting itself to a foreign proceeding. All that a debtor would need to do is to form a new subsidiary in a jurisdiction of its choice and then cause that new subsidiary to assume the parent company's obligations. The parent company's COMI would no longer be relevant to the parent's restructuring of its debts. The laws of the chosen jurisdiction would govern a restructuring, no matter how those laws might affect the legitimate expectations of creditors and regardless of whether the debtor had chosen a particular jurisdiction for the purpose of favoring insiders or for other improper reasons.

Id.

B. Assessing COMI Manipulation

In a case where a Part 26 Scheme or a Part 26A Plan is used to restructure debt of a non-U.K. company, a chapter 15 court should scrutinize COMI closely to be sure the Scheme or Plan has not been used unfairly to favor one group of creditors over others to achieve a result that could not be achieved in a chapter 11 case. *In re SPhinX, Ltd.*, 351 B.R. 103, 117 (Bankr. S.D.N.Y. 2006) (holding that COMI determinations should not be made "mechanically," and that COMI should be assessed "in light of chapter 15's emphasis on protecting the reasonable interests of parties in interest pursuant to fair procedures and the maximization of the debtor's value").

Insider exploitation, untoward manipulation, and overt thwarting of third-party expectations may result in a refusal to recognize and enforce the foreign scheme or plan for bad faith COMI manipulation. Tr. Hr'g at 21, *In re Codere Fin.*, (No. 20-12151, ECF

Doc. # 13) ("Those sorts of things could evidence bad faith COMI manipulation . . . . I want to be clear that if there were objections that established exploitation or untoward manipulation or thwarting of third-party expectations, it is doubtful that this Court would recognize and enforce this scheme of arrangement.").

A lack of objections and support for a scheme of arrangement or plan weigh in favor of recognition. Tr. Hr'g at 21-22, *In re Codere Fin.*, (No. 20-12151, ECF Doc. # 13); *In re Mega Newco Ltd.*, 2025 WL 601463, at *4 ("If COMI manipulation is a matter of concern because of the risk that creditors' rights and expectations might be thwarted, then one of the main factors I ought to consider, in deciding whether such a manipulation has occurred, is whether the affected creditors have asserted any objection.").

The court in *In re Mega Newco Ltd.* highlighted that the scheme of arrangement was the product of negotiations with and consent of the affected creditors and that it enabled a broader restructuring with increased recoveries for all parties. *In re Mega Newco Ltd.*, 2025 WL 601463, at *4. The court deferred to the creditors in determining whether their expectations were thwarted. *Id.* (citing *In re SPhinX, Ltd.*, 351 B.R. at 117 (stating that "creditors presumably are in the bast position to determine whether their own expectations are being thwarted, and therefore that 'one generally should defer . . . to the creditors' acquiescence in or support of a proposed COMI'")).

After carefully reviewing the record in this case, the Court found no evidence that the Plans that were sanctioned by the U.K. court were the result of exploitation or untoward manipulation that would lead the Court to deny recognition and enforcement of the Plans.

C. 11 U.S.C. § 1522(a) as a Guardrail

Notably, the Bankruptcy Code does not expressly prevent domestic entity from establishing a foreign affiliate to act as plan or scheme company and if a plan or scheme is sanctioned by a foreign court, seeking to have the foreign plan or scheme recognized and enforced in a chapter 15 case. However, U.S. courts should look closely at recognition requests, with particular attention to the requirements of section 1522(a). The "sufficiently protected" requirement of section 1522(a) provides a helpful guardrail to protect creditor interests. Tr. Hr'g at 21, *In re Codere Fin.*, (No. 20-12151, ECF Doc. # 13) (stating that "such relief can be granted only if the interests of creditors and other interested entities, including the debtor, are sufficiently protected"). The requirements and application of section 1522(a) are discussed in more detail below.

D. Enforcing the Plan, Including the Releases, as Discretionary Relief under Sections 1507 and 1521 is Proper

Again, section 1521(a) of the Code authorizes this Court to grant enumerated forms of relief in addition to "any appropriate relief" necessary to effectuate the purposes of chapter 15 and to protect a debtor's assets and the interest of creditors. 11 U.S.C. § 1521. Further, section 1522(a) provides that the court may only grant discretionary relief under section 1521 if the interests of creditors are sufficiently protected. 11 U.S.C. § 1522(a). "Sufficient protection" has been interpreted as requiring "the just treatment of all holders of claims against the bankruptcy estate, the protection of U.S. claimants against prejudice and inconvenience in the processing of claims in the [foreign] proceeding, and the distribution of proceeds of the [foreign] estate substantially in accordance with the order prescribed by U.S. law." *In re Atlas Shipping A/S*, 404 B.R. at 740 (internal citation and quotation marks omitted) (alteration in the original).

Given the lack of objections in this case, and overwhelming creditor support, the Court found that the interests of creditors are sufficiently protected.

1. Just Treatment of Creditors

First, the Code requires the Court to inquire whether the additional assistance will reasonably assure just treatment of all holders of claims against or interests in the debtor's property. Just treatment is satisfied upon a showing that the applicable law "provides for a comprehensive procedure for the orderly and equitable distribution of [the debtor]'s assets among all of its creditors." *In re Rede Energia S.A.*, 515 B.R. at 95 (quoting *In re Bd. of Directors of Telecom Argentina, S.A.*, 528 F.3d 162, 170 (2d Cir. 2008)) (alterations in the original); *In re Oi S.A.*, 587 B.R. 253, 267 (Bankr. S.D.N.Y. 2018).

The record reflects that creditors were treated fairly in the English Proceedings. The Foreign Representative has made a sufficient showing that the English Proceedings constituted a "comprehensive procedure" for the purposes of section 1521. Pursuant to the RSA, there is overwhelming support for the Restructuring Plans from Plan Creditors. (VP ¶ 99.) Under the Restructuring Plans, Plan Creditors will receive the Plan Consideration, which is preferable to liquidation because liquidation would likely result in a substantially lower return to Plan Creditors as compared to the Plan Consideration. (*Id.*) The Foreign Representative states that the Restructuring Plans will result in the same compromise or arrangement between the Debtors and each Plan Creditor as other similarly situated Plan Creditor. (*Id.*) Under the RAR, all Plan Creditors receive a better outcome under the Restructuring Plans compared to the Relevant Alternative. (RAR at 16.)

The Debtors held Plan Meetings on June 15, 2026 and the Restructuring Plans were approved with nearly unanimous consent, with unanimous votes in favor obtained in six out of the seven classes. (Supp. Stephansen Decl. ¶ 8.) Notably, the Legacy Noteholders, the only class where creditors voted against the Plans, has recovery of 13% under the Relevant Alternative compared with 26% under the Restructuring Plans. (RAR at 16.)

The terms of the Restructuring Plans require approval of the English Court in the form of orders sanctioning the Restructuring Plans. (VP ¶ 99.) The Plan Creditors were afforded extensive notice of, and multiple opportunities to review, consider, and object to, the Restructuring Plans and the Plan Releases. (Supp. Stephansen Decl. ¶ 9.) Plan Creditors were entitled to be heard with respect to the Restructuring Plans at both the Convening Hearing and the Sanction Hearing. (*Id.*) Plan Creditors received formal notice of the Plan Releases through multiple documents and proceedings and were provided with contact information for the Information Agent and the Debtors' advisors to direct any questions regarding the Restructuring Plans, including the Plan Releases. (*Id.* ¶ 10.) These materials and proceedings include the RSA, the Convening Hearing, the Explanatory Statement which serves a function comparable to that of a disclosure statement required under section 1125 of the Bankruptcy Code, the Plan Meetings, and the Sanction Hearing. (*Id.*)

Further, the Restructuring is the result of a months-long, hard fought negotiation between the Debtors and the Plan Creditors, with creditors organizing into groups and retaining sophisticated advisors before ultimately accepting the terms of Plan Releases. (*Id.* ¶ 13.) The Foreign Representative characterizes the Supporting Creditors subject to the Plan Releases as "sophisticated investors who have had ample notice and opportunity to review and understand the terms of the Restructuring Plans, including the Plan Releases, and who have independently determined to support the Restructuring." (*Id.* ¶ 15.)

At the Sanction Hearing, the Debtors walked the English Court through the Plan Releases and the English Court considered whether they were appropriate. (*Id.* ¶ 10.) No Plan Creditor appeared to object to the Plan Releases or otherwise oppose sanction of the Restructuring Plans. (*Id.*)

Accordingly, the English Proceedings constitute a comprehensive procedure for the distribution of estate property, and the first factor is satisfied.

2. Protection of U.S. Claimants

Next, this Court has found that U.S. creditors must be protected against "prejudice and inconvenience in the processing of claims" in the foreign proceeding. *Atlas Shipping*, 404 B.R. at 740 (internal citation omitted). This prong is clearly met. The Restructuring Plans address and restructure only the claims of the Plan Creditors (who are the only affected creditors) and do not contemplate any other class of creditors other than the Plan Creditors being affected. (VP ¶ 100.) All of the Plan Creditors have been given adequate notice of the Restructuring Plans, and the process for participating in or objecting to the Restructuring Plans is the same for United States creditors as all other creditors. (*Id.* ¶ 99.) This is sufficient to satisfy this factor of the analysis.

Furthermore, no party has objected to the Motion or otherwise represented to the Court that the English Proceedings prejudiced the rights of U.S. Creditors. Accordingly, the Court found that the second factor is satisfied.

3. Distribution of Estate Proceeds

Section 1521(b), provides that the foreign representative may be entrusted with "the distribution of all or part of the debtor's assets located in the United States." 11 U.S.C. § 1521(b). Again, this Court has previously described the third element of "sufficient protection" as requiring that "the distribution of proceeds of the [foreign] estate substantially in accordance with the order prescribed by U.S. law." *In re Atlas Shipping A/S*, 404 B.R. at 740 (internal citation and quotation marks omitted) (alteration in the original).

Here, the Debtors seek to restructure the Debtors' and the Group's funded debt obligations, and the contractual terms of other classes of creditors or of other non-Plan Creditors are not the subject of the English Proceedings. (*Id.* ¶ 102.) Accordingly, the Foreign Representative submits that recognition and enforcement of the Restructuring Plans is necessary and appropriate and that the interests of creditors and other interested entities, including the Debtors, are sufficiently protected. (*Id.*)

4. Balancing of Interests

It is clear that that the balance of interests weighs in favor of grating the Requested Relief. The Requested Relief is necessary for the Restructuring and to carry out the provisions of the Restructuring Plans, which will benefit both the Debtors and their creditors.

Accordingly, the Court found that the balance of interests weighs in favor of granting the Requested Relief.

5. Additional Factors Considered

Relief is also appropriate under section 1507 of the Code. The analysis for section 1507 is broadly similar to that of section 1521, and having determined that the first, second and fourth factors have been met, which are identical to the section 1521 analysis, this Court found that these factors are also met for purposes of section 1507.

Section 1507(b)(3), the third factor, provides that the foreign proceeding must reasonably prevent "preferential or fraudulent dispositions of property of the debtor" 11 U.S.C. § 1507(b)(3). The English Proceedings are adequately protective, the third factor of section 1507 is also satisfied, and the Requested Relief is appropriate under section 1507 of the Code.

6. Enforcement of the Restructuring Plans are Not Manifestly Contrary to U.S. Public Policy

This Court has noted that the public-policy exception is an "exacting standard," *ARD Fin., S.A.*, 2026 WL 817458, at *19, and an objecting party must demonstrate the existence of "exceptional circumstances concerning matters of fundamental importance for the United States." *Id.* (quoting *Black Gold S.A.R.L.*, 635 B.R. at 528).

According to Daniel Glosband (the "Expert"), the author of the Expert Report, the Restructuring Plans should not raise public policy concerns because U.S. courts have previously recognized and given full force and effect to numerous schemes of arrangement and restructuring plans that included Non-Debtor Effects including third-party releases. (Expert Report ¶ 111.) Additionally, the Expert points out that the process required by the Companies Act 2006 is "broadly analogous to the disclosure, voting and confirmation framework applicable to chapter 11 plans under the US Bankruptcy Code." (*Id.* ¶ 115.) The Expert asserts that because similar relief could be granted in a domestic proceeding, recognition and enforcement of the Plans would not be manifestly contrary to public policy. (*Id.*)

The Expert additionally argues that *Purdue* was limited to statutory interpretation under the provisions of chapter 11 and that the Supreme Court expressly acknowledged that "Congress may authorize" such releases, indicating that such releases are not "manifestly contrary to fundamental U.S. policy." (*Id.* ¶ 118; citing *In re Crédito Real, S.A.B. de C.V., SOFOM, E.N.R.*, 670 B.R. 150, 164–72,(Bankr. D. Del. 2025).

As such, enforcement of the Restructuring Plans, including the Plan Releases, and the Sanction Order is not manifestly contrary to U.S. public policy.

VII. CONCLUSION

For the reasons discussed above, the Court **GRANTED** the Requested Relief and (i) recognized the English Proceedings as "foreign main proceedings"; (ii) recognized the Foreign Representative as the "foreign representative" of the Debtors; (iii) found that the Verified Petition meets the requirements of section 1515 of the Bankruptcy Code; and (iv) recognized the English Court's Sanction Order, giving full force to the Sanction Order and the Restructuring Plans, including the Plan Releases.

A separate Order has already been entered to reflect the Court's rulings.

Dated: July 14, 2026
New York, New York

Martin Glenn
MARTIN GLENN
Chief United States Bankruptcy Judge

Neutral Citation Number: [2024] EWCA Civ 24

Case No: CA-2023-000914

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST
Mr. Justice Leech
[2023] EWHC 916 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Tuesday 23 January 2024

Before :

LORD JUSTICE NUGEE
LORD JUSTICE SNOWDEN
and
SIR NICHOLAS PATTEN

- -

IN THE MATTER OF AGPS BONDCO PLC

Between :

STRATEGIC VALUE CAPITAL SOLUTIONS MASTER FUND LP and others	**Appellants**
- and –	
AGPS BONDCO PLC	**Respondent**

- -

Tom Smith KC and Adam Al-Attar (instructed by **Akin Gump LLP**) for the **Appellants**
Daniel Bayfield KC, Ryan Perkins and Annabelle Wang (instructed by **White & Case LLP**) for the **Respondent**

Hearing dates: 23-25 October 2023

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Approved Judgment

This judgment was handed down remotely at 10 a.m. on Tuesday 23 January 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Snowden:

1. This is an appeal against the order of Leech J (the "Judge") dated 12 April 2023 sanctioning a restructuring plan (the "Plan") pursuant to Part 26A of the Companies Act 2006 ("Part 26A" and the "2006 Act"). The Plan was between the Respondent company (the "Plan Company") and its creditors (the "Plan Creditors" or the "Noteholders") under six classes of senior unsecured notes (the "SUNs" or the "Notes"). The Judge's reasons for sanctioning the Plan were set out in a detailed judgment of 21 April 2023: see [2023] EWHC 916 (Ch) (the "Judgment").

2. This is the first appeal to this Court in relation to a restructuring plan under Part 26A. It raises some important questions concerning the approach which the court should take to the exercise of its discretion to sanction a restructuring plan notwithstanding that not all of the classes of plan creditors have approved the plan. The exercise of that power is generally referred to as a "cross-class cram down". The Appellants each hold Notes in the relevant class of Noteholders that did not vote by the required 75% majority to approve the Plan, they voted against the Plan, and they contend that the exercise of discretion by the Judge to impose the Plan upon them was vitiated by a number of errors of law and approach.

Parts 26 and 26A of the 2006 Act in outline

3. Part 26A was inserted into the 2006 Act during the COVID-19 pandemic by Schedule 9 to the Corporate Insolvency and Governance Act 2020. Part 26A was intended to provide a new restructuring tool to supplement the existing regimes for schemes of arrangement under Part 26 of the 2006 Act.

4. There are very considerable similarities between a scheme of arrangement under Part 26 and a restructuring plan under Part 26A. Both types of procedure apply where a "compromise or arrangement" is proposed between a company and its creditors (or any class of them) or its members (or any class of them): see sections 895(1) and 901A(3) of the 2006 Act.

5. Both procedures also involve a three-stage process consisting of, (i) a convening hearing at which the court considers (among other things) the appropriate composition of the classes of creditors that are to be invited to meetings to vote on the proposed scheme or plan and to receive a statement explaining its effect; (ii) the holding of those class meetings; and (iii) a sanction hearing at which the court has a discretion whether to sanction the scheme or plan: see sections 896 - 899 and 901C-901F of the 2006 Act.

6. There are, however, a number of important differences in the express provisions of Part 26 and Part 26A.

7. First, a company that wishes to propose a restructuring plan under Part 26A must satisfy two threshold conditions in section 901A which restrict the use of Part 26A plans to companies which have encountered or are likely to encounter financial difficulties affecting their ability to carry on business as a going concern. There is no such requirement in Part 26, which can also be used by solvent companies to promote schemes of arrangement to implement takeovers and other changes to their capital structures.

8. Secondly, unlike Part 26, under which all members or creditors whose rights against the company are to be affected by a scheme of arrangement must be summoned to a meeting or class meeting to vote upon the scheme, section 901C(4) in Part 26A gives the court power to exclude any class of plan creditors or members from being summoned to a meeting if the court is satisfied that none of the creditors or members in that class has a genuine economic interest in the company.

9. Thirdly, the court may sanction a restructuring plan under section 901F(1) in Part 26A if it is approved by 75% in value of those present and voting (either in person or by proxy) at the class meeting or meetings. Unlike schemes of arrangement under section 899(1) in Part 26, there is no additional requirement to obtain a majority in number of those present and voting at each class meeting.

10. Fourthly, and most significantly for present purposes, a scheme of arrangement under Part 26 can only be sanctioned by the court if each of the classes of creditors or members have voted in favour of the scheme by the required majorities at their respective class meetings. That gives any class a potential right of veto over the scheme. By virtue of section 901G in Part 26A, however, the court's discretion to sanction a restructuring plan under section 901F may be exercisable notwithstanding that the plan has not received the requisite approval of one or more classes of creditors or members.

11. Section 901G provides,

> "901G *Sanction for compromise or arrangement where one or more classes dissent*
>
> (1) This section applies if the compromise or arrangement is not agreed by a number representing at least 75% in value of a class of creditors or (as the case may be) of members of the company ("the dissenting class"), present and voting either in person or by proxy at the meeting summoned under section 901C.
>
> (2) If conditions A and B are met, the fact that the dissenting class has not agreed the compromise or arrangement does not prevent the court from sanctioning it under section 901F.
>
> (3) Condition A is that the court is satisfied that, if the compromise or arrangement were to be sanctioned under section 901F, none of the members of the dissenting class would be any worse off than they would be in the event of the relevant alternative (see subsection (4)).
>
> (4) For the purposes of this section "the relevant alternative" is whatever the court considers would be most likely to occur in relation to the company if the compromise or arrangement were not sanctioned under section 901F.

> (5) Condition B is that the compromise or arrangement has been agreed by a number representing 75% in value of a class of creditors or (as the case may be) of members, present and voting either in person or by proxy at the meeting summoned under section 901C, who would receive a payment, or have a genuine economic interest in the company, in the event of the relevant alternative."

12. It can be seen that section 901G specifies that before the cross-class cram down power can be exercised, two pre-conditions must be satisfied. The first ("Condition A") is that if the plan were to be sanctioned, none of the members of the dissenting class would be any worse off than they would be in the event of the relevant alternative. This is colloquially referred to as the "no worse off" test. The second ("Condition B") is that the compromise or arrangement has been approved at a class meeting by a class who would receive a payment or have a genuine economic interest in the company in the event of the relevant alternative. It will thus be appreciated that "the relevant alternative", as defined in section 901(G)(4), is a central statutory concept in relation to the exercise of the cross-class cram down power.

<u>The Facts in outline</u>

13. The Judgment contains a full account of the factual background to the Plan and its contents. For present purposes a shorter summary drawn from the Judgment and supplemented by an agreed chronology provided by the parties will suffice.

14. Adler Group SA (the "Parent Company") is a company incorporated in Luxembourg. The Parent Company and its subsidiaries (including Adler Real Estate AG ("Adler Re") form the "Group". The Group's business consists of the purchase, management and development of income-producing, multi-family residential real estate in Germany. It is likely that the centre of main interests (COMI) of the companies in the Group is in Germany and hence that any formal insolvency proceedings in relation to the Group companies would take place there.

15. Prior to the Plan, the external debt of the Group amounted to approximately €6.1 billion. Included within that debt were the Notes with a combined principal value of €3.2 billion. The six series of Notes had different maturity dates and interest rates. The first series was payable on 26 July 2024 (the "2024 Notes") and had a face value of €400 million. The second series was payable in August 2025 (the "2025 Notes") and also had a face value of €400 million. The third, fourth and fifth series of notes were payable in early and late 2026 and 2027 and had a combined face value of €1.6 billion. The final series of notes was payable on 14 January 2029 (the "2029 Notes") and had the largest single face value of any of the series of €800 million.

16. It was common ground between the parties, and is a central feature of this case that, absent the Plan, in the event of a formal insolvency of the issuer, the obligations under the Notes would all rank equally as unsecured debts.

17. The external debt of the Group also included €165 million of convertible notes issued by the Parent Company which were due on 23 November 2023; €500 million of unsecured notes issued by Adler Re which were due on 27 April 2023 (the "2023

Adler Re notes"); and €300 million of unsecured notes issued by Adler Re which were due on 6 February 2024 (the "2024 Adler Re notes").

18. From October 2021 the Group was the subject of a number of allegations from an entity known as Viceroy Research LLC to the effect that it had artificially inflated the value of its real estate assets and had entered into a number of undisclosed related party transactions. Following publication of a forensic special audit report by KPMG in April 2022, KPMG disclaimed its opinion on the Group's 2021 accounts and informed the Parent Company that it would not act as auditor for the 2022 accounts.

19. Domestic and global economic problems in 2022, and decreased business confidence caused a sharp downturn in the demand for residential and commercial real estate in Germany. This had a significant adverse impact on the Group's business. The Group pursued a number of measures aimed at improving its liquidity position in 2022, including selling in excess of €2 billion of assets. However, in early September 2022 the Group commenced restructuring discussions with the advisors to a number of Noteholders. The Group delivered its first restructuring proposal to those advisors in early October 2022 and negotiations continued during that month. At the start of November 2022, six entities holding about 45% of the total value of all Notes (the so-called "SteerCo") entered into non-disclosure agreements with the Parent Company and commenced detailed restructuring negotiations. The Appellants, who held about 34% by value of the 2029 Notes, were not members of SteerCo and did not take part in those negotiations.

20. On 25 November 2022 the Parent Company announced that it had entered into a "Lockup Agreement" with the members of the SteerCo, pursuant to which, in return for a lockup fee of 0.25% of the face value of their locked-up Notes, the members of the SteerCo agreed to support a restructuring of the Group.

21. Importantly, the purpose of the proposed restructuring was not to achieve the long-term survival of the Group. The proposal was for a controlled wind down of the business and a more beneficial realisation of the assets of the Group than in an immediate formal insolvency. To that end the restructuring offered the Group some new short-term liquidity to repay the 2023 and 2024 Adler Re notes, the capitalisation of interest on the Notes for two years in return for an increase in the coupon, the postponement of the maturity of the 2024 Notes for a year, and the modification of the Group's reporting covenants. It was thought that this would allow the management of the Group time to implement a phased programme of asset disposals during 2025 and 2026, in what was hoped would be a recovering property market, leading to the distribution of enhanced realisations to creditors and the liquidation of the Group companies in 2027.

22. The liquidity was to be provided by a special purpose company formed by the SteerCo under which up to €937.5 million of new term loans carrying interest at 12.5% per annum and maturing in June 2025 would be made to the Group (the "New Money"). The members of the SteerCo entered into commitment letters promising to provide €880 million of the New Money, which amount would be reduced to the extent that other Noteholders elected to participate.

23. €800 million of the New Money was to be used to repay the 2023 Adler Re notes and the 2024 Adler Re notes. A further €57.5 million was to be used to pay a variety of

fees to the lenders in connection with the New Money (the "New Money Fees"). These included so-called "Backstop Fees" of 3% of the SteerCo's €880 million initial commitment; "Ticking Fees" of 5% on any undrawn commitment; "Early Bird Fees" of 1% of any sums committed by Noteholders before a specified deadline, and "Original Issue Discount Fees" of 1% to any Noteholder who participated in the New Money. In addition, each provider of New Money would be allocated, pro rata, ordinary shares in the Parent Company amounting in total to 22.5% of the fully diluted share capital. It was further provided that claims for these New Money Fees would rank as unsecured debts in any insolvency.

24. The proposed amendments to the terms and conditions of the Notes included a suspension of the obligation to pay interest for two years, with the interest being capitalised and subject to an increase in the coupon by 2.75% over that period; and the insertion of a covenant by the Group to maintain a specified loan to value ("LTV") ratio of its assets.

25. Critically for present purposes, the proposed restructuring and the amendments to the terms and conditions of the Notes also included two features that would apply differently to the 2024 Notes and the other series of Notes. First, the maturity date of the 2024 Notes was to be extended by a year from 26 July 2024 to 31 July 2025. The maturity dates of all the other Notes were left unchanged. Secondly, it was proposed to modify the negative pledge clauses in the Notes to permit the grant of new security by the Group in respect of the New Money and the Notes. Under this new security (the "Transaction Security"), and according to an intercreditor agreement (the "Intercreditor Agreement"), the proceeds of enforcement of the security would be applied in accordance with a waterfall under which, after payment of certain costs and expenses, the New Money would rank first in priority, followed by the 2024 Notes, and then the five other series of Notes which would rank equally as between themselves.

26. The commitment of the members of the SteerCo to provide the New Money was conditional upon the alteration of the terms and conditions of the Notes, and their agreement to support the restructuring was expressed to expire on 12 April 2023.

The Consent Solicitation

27. The Group and the SteerCo envisaged that the proposed alteration of the terms and conditions of the Notes would be implemented by a so-called "consent solicitation" to obtain the agreement of the Noteholders. Under the terms and conditions of the Notes, this required a majority of 75% in value and 50% in number of the holders of each series of Notes.

28. The consent solicitation process commenced on 2 December 2022. On 8 December 2022 the Appellants notified the Group that they intended to vote against the consent solicitation. On 20 December 2022 the Group announced that although the requisite 75% majority by value had been obtained in five series of Notes, the consent solicitation had failed to achieve the required 75% majority in relation to the 2029 Notes, of which only about 55% in value had voted in favour.

The Issuer Substitution

29. After the failure of the consent solicitation, the Group announced its intention to implement the proposed restructuring by an alternative route. This was to propose a restructuring plan under Part 26A and to ask the English court to exercise its cram down power to overcome the objections of the Appellants. To that end, the Plan Company was incorporated in England and Wales as a subsidiary of the Parent Company on 23 December 2022.

30. On 10 January 2023, the Appellants put forward an alternative restructuring proposal to the Group. That elicited no immediate response, but on 19 January 2023 the SteerCo informed the Company that the Appellants' proposal was not acceptable.

31. On 11 January 2023 the Plan Company was substituted for the Parent Company as the issuer of the Notes, ostensibly pursuant to the substitution procedure under the Notes (the "Issuer Substitution"). In connection with that substitution, the Parent Company guaranteed the Plan Company's obligations under the Notes, and the Parent Company issued back-to-back loan notes to the Plan Company on the same terms as the Notes.

32. It is self-evident, and the Plan Company accepted before the Judge, that the Issuer Substitution was carried out for the sole purpose of introducing an English company into the Group structure in order to persuade the English court to exercise its jurisdiction under Part 26A. Absent the Issuer Substitution, a proposal for the compromise of foreign law debts owed by a foreign company with no relevant connection with England would not have been entertained by the English court.

33. The technique of inserting a newly incorporated English company as a substitute obligor or co-obligor of debt owed by a foreign company in order to engage the jurisdiction of the English court under Part 26 or Part 26A has been used in a number of schemes and plans that have been sanctioned at first instance over the last few years: see e.g. Codere Finance (UK) Limited [2015] EWHC 3778 (Ch) and Gategroup Guarantee Limited [2021] EWHC 775 (Ch) at [12]-[23]. Mr. Bayfield KC told the Judge that it was "an established technique". It has, however, not been the subject of consideration at an appellate level.

34. The Appellants did not oppose the Plan before the Judge on the basis that the Issuer Substitution was an artificial device that could not justify the exercise of discretion to sanction the Plan. The point did not, therefore, arise for consideration on this appeal. For the avoidance of doubt, and without expressing a view one way or the other, I would wish to make it clear that the fact that this judgment does not deal with this issue should not be taken as an endorsement of the technique for future cases.

35. The Appellants did, however, challenge the legality of the Issuer Substitution as a matter of German law, both before the Judge, and by proceedings in Germany itself. The Judge heard expert evidence and was satisfied that it complied with German law. The Appellants also indicated that irrespective of our decision on this point, they reserved the right to continue their challenge to the Issuer Substitution in Germany.

The Plan

36. The Plan essentially sought to make the same changes to the terms and conditions of each series of Notes for which agreement had been sought in the consent solicitation as set out above. The Plan provided that the Notes were to be directly amended to

take the form set out in an Appendix, and that the Plan Company was also authorised by the Plan to execute on behalf of all the Plan Creditors an agreement in accordance with German law providing that the Notes were to take that amended form. In particular, the amendments to the Notes included provisions as to the postponement of the maturity date for the 2024 Notes and the variation to the negative pledge clauses to permit the grant of the new Transaction Security.

The convening hearing

37. On 26 January 2023, the Plan Company issued a letter to the Plan Creditors pursuant to the Practice Statement (Companies: Schemes of Arrangement) [2020] 1 WLR 4493 (the "Practice Statement"), informing them of the intention to promote the Plan. The letter indicated that there would be a convening hearing in respect of the Plan on 24 February 2023.

38. The convening hearing took place before Sir Anthony Mann. In his judgment, [2023] EWHC 415 (Ch), Sir Anthony found that the threshold jurisdictional requirements of Part 26A had been satisfied. He also accepted the submission of the Plan Company that there should be a separate class meeting of the holders of each series of Notes (the "Plan Meetings").

39. In the expectation that the Appellants would vote against the Plan and the 2029 Notes would be a dissenting class, Sir Anthony Mann also considered how it might be possible for the parties and the court to have sufficient time to deal with the numerous legal and valuation issues that would arise when the Plan Company asked the court to exercise its cross-class cram down power and give a decision on sanction before 12 April 2023. The result was that the convening order provided for the explanatory statement in respect of the Plan to be made available to Plan Creditors on 27 February 2023, for the Plan Meetings to take place on 16 March 2023, and for evidence to be prepared and exchanged under a very compressed timetable prior to a sanction hearing commencing on 30 or 31 March 2023.

The BCG Report

40. One of the important documents annexed to the explanatory statement was a report dated 20 February 2023 prepared by The Boston Consulting Group UK LLP ("BCG") which had been engaged by the Plan Company pursuant to a letter dated 10 February 2023. That report compared the projected outcome for Plan Creditors under the Plan and in the relevant alternative to the Plan.

41. The projected outcome under the Plan was based upon a business plan developed by the management of the Group (the "Management Case"). As indicated above, this was a "wind down" plan that envisaged a phased sale of the Group's yielding and development assets until the end of 2026, and a similarly phased reduction in the Group's personnel and organisation leading to a liquidation of the Group companies in 2027. BCG made it clear that they had relied upon the underlying assumptions made by the management of the Group, and that although they had conducted "plausibility checks" of that data, they had not performed a full examination or any audit of it. The values attributed by BCG to the Group's yielding and development assets were those which had been given in the last regular valuations for the Group in September 2022 by CBRE GmbH ("CBRE") (for the yielding assets) and in June

2022 by Apollo Valuation and Research GmbH ("NAI Apollo") (for the development assets).

42. BCG's projected outcome for Plan Creditors in the relevant alternative was based on a conclusion that if the Plan was not implemented, it was most likely that each of the main companies in the Group would commence formal insolvency proceedings in April 2023. Those proceedings would be in England for the Plan Company, and in Germany for the Parent Company and the remainder of the Group. In that event, the claims of Noteholders would all rank equally as unsecured claims for payment of distributions in the insolvency proceedings. In addition, the New Money Fees would also rank as unsecured debts. These conclusions formed the basis of "the relevant alternative" under section 901G(4) by reference to which the Judge considered whether to exercise the cross-class cram down power (the "Relevant Alternative").

43. In a "Comparator Analysis", the BCG report expressed the opinion that provided that asset disposals were executed in accordance with the Management Case, the Plan would result in net proceeds (after payment of bank debt, interest and tax) of €4.1 billion which would be applied to repay the total of €3.684 billion (including interest) due on the Notes in full, starting with the 2024 Notes and the 2025 Notes and moving through the 2026, 2027 and 2029 Notes in chronological sequence. On the basis that the Management Case envisaged disposals being concluded by the end of 2026, it was said that this would permit payment of the 2027 and 2029 Notes prior to their scheduled maturity dates.

44. The Comparator Analysis in the BCG report assumed that in the Relevant Alternative there would be two phases of disposals of the assets of the Group companies at values that would be significantly discounted because the sales were being conducted in a formal insolvency. BCG opined that there would be two distributions in the first quarter of 2026 and 2028, together amounting to a payment of 57% of the amounts owing under the Notes.

45. On 15 March 2023, the day before the date fixed for the Plan Meetings, the Plan Company made available a revised explanatory statement. This contained an updated report from BCG (the "BCG Report") which revised the projection for the return to Plan Creditors in the Relevant Alternative to 63% rather than 57%.

The Plan Meetings

46. The Plan Meetings were commenced and then adjourned on 16 March 2023 to enable the updated BCG Report to be considered. They were reconvened on 21 March 2023. The attendance at each class meeting represented a very high proportion of the total Notes in issue. The chairman of the meetings subsequently reported to the court that the Plan had been approved by majorities in excess of 90% of those voting at the class meetings for the 2024, 2025 and 2026 Notes, and by a majority of about 80% of those voting at the class meeting for the 2027 Notes. However, at the meeting of the 2029 Notes, the Plan was approved by only 62.28% of those voting and so failed to achieve the required 75% majority.

The sanction hearing

47. The sanction hearing commenced before the Judge on 3 April 2023 and lasted for three extended court days, sitting from 9.30 am to 5 pm. The hearing was conducted on the footing that the terms of the SteerCo's funding commitment required a decision to be made by, at the latest, 12 April 2023.

48. At the hearing, the Judge was faced with the explanatory statement and BCG Report, together with factual evidence from a director of the Plan Company (Mr. Trozzi) as to the financial state of the Group, the state of its diverse property portfolio, and the manner in which the management of the Group intended to implement the Management Case and wind down its business and affairs if the Plan were sanctioned.

49. In relation to the comparative estimated outcomes for Plan Creditors under the Plan and in the Relevant Alternative, the Judge had written evidence supporting the valuations used in the BCG Report from CBRE and NAI Apollo, together with evidence from BCG (Mr. Wolf) and a restructuring expert (Mr. Gunther) on behalf of the Plan Company. He also had written evidence from a rival restructuring expert (Ms. Rickelton) and a report (the "Knight Frank Report") from an expert in German property valuation (Mr. Gerlinger of Knight Frank Valuation and Advisory GmbH) instructed by the Appellants.

50. In addition to the matters outlined in the revised explanatory statement and in the BCG Report, the evidence in reply filed on behalf of the Plan Company shortly prior to the sanction hearing included a response to the Appellants' contentions that the values of the Group's properties were as stated in the Knight Frank Report rather than the values given by CBRE and NAI Apollo. The Plan Company contended that if that were to be the case, and the Management Case could not be successfully implemented, the LTV covenant inserted into the Notes under the Plan would be breached at the end of 2024. The Plan Company contended that the likely result would be that the holders of the 2029 Notes would serve acceleration notices, leading to an enforcement process and a distribution of assets in accordance with the Transaction Security and Intercreditor Agreement. This was referred to in the Judgment as the Plan Company's "Alternative Case".

51. In addition to the experts on restructuring and valuation, there were also rival expert reports on German law dealing with the validity (or otherwise) of the Issuer Substitution and various aspects of the enforcement process that the Plan Company contended would follow a breach of the LTV covenant under the Plan Company's Alternative Case.

52. At the hearing, the Judge heard cross-examination of a total of seven witnesses and heard submissions from leading counsel for the Plan Company, the SteerCo and the Appellants. As he had been requested to do, the Judge announced his decision within a week on 12 April 2023. He decided to sanction the Plan and made an order to that effect on the same day (the "Order").

53. Although the Appellants immediately indicated an intention to seek permission to appeal, they did not seek a stay of the Order or any direction that the Plan not be made effective. Instead, the Judge made an order that a copy of the Order be delivered to the Registrar of Companies by the Plan Company "as soon as reasonably practicable". That was done the same day, whereupon the Plan became effective pursuant to section 901F(6) of the 2006 Act.

54. The Judge adjourned all consequential matters including the question of permission to appeal to a further hearing to take place after he had provided his written Judgment to the parties. His reserved Judgment was handed down on 21 April 2023. The further hearing took place on 25 April 2023. The Judge gave a short judgment refusing permission to appeal: see [2023] EWHC 987 (Ch).

Timing issues

55. Before summarising the Judgment, I wish to pay tribute to the Judge's conspicuous diligence and ability in assimilating a very large amount of detailed valuation and expert evidence, in conducting a complex hearing under intense time pressure, and in reaching a decision and producing a detailed and careful judgment with remarkable expedition. The Judge clearly went above and beyond the call of duty.

56. The compressed timetable for the process and the hearing was, however, criticised by Mr. Smith KC, who blamed the Plan Company and suggested that the pressure which was placed upon the Judge to give a decision within five business days of the end of the hearing may have contributed to the errors that he contended the Judge had made. Mr. Bayfield KC disputed that the Judge had made any errors and sought to deflect responsibility for the compressed timetable onto the Noteholder factions. However, he fairly accepted that the sanction exercise had been done to a timetable that was, for all concerned and especially the Judge, inadequate.

57. These are not new issues. Some five years ago in Noble Group Limited [2018] EWHC 2911 (Ch) ("Noble Group"), a case under Part 26, I commented, at [178]-[179],

> "178. … As has been demonstrated on many occasions, flexibility and the ability to move swiftly when a genuine need arises is a particularly attractive and useful feature of the process for schemes of arrangement. The Companies Court will also always do what it can to accommodate the business needs of its users. However, it has been made crystal clear on numerous occasions that the Court is not a "rubber-stamp" for schemes of this (or any other) type. It is important that the Court is not taken for granted and its willingness to assist must not be abused.
>
> 179. That means that the Judge hearing a scheme case needs to be given adequate time for pre-reading and for the hearing, including time to consider what decision to make and to prepare a judgment. The parties involved in restructuring discussions must understand that they cannot run things down to the wire for their own benefit and without due regard for the proper process of the Court. Negotiations must be finalised in good time. The position should not be reached in which the Court is presented with a metaphorical "gun to the head" and the Judge is in effect told that if he does not comply with the company's application immediately, he will be responsible for the collapse of the company because other creditors … will be unwilling to extend their deadlines."

58. These comments were made in relation to Part 26 schemes in which it was very rare for any valuation disputes to arise. The introduction of cross-class cram down in Part 26A has only served to accentuate these potential problems. That is because of the statutory requirement to demonstrate that dissenting classes of creditors will be no worse off under the plan than in the relevant alternative, coupled with the question of whether the treatment of assenting and dissenting classes justifies the court in exercising its cross-class cram down power under section 901G. As occurred in the instant case, it is apparent that these additional requirements are increasingly leading to complex valuation disputes which the court is called upon to resolve under considerable time pressure.

59. In some cases, the time pressure is driven by external factors which are largely outside the control of the parties. An early example was Virgin Active Holdings Limited [2021] EWHC 1246 (Ch) ("Virgin Active"), a case of a viable company in the leisure industry suffering from the effects of the COVID-19 pandemic and seeking to reduce its debt burden to survive. But in other cases, especially where the deadlines result from the entirely foreseeable scheduled maturities of financial instruments, the time pressures on the court process appear to be the result of the parties, either by oversight or design, running matters down to the wire.

60. In such cases, in addition to the pressures upon the court that I identified in Noble Group, leaving things to the last minute can have other undesirable consequences. For example, if time is short, creditors may not be given adequate notice of the convening hearing and may also have little time to obtain, and even less time to get to grips with, the detailed financial information that underlies the plan company's valuation evidence.

61. Some of those problems were evident in Virgin Active and were also present in the instant case. So, for example, as the Judge observed at [94]-[95], although Mr. Gerlinger had assembled as much information as he could in the time available, and had produced a report that was impressive in the circumstances, in reality he had very little to go on, because he had essentially been asked to value all of the Group's assets within a matter of days or weeks. There was also no time for the experts to meet and to seek to narrow the issues for decision by the court at the sanction hearing.

62. Similarly, if time is unduly shortened, there may be a temptation to invite the judge at the convening hearing to postpone to the sanction stage consideration of issues that should be determined at the convening hearing. This will only serve to increase the pressure on the judge at the sanction hearing. In that respect I entirely agree with the recent observations of Miles J in Re Project Lietzenburger Strasse Holdco SÀRL [2023] EWHC 2849 (Ch) at [31], that if such a practice is developing, it is to be deprecated.

63. It is clear that to be of real value, the cross-class cram down power should be capable of being deployed swiftly and decisively when a genuine need arises. However, just as schemes under Part 26 have long been regarded as exercising "a most formidable compulsion upon dissentient, or would be dissentient creditors" (*per* Bowen LJ in Sovereign Life Assurance Co. v Dodd [1892] 2 QB 573 at 583) so it must be appreciated that plans under Part 26A, which offer the possibility of cross-class cram

down, are capable of exerting an even more formidable compulsion and potential injustice upon dissenting creditors.

64. These considerations suggest that to prevent undue delay and expense, a plan company must (subject to the giving of any necessary confidentiality undertakings) make available in a timely manner the relevant material that underlies the valuations upon which it relies. The parties and their advisers and experts must also cooperate to focus and narrow the issues for decision so that sanction hearings are confined to manageable proportions. If sensible agreement is not forthcoming, the court should exercise its power to order specific disclosure of key information and its other case management powers robustly.

65. It must also be reiterated that the court's willingness to decide cases quickly to assist companies in genuine and urgent financial difficulties must not be taken for granted or abused. In particular, where a restructuring is designed to deal with the foreseeable maturity of financial instruments, and a division of the anticipated benefits of the restructuring is being negotiated between sophisticated investors, sufficient time for the proper conduct of a contested Part 26A process must be factored into the timetable. This will include complying fully with the Practice Statement, giving interested parties sufficient time to prepare for hearings, giving the court appropriate time to hear the case and to deliver a reasoned decision, and permitting time for the determination of any application for permission to appeal. If this is not done, the parties can have no complaint if the court decides to adjourn hearings and to take whatever time it requires to give its decision.

The Judgment

The law

66. In his Judgment, after setting out the facts, the Judge considered the law. For present purposes, the most relevant parts of his Judgment are those which dealt with the court's approach to the exercise of the discretion to impose a plan on a dissenting class in circumstances where section 901G applies.

67. The Judge first held, at [65], that satisfaction of Conditions A and B in section 901G is a jurisdictional requirement and does not give rise to a presumption in favour of sanction.

68. The Judge then dealt with a number of points under specific headings. Under the heading "Overall Support", at [66]-[67], the Judge accepted the arguments of the Plan Company that in deciding whether to exercise the power of cross-class cram down, he could take into account both the overall level of support for the Plan across all voting classes, and the 62.28% vote in favour of the Plan in the dissenting class of 2029 Noteholders. He said,

> "66. Mr Bayfield submitted that the creditors are normally the best judges of their own interests and that the overall support for the restructuring plan is a relevant factor. In answer, Mr Smith submitted that the normal principle that overall support is a relevant factor is weaker in the case of a cross-class cram down where, by definition, the restructuring

> plan has not been approved by the requisite majority in each class of creditors. I accept both submissions. In particular, I approach the question of discretion on the basis that overall support is a relevant but not [an] important or decisive factor.
>
> 67. In ED&F Man Holdings Trower J placed reliance on the fact that the plan enjoyed strong support across all classes of creditors: see [50]. In that case the vote in favour of the plan across all of the classes was 84% and the present case involves similar support. In relation to the dissenting class itself, Trower J considered that it remained relevant that a significant majority by value – in that case 69% – had voted in favour of the plan (although it fell short of the statutory majority): see [55]. In the present case, the majority was 62.28%. The fact that a majority of the 2029 Plan Creditors voted in favour of the Plan is also a relevant factor which I may take into account in the exercise of the Court's discretion."

69. In a later part of his legal analysis, under the heading "Holdings" the Judge also observed, at [84],

> "Many of the Plan Creditors who voted in support of the Plan are members of SteerCo. Others hold interests across all classes of the SUNs and so it is possible that they may have voted all of their rights under the SUNs in favour of an outcome which was more favourable to holders with earlier dated notes rather than later dated notes. Mr Bayfield submitted (and I accept) that it was relevant, therefore, to consider the extent to which the Plan is supported by "pure" 2029 Plan Creditors, who do not have "cross-holdings" in other classes of SUNs …."

70. Under the heading "Fair Distribution of Benefits" the Judge accepted at [71] that the principle of *pari passu* distribution is a fundamental principle of corporate insolvency law, and that it is important in the exercise of the cross-class cram down power under Part 26A for the court to take account of the "horizontal comparison" – i.e. the relative treatment of the classes of creditors *inter se*. In this respect, the Judge reached an important conclusion at [74],

> "74. … The Court should take into account the horizontal comparator and will normally approve a plan if there is equal treatment between all creditors. Moreover, equal treatment will normally mean adherence to the *pari passu* principle. However, even if there are differences in the treatment of individual creditors or classes of creditors, the Court may still approve or sanction the scheme provided that there is a good reason or a proper basis for departing from the *pari passu* principle and for the differential treatment."

The Judge's recognition of the importance of the principle of *pari passu* distribution and the need to take into account the horizontal comparison was, for reasons that I shall explain, entirely correct and not challenged on appeal. The parties did, however, disagree as to whether the Judge had correctly applied these principles in the instant case.

71. Under the same heading of "Fair Distribution of Benefits", at [75]-[77], the Judge accepted a further submission on behalf of the Plan Company that it was not the role of the court under Part 26A to consider whether a better or fairer plan might have been available than the one that had been presented to the court. In this respect, the Judge relied upon dicta of Sir Alastair Norris in Re Amicus Finance plc [2022] Bus LR 86 ("Amicus Finance") at [45] and rejected the Appellants' contention that the approach should be similar to that explained by Zacaroli J when considering a challenge to a company voluntary arrangement ("CVA") in Lazari Properties 2 Ltd v New Look Retailers Ltd [2022] 1 BCLC 557 ("New Look") at [191]-[196].

The Issuer Substitution

72. After his summary of the legal principles, the Judge dealt with the German law evidence as to the Issuer Substitution. He found that the Issuer Substitution was valid and that he had jurisdiction to sanction the Plan.

"*No worse off*"

73. The Judge then turned to consider the "no worse off test" under section 901G on the facts. The Appellants contended that the Plan Company was wrong to suggest that all of the Notes would be likely to be paid in full under the Plan, and to compare this with a likely return of 63% to all Noteholders in the Relevant Alternative. The Appellants contended that based upon Mr. Gerlinger's evidence and the reduced valuations as set out in the Knight Frank Report, because the 2029 Noteholders would be paid out last under the Plan, they would be likely to receive only about 10.6% of their debt. The Appellants contended that this was much worse than the 56.1% return that they predicted would be likely to be paid to them in the Relevant Alternative.

74. In addition to disputing Mr. Gerlinger's evidence and the valuations in the Knight Frank Report, the Plan Company relied upon its Alternative Case to suggest that even if the Knight Frank valuations were correct, the 2029 Noteholders would be able to accelerate their Notes, leading to an enforcement scenario in which they would be likely to recover a greater amount than in the Relevant Alternative.

75. The Judge first considered the outcome for Plan Creditors in the Relevant Alternative. He stated, at [176],

> "176. It is common ground that the Relevant Alternative to the Plan is that the Plan Company and the other Group companies go into a formal insolvency process. In the case of the Plan Company, this is an insolvency process in England (either administration or liquidation). In the case of the Parent Company, this is an insolvency process in Germany. It is also common ground that in both sets of proceedings the claims of the Plan Creditors would rank for payment *pari passu*. Indeed, Mr. Smith stated in closing submissions that it was part of the [Appellants'] case that the Relevant Alternative was an

> insolvency process in which all of the Plan Creditors were treated equally."

76. The Judge then considered the rival expert evidence as to the "Insolvency Discount" that would reduce the realisations from sale of the yielding assets and development assets in a formal insolvency. He concluded, at [184],

> "184. I accept Mr. Gunther's evidence [for the Plan Company] that the Insolvency Discounts applied by BCG are reasonable and I find on a balance of probabilities that if the Group went into liquidation the most likely of the two alternatives presented to the Court by the parties is that the Group's assets would be realised with Insolvency Discounts of 25% and 23% for the Yielding Assets and the Development Assets respectively."

77. This conclusion led to the Judge accepting the conclusion in the BCG Report that if the Plan was not sanctioned, the most likely outcome in the Relevant Alternative would be that €2.023 billion would be distributed to the Plan Creditors in 2026 and 2028, amounting to a return of 63.25% on all series of Notes.

78. The Judge then turned to the rival contentions as to the likely outcome under the Plan. After considering the evidence in some detail, the Judge reached his conclusion on the Plan Company's primary case at [217],

> "217. I prefer the evidence of Mr. Wolf [of BCG] to the evidence of Mr. Gerlinger [of Knight Frank] in relation to the proceeds of the future sales of the Group's assets and I find on a balance of probabilities that if the Plan is implemented the Group is more likely to realise the sums forecast in the BCG Report than the sums forecast in the Knight Frank Report and that it is likely the 2029 SUNs will be repaid in full."

79. On the Alternative Case, the Judge examined a complex series of events that might occur if the Plan was sanctioned, but the valuations in the Knight Frank Report turned out to be correct rather than those in the BCG Report. His conclusion was at [281],

> "281. I find, therefore, that if the future valuations set out in the Knight Frank Report turn out to be accurate, then the Plan Company and the Parent Company will be in breach of the LTV Covenant in the 2029 Notes and the 2029 [Noteholders] will be entitled to serve notice … declaring that their debts are immediately due and payable. I also find that if this occurs, then the likely outcome is that all of the Plan Creditors will serve notice … and will form an Instructing Group to instruct the Security Agent to enforce the Transaction Security under the Intercreditor [Agreement] by accepting a Credit Bid from a [Noteholder] Bidco resulting in an orderly wind down and sale of the Group's assets. Finally, I find that in that event the likely outcome is that the net proceeds will be distributed rateably and on a *pari passu* basis to all the Plan Creditors."

80. The Judge's basis for his conclusion in the last sentence of [281] that in the Alternative Case the net proceeds of enforcement of the Transaction Security would be distributed rateably and on a *pari passu* basis to all the Plan Creditors was set out in the immediately preceding paragraphs [278]-[280],

> "278. I turn next to consider whether the proceeds of the Group's property sales will be distributed under the security enforcement waterfall. This issue arose right at the end of closing submissions and, again, I would be hesitant to express a final view about the scope of the Intercreditor Agreement. Nevertheless, I am not persuaded that the Transaction Security will not include most of the Group's assets (as Mr. Smith submitted). A large number of the Group's subsidiaries will be parties to the Intercreditor Agreement for the purpose of providing guarantees and securities and their shares will also be pledged as Transaction Security.
>
> 279. Furthermore, section 7 of the Explanatory Statement summarises the Transaction Security which the Group intends to provide under the Intercreditor Agreement. It expressly states that: "Any asset which can be provided as security will be provided as transaction security, subject to the restrictions set forth in this section." There is no suggestion that the Group intends to exclude from the Transaction Security any of the Group's assets unless it is unable to do so, and this was not put to Mr. Trozzi.
>
> 280. But even if most of the Group's assets will not form part of the Transaction Security, I accept Mr Bayfield's submission that if Group assets are sold after the acceleration of each series of Notes, then the Group would be required to distribute the proceeds of sale in the same order of priority as the security enforcement waterfall. Once the secured creditors are paid off, the Group would have to distribute the proceeds of sale between the Plan Creditors rateably."

81. The Judge then considered whether the "no worse off" test (Condition A) was satisfied on the facts. He held, at [291]-[292],

> "291. I accept Mr Smith's submission that future forecasts of property prices are inherently uncertain especially when based on macro-economic data. I also agree with him that it is perfectly possible for two highly experienced and competent property professionals to reach very different views about the value of property assets (especially where they are carrying out residual valuations). Finally, I accept that it will be ambitious for the Plan Company to pay off the 2029 [Noteholders] in full.
>
> 292. Nevertheless, it is important to have in mind the statutory test which the Court must apply. I have to be satisfied that the 2029 [Noteholders] will be no worse off than they

would be in the relevant alternative. It is not necessary, therefore, for the Court to be satisfied that the most likely outcome is that the 2029 [Noteholders] will be paid in full, only that the most likely outcome is that they will be better off. I am fully satisfied that this is the most likely outcome because even if the Group fails to achieve the sales prices forecast by BCG in the BCG Report and is only able to recover the sums forecast in the Knight Frank Report, I am still satisfied that the 2029 [Noteholders] will be better off. This is the consequence of my finding on the Plan Company's Alternative Case."

Discretion

82. The Judge considered the exercise of his discretion under sections 901F and 901G under a number of headings, reflecting the arguments made by the Appellants. Of these, the most relevant ones for the purposes of the appeal were (i) the retention of different maturity dates for the different series of Notes, (ii) the prior ranking security given to the 2024 Notes in comparison to the other series of Notes, and (iii) the retention of equity by the existing shareholders of the Parent Company.

Maturity Dates

83. The Appellants objected that the preservation of different maturity dates for the different series of Notes was a departure from the fundamental principle of *pari passu* distribution that would apply in a formal insolvency of the Plan Company, and that there was no justification for this departure. The Judge rejected this argument. He held, at [298]-[299],

> "298. In my judgment, the Plan does not involve a departure from the *pari passu* principle because it will preserve the existing maturity dates of the SUNs (apart from the 2024 Notes). I have found that if the Plan is implemented, it is likely that the Plan Creditors will be paid in full. There is, therefore, a significant difference between the restructuring plan in this case and the plans in many other Part 26A cases and the CVA cases where it is accepted on all sides that the creditors will not be paid in full. I might well have been prepared to accept that the Plan involved a departure from the *pari passu* principle if I had accepted the [Appellants'] evidence and found that the most likely outcome was a significant shortfall even if the Plan was fully implemented. I might also have found that this was unfair and a fundamental objection to the Plan. But I did not accept that evidence.
>
> 299. Equally importantly, I am not satisfied that the Plan involves a departure from the *pari passu* principle even if the Group fails to achieve the forecasts in the BCG Report. If the Group falls significantly short of those forecasts, then in my judgment the most likely outcome is that this will trigger an acceleration of all of the SUNs, enforcement of the Transaction Security and distribution in accordance with the *pari passu* principle subject to repayment of the Secured Parties (whom I consider separately below). Again, if I could have been satisfied that the *pari passu* principle would not apply if the Plan Company went into default, I might well have found that this was unfair. But, again, I accepted the Plan Company's evidence in relation to this issue."

84. The Judge then gave further consideration to the Appellants' arguments, accepting that the Plan involved a greater risk for the 2029 Noteholders than the holders of the earlier-dated Notes. He said, at [300]-[302],

> "300. I readily accept that the exercise in which all of the valuation and financial experts were engaged was inherently uncertain and that the three alternatives which the parties presented to the Court did not involve clear alternatives but more of a spectrum. I also accept that I do not have a crystal ball and that I cannot be certain that the 2029 [Noteholders] will be paid in full or even that they will recover on a *pari passu* basis if the Plan Company defaults … Whilst I was satisfied that this was a likely outcome, it remains far from certain.
>
> 301. I must accept, therefore, that the Plan involves a greater risk for the 2029 [Noteholders] than it does for the Plan Creditors holding earlier-dated notes and it is possible (although, in my judgment, unlikely) that they might be worse off if they have to wait for the Plan to be implemented than if the Group was put into an insolvency process now. I put this point to Mr. Smith and he went as far as to submit that because the *pari passu* principle is a fundamental principle, I had to be satisfied that the 2029 [Noteholders] would be paid in full before I could exercise my discretion to depart from it and to sanction the Plan...
>
> 302. I have considered this submission carefully and although it was powerfully made, I cannot accept it. In my judgment, it is not unfair to require the 2029 [Noteholders] to accept a greater level of risk than the other Plan Creditors and I am prepared to sanction the Plan even though it may have that effect."

85. The Judge gave a series of reasons for reaching the critical conclusion in [302] that he would be prepared to sanction the Plan even though it might have the effect of imposing a greater level of risk on the 2029 Noteholders than the other Plan Creditors. Of these, the most significant were the following,

> "(1) The Plan preserves the existing maturity dates of the SUNs (apart from the 2024 Notes). This reflects the commercial risks which the 2029 [Noteholders] assumed when they purchased them. I am not satisfied that the Plan involves a significant change to the balance of those risks.
>
> (2) I consider it most likely that they will be paid in full but if the Plan's primary purpose fails, I also consider it likely that the maturity dates will be accelerated and that the 2029 [Noteholders] will recover more than if the Group goes into insolvency measures. Equally importantly, I am satisfied that it is likely that they will not be treated differentially and that the *pari passu* principle will be respected.
>
> (3) But even if the Group achieves neither of these outcomes, I am satisfied that the Group will not miss the

Relevant Alternative by very much. Mr Bayfield submitted, and I accept, that the Group would have to realise at least £0.5 billion less than BCG has forecasted before it is in danger of producing a worse outcome than it would if it went into insolvency now….

(4) The power of [the Appellants'] case on unfairness really rests on … the comparison between the treatment of the near-dated SUNs (who all recover their claims in full) and the 2029 Plan Creditors (who recover only 10.6% of their claims). But I consider it to be unrealistic that the 2029 Plan Creditors will be unable to exercise their legal rights under the Plan to accelerate the 2029 Notes and even less realistic to assume that they will not attempt to do so.

(5) A majority of the 2029 [Noteholders] clearly take the same view and in my judgment their view of their own interests is a relevant factor to which I may (and do) attach weight. I also attach greater weight to their views than I would otherwise have done because, as Mr. Bayfield pointed out, a number of 2029 [Noteholders] do not have holdings in the 2024 Notes."

86. The Judge then considered a number of other factors,

"(6) I accept Mr Bayfield's submission that as a matter of law I do not have to be satisfied that the Plan is the best plan available or that it could not be fairer. I also accept that the Plan involved detailed and lengthy negotiations and that it was ultimately the only restructuring plan which commanded a significant measure of agreement between the Group and the Plan Creditors.

(7) Nevertheless, I consider this to be a weak reason for sanctioning the Plan (as Zacaroli J did in Houst) and I do not attribute much weight to it. Despite the volume of evidence filed by the parties, I was not given a compelling reason why the Plan Creditors wished to preserve the maturity dates and not to agree to harmonise them at the outset. If they had agreed to this, a great deal time and intellectual effort might have been saved in demonstrating to the Court why a default would result in a *pari passu* distribution.

(8) Again, I accept that the avoidance of a "debt wall" is a good reason for preserving the maturity dates. But in my judgment, this would not by itself justify the Court in sanctioning a scheme which was otherwise unfair. Moreover, Mr. Bayfield's reliance on this point was undercut by Mr. Trozzi's acceptance that the Plan itself involves a debt wall of sorts in 2025. It is clear, therefore, that this was not the most

important reason for preserving the existing maturity dates and I also give it limited weight."

87. The Judge concluded his reasons in [302(9)] by saying,

> "(9) Ultimately, I am persuaded by Mr. Bayfield's very final oral submission at the end of the hearing. If the Plan works, he submitted, everyone is better off and the best judges of this are the Plan Creditors themselves, who voted by the requisite majority in every class for the Plan and by 62% in the dissenting class. Given the balance of risk, the right exercise of discretion is to give the management of the Group the opportunity to implement it."

The prior ranking security given to the 2024 Notes under the Plan

88. The Judge identified the issue and the rival submissions of the parties in this respect as follows,

> "303. The Intercreditor Agreement provides for the 2024 Notes to rank after the New Money in priority to the other SUNs. The justification for this change in priority is that they represent the only series of Notes which is subject to an extension of its maturity date. Mr. Trozzi told the Court in cross-examination that this was the sole reason for them to be given priority …
>
> 304. Mr. Smith submitted that the extension of their maturity date was a bad reason to advance the priority of the 2024 Notes because the *pari passu* principle would apply in insolvency proceedings…
>
> 305. Mr. Bayfield accepted that this was an "imperfect compromise" but submitted that the Court should approach this issue on the basis that Condition A is satisfied and that the 2029 [Noteholders] will be no worse off under the Plan even though the 2024 Notes have been advanced in priority…"

89. At [306], the Judge indicated that the test that he was applying was that framed by Mr. Bayfield KC, namely whether the priority given to the 2024 Notes meant that the Plan was so flawed that the court should not sanction it. The Judge concluded that the Plan was not so flawed, giving the following main reasons,

> "(1) There is no issue between the parties that the Court may sanction a scheme which has the effect of altering the priority of different classes of creditors …. Rather, the issue for the Court in this case is whether it would be unfair to the 2029 [Noteholders] to approve the Plan on the basis that it involves an alteration to the priority of the 2024 Notes. I accept Mr. Bayfield's submission that the Court should approach this question on the basis that Condition A has been satisfied.
>
> (2) The Plan involves an extension to the maturity date of the 2024 Notes but not to any other series of the [Notes]. The

> *quid pro quo* for the agreement of the 2024 Noteholders to this extension is to give the 2024 Notes priority over the other [Notes]. The holders of the 2024 Notes have temporal priority over the other holders of [Notes] and they were being asked to agree both to an additional element of risk and to lock up their funds for another year and to compensate them they are to be given priority. In my judgment, this is a good reason why an honest intelligent person might approve the Plan on these terms.
>
> (3) Mr. Smith's primary submission was that this was unfair because it involved a departure from the *pari passu* principle. But for the reasons that I have given I do not consider the Plan to involve a departure from the *pari passu* principle…"

The Judge also found on the facts that there was no evidence to support a finding that, by reason of their cross-holdings, the SteerCo had been motivated by a desire to prefer the interests of the 2024 Noteholders over the interests of the other classes of Plan Creditors.

The retention of equity by the shareholders in the Parent Company

90. As indicated above, the restructuring provided that the SteerCo and any other Noteholders who chose to participate in the New Money would be issued with 22.5% of the enlarged equity share capital of the Parent Company. It also provided for the existing shareholders in the Parent Company to be entitled to retain the remaining 77.5% of the equity.

91. The Appellants contended that the retention of their shares in the Parent Company by the existing shareholders was unfair because the Group was insolvent. They contended that "the creditors owned the company" and since they alone were making the restructuring possible, they should therefore be entitled to take full ownership of the Parent Company, so that if there was any surplus value arising from the restructuring over and above the amount required to pay creditors in full, they would benefit from that surplus.

92. The Judge was plainly troubled by this point. He said, at [324],

> "324. This is the point on which I have had the greatest concern about approving the Plan. I can see no obvious reason why the shareholders who have provided no support for the Plan and no additional funding should get the upside if the Plan succeeds. The Plan Creditors rather than the Shareholders take the risk that the Plan will fail. I, therefore, accept Mr. Smith's submission that there is no compelling logic in Mr. Bayfield's position that if the Plan Creditors are paid in full, the shareholders should retain their equity."

93. However, the Judge concluded that he should not refuse to sanction the Plan on this basis. He gave a number of reasons for this at [326], of which the following were most significant,

> "(1) The parties who are most affected by the retention of equity in the present case are the [SteerCo who committed to providing the New Money]. They negotiated a 22.5% stake in the Group in return for providing the New Money and it is not suggested that they took anything other than a commercially rational approach …
>
> (2) The [SteerCo] might have attempted to negotiate a deal for 100% of the equity in the Group on the basis that the shareholders no longer had any economic interest in the Group. But if they had, there was no evidence that this would have affected the [Appellants'] attitude to the Plan or that they would have taken the opportunity to subscribe for New Money. They called no factual evidence at all.
>
> (3) Indeed, the [Appellants'] position throughout the hearing was that insolvency proceedings were the best alternative outcome for the Group and the shares had no value … on [the Appellants'] own case, the shares had (and have) no economic value at all.
>
> (4) Moreover, if the Plan Company had negotiated a better deal in which it agreed to issue equity to the [SteerCo] which gave them a much higher equity share in the Group, it is highly likely that the [Appellants] would have strongly objected on the basis that this was an improper incentive."

The Judge's conclusion

94. The Judge then dealt with a number of other points that are not the subject of the appeal. He also held that he did not need to decide whether some of the SUNs had been accelerated as a matter of German law, as contended by the Appellants, because this could be resolved by the German courts and would not make the Plan ineffective.

95. At the end of the Judgment the Judge concluded, at [344],

> "344. For all of these reasons I am satisfied that it was appropriate to sanction the Plan and to give effect to the votes cast by the majority of the Plan Creditors in all classes including the 2029 Notes."

<u>The Appeal</u>

96. On 16 May 2023, almost a month after the Plan had been made effective, the Appellants issued an application for permission to appeal, together with a somewhat belated request that the appeal be expedited. I granted permission to appeal but refused the application for expedition.

97. On the appeal, it was not suggested by the Plan Company that merely because the Plan had been made effective and the New Money had been drawn down and utilised, the appeal was moot or that it should for these reasons alone be dismissed. Instead, the Plan Company submitted that the fact that the Plan had been implemented should lead to this Court being slower to interfere with the Judge's exercise of discretion. Ultimately, however, Mr. Bayfield KC accepted that if we concluded that the Judge had been wrong in his approach to the exercise of discretion, his decision to sanction the Plan could not stand, and the appeal should be allowed. In that event, at least so far as English law is concerned, the alterations to the terms and conditions of the Notes effected by and under the Plan would be ineffective, and the parties would have to consider their respective positions in light of our judgment. We were content to hear the appeal on that basis.

98. I would, however, observe that it is surprising that when the Judge announced his decision on 12 April 2023, counsel did not raise with him the issues that might arise if the Plan were to be made effective before he could give reasons for his decision or could consider an application for permission to appeal. No application was made for a stay, or more conventionally, for the Judge to direct that the Order not be delivered to the Registrar of Companies until after he had given reasons for his decision and determined any application for permission to appeal. This may be yet a further example of the difficult issues that can arise when complex cases such as this are heard at the last minute under significant pressures of time. If similar circumstances arise in the future, such matters should be raised by the parties with the judge.

The arguments on appeal

99. There were eight grounds of appeal, some of which overlapped, and which I shall address in what I consider to be the most logical order.

100. Grounds 3 and 4 contended that the Judge wrongly failed to appreciate that the Plan materially departed from the principle of *pari passu* distribution of assets that would apply in the Relevant Alternative, thereby placing a materially greater risk of non-payment upon the 2029 Noteholders than the other Notes; and that no good reason had been shown for this differential treatment.

101. Grounds 1 and 2 contended that in assessing the fairness of the Plan as between the assenting and dissenting classes, the Judge wrongly applied the "rationality test" derived from scheme cases under Part 26, and wrongly held that he did not need to investigate whether the Plan could have been made better or improved.

102. Grounds 5 and 6 contended that in exercising his cross-class cram down discretion, the Judge wrongly attached significant weight to the fact that the Plan had been approved by the other classes of Noteholders and by a simple majority of the 2029 Noteholders. They also contended that the Judge wrongly treated his finding that the no worse off test was satisfied as a factor supporting the exercise of discretion, rather than simply a necessary precondition to the exercise of the cross-class cram down power.

103. Ground 7 contended that the Judge had been wrong on the facts to accept the Plan Company's Alternative Case. Ground 8 contended that the Judge had been wrong not to accept the argument that some of the SUNs had been accelerated. It was argued

that the commencement of proceedings under Part 26A amounted, under German law, to an "insolvency proceeding" which was an event of default under the Notes. It was said that the Judge should have found that this was a fundamental defect which was not addressed in the Plan and which prevented it from having substantial effect.

104. On behalf of the Plan Company, Mr. Bayfield KC essentially contended that the Judge was right to sanction the Plan for the reasons that he gave. He also reminded us that the Judge's decision to exercise his discretion to sanction the Plan was a complex evaluative exercise. He submitted, correctly, that this Court should not interfere with such a decision unless we were satisfied that the Judge applied incorrect legal principles, took into account irrelevant factors or omitted to take into account relevant factors, or came to a conclusion on the facts that no reasonable judge could reach.

<u>The law</u>

105. As indicated at the start of this judgment, section 901G enables the court to exercise its discretion under section 901F to sanction a restructuring plan, notwithstanding that there is a dissenting class or classes of plan creditors. It is apparent, however, that Part 26A contains no express statutory guidance to the court as to (i) how to define a "class" of creditors, (ii) how to exercise the discretion under section 901F in a case in which section 901G is <u>not</u> engaged, or (iii) how to exercise the discretion under section 901F in a case in which section 901G <u>is</u> engaged.

106. Instead, when introducing Part 26A, Parliament clearly envisaged that subject to the possibility of subsequent amendment of section 901G by regulations promulgated under section 901G(6), it would be for the courts to develop appropriate principles in these three areas, in much the same way as the courts have done for many years in relation to schemes of arrangement under Part 26. That is apparent from the explanatory notes prepared by the Department for Business, Energy and Industrial Strategy to accompany the introduction of Part 26A (the "Explanatory Notes"), which relevantly provided,

> "<u>Arrangements and reconstructions for companies in financial difficulty</u>
>
> 9. These provisions will allow struggling companies, or their creditors or members, to propose a new restructuring plan between the company and creditors and members. The measures will introduce a "cross-class cram down" feature that will allow dissenting classes of creditors or members to be bound to a restructuring plan. This means that classes of creditors or members who vote against a proposal, but who would be no worse off under the restructuring plan than they would be in the most likely outcome were the restructuring plan not to be agreed cannot prevent it from proceeding.
>
> …
>
> 13. The scheme of arrangement framework is highly regarded and has proved a flexible tool in recent years…

> 14. In schemes of arrangement creditors (and sometimes members) are divided into classes (based on the similarity of their rights, which may vary significantly across a company's creditor base) and each class must vote on the proposed scheme. If all classes vote in favour of the scheme (requiring 75% by value and a majority by number of each class), the court must then decide whether to sanction it…
>
> 15. The new restructuring plan procedure is intended to broadly follow the process for approving a scheme of arrangement (approval by creditors and sanction by the court), but it will additionally include the ability for the applicant to bind classes of creditors … to a restructuring plan, even where not all classes have voted in favour of it (known as cross-class cram down). Cross-class cram down must be sanctioned by the court and will be subject to meeting certain conditions. As is the case with Part 26 schemes, the court will always have absolute discretion over whether to sanction a restructuring plan. For example, even if the conditions of cross-class cram down are met, the court may refuse to sanction a restructuring plan on the basis it is not just and equitable….
>
> 16. While there are some differences between the new Part 26A and existing Part 26 (for example the ability to bind dissenting classes of creditors and members), the overall commonality between the two Parts is expected to enable the courts to draw on the existing body of Part 26 case law where appropriate."

107. Although paragraph 15 of the Explanatory Notes described the court's discretion under section 901F as "absolute", that plainly was not an invitation to a judge hearing a particular case to act capriciously, arbitrarily or on his own individualised view of the merits, untethered to legal principle. Nor were matters taken any further by the reference at the end of the same paragraph to the possibility that, even if Conditions A and B in sections 901G(3) and (5) were satisfied, the court might still refuse to sanction a plan if it thought that the plan was not "just and equitable". As I pointed out in Virgin Active at [291], those words do not appear anywhere in Part 26 or 26A, and they were not part of the established jurisprudence under Part 26. Moreover, like the related concept of "fairness", memorably discussed by Lord Hoffmann in O'Neill v Philips [1999] 1 WLR 1092 at 1098D-F, such general expressions are incapable of consistent judicial application without a frame of reference or rational principles to guide judges.

108. I therefore turn to summarise the principles that have been established in relation to class composition and the exercise of discretion under Part 26 and to consider how they should apply to restructuring plans under Part 26A.

Class composition

109. The basic principle in relation to class composition under Part 26 is that a class "must be confined to those persons whose rights are not so dissimilar as to make it

impossible for them to consult together with a view to their common interest": see Sovereign Life Assurance v Dodd [1892] 2 QB 573 at 583 *per* Bowen LJ. As David Richards J indicated in his convening judgment in Telewest Communications plc (No.1) [2004] EWHC 924 (Ch), [2005] 1 BCLC 752 at [37], the application of this test requires an exercise of judgment on the facts of each case. The authorities show that a broad approach is taken, and that the differences in rights may be material, certainly more than *de minimis*, without leading to separate classes.

110. In the Court of Appeal in Hawk Insurance Co Ltd [2001] EWCA Civ 241, [2001] 2 BCLC 480 ("Hawk") at [30] and [34], Chadwick LJ explained how the dissimilarity of rights test is to be applied,

> "In each case the answer to that question will depend upon analysis (i) of the rights which are to be released or varied under the scheme and (ii) of the new rights (if any) which the scheme gives, by way of compromise or arrangement, to those whose rights are to be released or varied."

111. It is also clear that where a scheme of arrangement is proposed as an alternative to a formal insolvency procedure, the application of the first limb of the "similarity of rights" test requires the court to identify the rights that the creditors would have in that insolvency proceeding, rather than the rights that they would have if the company were to carry on its business in the ordinary course. That appears clearly from the decision in Hawk, in which Chadwick LJ explained, at [42],

> "It is, to my mind, essential to have regard to the fact that the scheme is proposed as an alternative to a winding-up. There is no doubt that the company is insolvent. It has presented a petition for winding up and the court has appointed provisional liquidators. The right approach in those circumstances, as it seems to me, is to consider the position on the basis that the relevant rights are those which creditors would have in a winding up."

112. In his convening judgment in Virgin Atlantic Airways Limited [2020] EWHC 2191 (Ch) at [41]-[48], Trower J explained why the same principles of class composition that apply to schemes under Part 26 should apply to restructuring plans under Part 26A. Zacaroli J agreed with that conclusion in the convening judgment in Gategroup Guarantee Limited [2021] EWHC 304 (Ch) ("Gategroup") at [181]-[182], and I took a similar approach in the convening judgment in Virgin Active Holdings Limited [2021] EWHC 814 (Ch) at [61]-[69].

113. Neither party to this appeal suggested that this approach was wrong or that any different principles from those developed under Part 26 should be applied in relation to class composition under Part 26A. Nor did they suggest that any different principles were, or should have been, applied by Sir Anthony Mann when he accepted the Plan Company's proposal for the composition of the voting classes of Plan Creditors in the instant case.

114. I therefore proceed on the basis that the same underlying concepts of class composition developed in relation to scheme cases should apply to cases under Part

26A. That is an important starting point for an understanding of the statutory process under Part 26A and for the remainder of the analysis in this case.

Discretion to sanction where there is no cross-class cram down

115. The established principles that guide a court in the exercise of discretion to sanction a scheme of arrangement under Part 26 were summarised by David Richards J in his sanction judgment in Telewest Communications plc (No.2) [2004] EWHC 1466 (Ch), [2005] 1 BCLC 772 ("Telewest") at [20]-[22],

> "20. The classic formulation of the principles which guide the court in considering whether to sanction a scheme was set out by Plowman J in Re National Bank Limited [1966] 1 WLR 819 at 829 by reference to a passage in *Buckley on the Companies Acts* (13th ed., 1957) page 409, which has been approved and applied by the courts on many subsequent occasions:
>
> > "In exercising its power of sanction the court will see, first, that the provisions of the statute have been complied with; secondly, that the class was fairly represented by those who attended the meeting and that the statutory majority are acting bona fide and are not coercing the minority in order to promote interests adverse to those of the class whom they purport to represent, and thirdly, that the arrangement is such as an intelligent and honest man, a member of the class concerned and acting in respect of his interest, might reasonably approve.
> >
> > The court does not sit merely to see that the majority are acting bona fide and thereupon to register the decision of the meeting; but at the same time the court will be slow to differ from the meeting, unless either the class has not been properly consulted, or the meeting has not considered the matter with a view to the interests of the class which it is empowered to bind, or some blot is found in the scheme."
>
> 21. This formulation in particular recognises and balances two important factors. First, in deciding to sanction a scheme under section 425, which has the effect of binding members or creditors who have voted against the scheme or abstained as well as those who voted in its favour, the court must be satisfied that it is a fair scheme. It must be a scheme that "an intelligent and honest man, a member of the class concerned and acting in respect of his interest, might reasonably approve". That test also makes clear that the scheme proposed need not be the only fair scheme or even, in the court's view, the best scheme. Necessarily there may be reasonable differences of view on these issues.
>
> 22. The second factor recognised by the above-cited passage is that in commercial matters members or creditors are much better judges of their own interests than the courts. Subject to

the qualifications set out in the second paragraph, the court "will be slow to differ from the meeting"."

116. I paraphrased those principles in Noble Group at [17],

> "(i) At the first stage, the Court must consider whether the provisions of the statute have been complied with. This will include questions of class composition, whether the statutory majorities were obtained, and whether an adequate explanatory statement was distributed to creditors.
>
> (ii) At the second stage, the Court must consider whether the class was fairly represented by the meeting, and whether the majority were coercing the minority in order to promote interests adverse to the class whom they purported to represent.
>
> (iii) At the third stage, the Court must consider whether the scheme is a fair scheme which a creditor could reasonably approve. Importantly it must be appreciated that the Court is not concerned to decide whether the scheme is the only fair scheme or even the "best" scheme.
>
> (iv) At the fourth stage the Court must consider whether there is any "blot" or defect in the scheme that would, for example, make it unlawful or in any other way inoperable."

117. These statements of principle were made in relation to a Part 26 scheme in circumstances in which all classes of creditors had voted in favour of the scheme. In a case where a restructuring plan under Part 26A has been approved by the required majority in each class meeting, so that there is no need to rely upon the provisions of section 901G to cram down a dissenting class, the same principles should be applied: see e.g. the sanction judgment in Virgin Atlantic Airways Limited [2020] EWHC 2376 (Ch) at [45]-[46].

Discretion to sanction: cross-class cram down

118. However, where a dissenting class has voted against a restructuring plan or has failed to vote in favour by the required 75% majority, and the plan company seeks to rely upon section 901G to persuade the court to impose the plan upon the dissenting class, the approach under Part 26 requires modification.

119. In general terms, the principles set out in the first and fourth stages of my summary in Noble Group will continue to apply. The court must confirm that the classes have been correctly constituted, that the explanatory statement is adequate, and that there is no defect in the plan making it unlawful or otherwise inoperable.

120. The court will also need to consider the matters set out in the second stage of the summary in Noble Group as regards each assenting class. Thus the court will need to be satisfied that those who attended and voted in favour at the meeting were a true reflection of the class as a whole (which might not be the case, for example, where the turnout was very low), and that the majority in each class had not voted in favour in

order to promote interests adverse to the class of which they formed part. These factors will be particularly important as regards any class whose affirmative vote in favour of a plan is relied upon to satisfy Condition B under section 901G.

The rationality test, overall support and cross-class cram down

121. It is the third stage of the test outlined in the first paragraph of the extract from *Buckley* and in my summary in Noble Group that requires the greatest modification in its application to cross-class cram down under Part 26A.

122. As David Richards J explained in Telewest at [21], under Part 26 the question of whether it is "fair" to impose a scheme upon the dissenting minority within a class is answered by applying a limited rationality test to the majority vote within that class. The court does not impose its own view of the commercial merits of the scheme, but asks a more limited question in relation to each class of whether the compromise or arrangement embodied in the scheme is one that "an intelligent and honest man, a member of the class concerned and acting in respect of his interest, might reasonably approve".

123. Almost invariably, under Part 26 this question is answered by the very fact of the vote in favour at each class meeting. The confidence that the court reposes in the decision of each class meeting in such circumstances is reinforced by the fact that the decision in favour of the scheme is the decision of an enhanced majority of 75% in value, rather than just a simple majority, of those who voted at the class meeting. Moreover, the greater the majority in favour at the class meeting, the greater confidence that the court can have that the scheme is in the interests of the class in question.

124. It is important to recognise, however, that this entire approach is dependent upon a number of fundamental assumptions.

125. The first, and most important for present purposes, is that it applies within a class of creditors that has been properly constituted, so that the majority and the minority in the class have a commonality of commercial interests based upon a sufficient similarity of their rights. The court's view that it would be fair to impose the scheme upon the dissenting members of the class, based only upon a rationality check on the commercial judgment of the majority, presupposes that the majority and minority have sufficiently similar commercial interests based upon their rights. If there is no such sufficient commonality of interests, then there can be no assumption that it is fair to impose the views of the majority upon a minority that is in a materially different commercial position.

126. The same logic also underpins the second assumption, which David Richards J expressly identified in Telewest at [22] by reference to the second paragraph of the extract from *Buckley*. If the majority in a class can be seen to have voted in favour of a scheme to promote some extraneous interest adverse to the interests of the class, then the court would not be justified in relying upon their commercial judgment to impose the scheme upon the dissenting minority in the class. One of the most obvious examples of this type of situation would be if creditors in the majority in one class (A) also had cross-holdings in another class (B), and it appeared that they had voted in favour in class A, not because of the merits of the proposed scheme for that class, but

because of their desire to benefit from a more favourable commercial deal offered to class B.

127. The third assumption, again expressly identified in the extract from *Buckley* and by David Richards J in Telewest at [22] is that the class should have been "properly consulted". The court could have no confidence that the majority were the best judges of the commercial interests of the class if, for example, they had been acting on inadequate or misleading information in the explanatory statement, or had not had enough time to consider the proposals fully: see in that respect Sunbird Business Services Limited [2020] EWHC 2493 (Ch) at [53]-[58], and ALL Scheme Limited [2021] EWHC 1401(Ch) at [102(ii), (xiii) and (ix)] and [134]-[141].

128. I see no reason why these principles that have been developed in relation to schemes should not be applied under Part 26A within an assenting class as the basis of an exercise of discretion to impose the plan on the dissenting minority within that class.

129. However, in my judgment, when considering whether to exercise the court's discretion to impose a plan on a dissenting class under Part 26A, the court cannot simply apply the same rationality test, either (i) as regards the voting within the dissenting class, or (ii) as regards the overall voting across the different classes.

130. On the first point, where there is a dissenting class as defined by section 901G, *ex hypothesi* the court will not have the assurance of an enhanced 75% majority required by section 901F(1) voting in favour of the plan. One possibility (as in the instant case) is that the votes in favour within the dissenting class will constitute a simple majority, but will not have reached the 75% in value required by the statute. Simply applying a rationality test in such a case based on a lesser majority would undermine the importance that Parliament has plainly attached to obtaining the 75% threshold. Alternatively, the dissenting class may actually have voted against the plan. Simply applying a rationality test to that vote would result in the court refusing to sanction the plan. That would also defeat the legislative intention inherent in section 901G that the court should be able to impose a plan on a dissenting class in appropriate circumstances.

131. It is important to appreciate that I am not saying that a judge cannot pay some regard to the fact that a majority, short of the 75% required, voted in favour of a plan in the dissenting class. But the court cannot simply defer to the (inadequate) majority and apply a rationality test. If the court is going to place any weight on this factor, what would be required is an examination, not only of the same issues that are a pre-condition to the application of the rationality test (such as whether those voting in favour were representative of the class, were properly consulted and were not advancing interests extraneous to those of the class), but also of the commercial reasons why the plan might be thought to be in the interests of the dissenting class.

132. The court's approach to the overall levels of voting across the assenting class(es) and the dissenting class(es) must, however, be very different. For the reasons that I have explained, there can be no assumption that the assenting classes that have voted in favour of a plan have any commonality of commercial interests with the dissenting class. Rather, the entire premise for the Part 26A process is that creditors will have been summoned to different class meetings precisely because the differences in their existing and proposed rights under the plan meant that they had insufficient

commonality of commercial interests to consider the merits of the plan together. To adapt David Richards J's memorable phrase from Telewest Communications plc (No.1) [2005] BCLC 752 at [40], the creditors will have been placed into separate classes because there is more about the plan that divides than unites them.

133. Given that dissimilarity of interests, the mere fact that one or more classes of creditors may have acted in their own separate interests in voting in favour of the plan says nothing about the commercial merits of the plan for a dissenting class or the fairness of imposing the plan upon them. Indeed, given that the very premise of Part 26A is that the company is facing financial difficulties and hence may not have sufficient assets to pay everyone in full, the assenting class(es) may have voted overwhelmingly in favour precisely because the plan requires them to accept less risk of loss, or a lower discount on their claims, than the dissenting class.

134. Accordingly, I do not consider that the court can, when deciding whether it is fair to impose a plan upon a dissenting class under Part 26A, apply some form of rationality test based upon the level of voting in an assenting class or classes, or upon the overall value of claims voted in favour of the plan across the assenting and dissenting classes as a whole.

135. At this stage I should address the Judge's legal analysis in this respect, which is relevant to Grounds 2 and 5 of the appeal. As I have indicated above, at [66] of the Judgment, the Judge accepted a submission on behalf of the Plan Company which appeared to incorporate the underlying basis for the rationality test in scheme cases that "creditors are normally the best judges of their own interests" as a basis for concluding that the level of "overall support" for a plan was a relevant factor in the exercise of the court's discretion to impose a plan upon a dissenting class (albeit that the Judge then qualified this by saying that the overall support for a plan was "not [an] important or decisive factor").

136. At [67] the Judge relied in this respect upon the observations of Trower J in ED&F Man Holdings Limited [2022] EWHC 687 (Ch) ("ED&F Man") at [50]. ED&F Man was a case in which Trower J exercised the cross-class cram down jurisdiction, but it is important to note that the sanction application was not opposed, and his judgment was given *ex tempore*. At [48], Trower J accepted that the mere fact that Conditions A and B in section 901G had been satisfied did not create a presumption that the cross-class cram down discretion should be exercised. He then continued,

> "49. In this case there are a number of other factors which have to be taken into account. First, I am satisfied that having regard to the plan meetings, which agreed the plan by the statutory majorities, the conventional approach to sanction a Part 26 scheme would be satisfied in the present case. That this is a relevant factor is now established by the DeepOcean and Virgin Active decisions.
>
> 50. I say that for the following reasons. First of all each meeting of assenting creditors approved the plan by an overwhelming majority. I have already recited what they were. Furthermore, and perhaps more significantly, the total number of creditors who voted to approve the plan amounted to some

> 84% of plan creditors across all classes. That is a very significant majority.
>
> 51. Secondly, the provisions of the statute were otherwise complied with.
>
> 52. Thirdly, there is no evidence to indicate that the assenting classes were not fairly represented by those who attended the meeting. This is reflected by the very high turnouts at all of the class meetings. It is also reflected by the fact that there are a material number of creditors and members who had not been involved in the formulation of the plan, whether as members of the Co-Com or otherwise, who have voted in favour of the plan.
>
> 53. Fourthly, there is no indication that any member of the assenting classes acted other than bona fide, and there is no evidence that any of them were coercing those who did not vote in favour in order to promote interests adverse to those of the class whom they represented.
>
> 54. Fifthly, the plan is such as an honest intelligent person might reasonably approve. This is established by the large number of creditors who voted in favour of the plan. It is also reflected by the considered views of the directors of the company who resolved that it was in the best interests of the company, the group as a whole and each of the plan creditors and plan members for the plan to be approved and sanctioned.
>
> 55. So far as numbers alone are concerned, the position is obviously rather different for the dissenting class because the statutory majority was not achieved. Nonetheless, it seems to me that it remains relevant that a significant majority by value, some 69%, voted in favour of the plan, even though the number fell short of the value required by the statute. Taken together with the members of the assenting classes, there is considerable and indeed overwhelming support for the plan."

137. It can be seen from [49] that Trower J's first reference in [50] to the overall support for the plan of 84% of plan creditors across all classes was actually part of the application in [50]-[53] of the conventional Telewest test to the assenting classes of creditors who had voted in favour of the plan by the required majorities. Trower J was not purporting in [50] to consider what conclusions might be drawn from the overall voting for the position of the dissenting class. Trower J's comments in [55] were primarily directed to the level of support for the plan in the dissenting class (69%). His reference in the last sentence to the level of support for the plan in the assenting classes was a passing reference without any further analysis.

138. Accordingly, when Trower J's remarks are put into context, and having regard to the lack of opposition and the fact that the judgment was given *ex tempore*, I do not consider that ED&F Man should be taken as authority for the proposition that the

overall level of support for a plan in the assenting classes is a relevant factor that should be taken into account by the court when considering whether it is fair to impose the plan upon the dissenting class.

139. Many of the points that I have made above were well summarised by Adam Johnson J in Great Annual Savings Co Ltd [2023] Bus LR 1163 ("GAS"), a case which was decided after the Judge's decision in the instant case. The main issue in GAS was whether the court should sanction a Part 26A plan that had been supported by a large number of classes of creditors, but was opposed by HMRC and four other creditors who formed two dissenting classes. The judge found that Condition A - the "no worse off" test – was not satisfied in respect of HMRC, so that he had no jurisdiction to sanction the plan. However, he went on to consider, *obiter*, the exercise of discretion more generally.

140. At [99]-[103], under the heading of "Fairness", Adam Johnson J stated,

> "99. In scheme cases under Part 26, the concept of fairness has a particular role and is tested in a particular way. In short, a rationality test is used as a cross-check of fairness where there has been a majority vote in favour of a scheme by a particular class of creditor. The positive vote is not determinative: the court will also look to the terms of the scheme, in order to assure itself that it is fair to impose it on the dissentient minority. Thus (per David Richards J in Telewest), the court asks whether the scheme is one "that 'an intelligent and honest man, a member of the class concerned and acting in his own interest, might reasonably approve'".
>
> 100. The present context of course is different (see Virgin Active). Where the cram-down power is sought to be invoked, the relevant dissenting class will have voted against the plan, although other classes will have voted in favour. This is not a matter of imposing terms on a dissentient minority whose interests are materially the same as those of the assenting majority: it is a matter of imposing terms on dissenting creditor class whose interests are different to those of the assenting creditor classes.
>
> 101. In some instances, strong overall support for a plan can nonetheless be an important discretionary factor, and if there are *similarities* between the positions of an assenting class and a dissenting class, the vote of the assenting class can help justify the conclusion that the dissenting class *might* rationally have supported the plan, and thus that it is a fair one overall (see Deep Ocean, referenced by Snowden J in Virgin Active at [225]). But much will depend on the circumstances of each individual case.
>
> 102. In the present case, I do not consider that applying the Telewest rationality test to the majority votes of the classes who supported the Plan helps one evaluate its overall fairness,

> or that the relatively strong overall support for the Plan is of much assistance. For example, as I have noted, nine of the 12 classes who voted in favour of the Plan are classes of out of the money creditors: i.e., creditors who would receive nothing at all in the relevant alternative. Under the Plan, each of them will receive a positive return. That being so, it is entirely rational that they should have supported it: their choice was between getting something and getting nothing. In each of their cases, the question posed in Telewest would be answered affirmatively. But in this case that tells one little about the inherent fairness of the Plan and whether it would be right to impose it on a dissenting creditor in a different class with very different interests such as HMRC.
>
> 103. As the parties I think recognised, a more pertinent question to ask in such a case is whether the plan provides a fair distribution of the benefits generated by the restructuring between those classes who have agreed to it and those who have not, notwithstanding that their interests are different …"
>
> (emphasis in original)

141. It will be apparent from my analysis above that I agree with, and endorse, Adam Johnson J's comments in GAS at [99]-[100] and [103]. His observations on the particular facts of the case in [102] also provide a good illustration of the point I have made in [133] above that the fact that assenting classes have voted in favour of a plan for entirely understandable reasons tells you nothing about the fairness of imposing the plan upon dissenting classes whose interests are different.

142. I would, however, not endorse Adam Johnson J's analysis in GAS at [101]. In that paragraph, he suggested that Trower J's decision in Re DeepOcean 1 UK Limited [2021] EWHC 138 (Ch) ("DeepOcean") was authority for the proposition that strong overall support for a plan could be an important discretionary factor, and that if the court could find *similarities* in the position of the assenting classes and the dissenting classes, that might support the view that the dissenting class *might* rationally have supported the plan, and that it was thus a fair one overall. This is a misreading of DeepOcean.

143. In DeepOcean, identical plans were proposed for three companies in the same group (DSC, DO1 and ES), and meetings of classes defined in the same way were convened for each company. These included classes of "Secured Creditors" and "Other Plan Creditors". In the case of two of the companies (DO1 and ES), all classes voted in favour of the plan, either unanimously or by very large majorities well in excess of the required 75%, and so section 901G was not engaged. However, in the case of the third company (DSC), the Other Plan Creditors voted in favour, but not by the required 75% majority.

144. The relevant passage in Trower J's judgment was at [58]-[61],

> "58. As to the weight of votes more generally, more than 99% of all claims against DSC by value voted in favour of the

> Restructuring Plan. At first blush, this points to the arrangement being one which an intelligent and honest man, acting in respect of his own interests, might reasonably approve. However, the nature of the deal for Secured Creditors was very different from the nature of the deal for Other Plan Creditors and so this is not of great significance in assessing the justice of the Plan for DSC's Plan Creditors as a whole.
>
> 59. Of greater relevance is an analysis of the voting figures for all three groups of Other Plan Creditors (i.e. those with claims against each of DO1, ES and DSC). The reason for this is that all will receive the same percentage uplift on the liquidation value of their claims against the three different members of the DeepOcean Group … In that limited sense, they were all concerned with very similar questions at their respective Plan meetings, even though they could not be placed in the same class because their claims were against different debtor companies.
>
> 60. The aggregate of claims by Other Plan Creditors of DO1, ES and DSC present and voting at their respective Plan meetings was just in excess of £4 million. Of these just under 84% voted in favour of the Restructuring Plan, and just over 16% voted against.
>
> 61. It follows that, although the meeting of DSC Other Plan Creditors did not agree the Restructuring Plan because the statutory majority of 75% was not achieved, all other classes of creditor did either unanimously or by a very substantial majority. In my view the majorities taken overall, particularly having regard to the fact that the proposal for the DO1 Other Plan Creditors and the ES Other Plan Creditors were to all intents and purposes the same as those for the DSC Other Plan Creditors, support a conclusion that it was open to an intelligent and honest man to vote in favour of the Restructuring Plan."

145. From [58], it is clear that Trower J was alive to the point that although "at first blush" it might have been thought significant that 99% by value of all creditors voted in favour of the plan in relation to DSC, this was not actually of any significance in assessing what he described as the justice of the plan, because most of those claims by value comprised the claims in the other classes (and in particular the Secured Creditors) who were being offered a very different deal under the plan than the dissenting class of the Other Plan Creditors.

146. The other point Trower J addressed in [58]-[61] was not, as Adam Johnson J mistakenly thought in GAS at [101], a suggestion that similarities existed between the position of the assenting and dissenting classes in DSC. Rather, it was a comparison between the dissenting class of Other Plan Creditors in DSC and the similarly placed but assenting classes of Other Plan Creditors in each of the other two companies, DO1 and ES.

147. DeepOcean therefore provides no support for the proposition that the court should attempt to find "similarities" between the positions of creditors in assenting and dissenting classes in relation to the same company. Indeed, I consider that the exercise envisaged by Adam Johnson J would be misconceived. Creditors should only have been placed into separate voting classes if there were insufficient similarities in their positions, i.e. if there was more that divided than united them. In such circumstances, searching for any component elements of similarity and then trying to identify how the classes might have factored those elements into their decision would be fraught with difficulties, if not impossible.

Vertical and horizontal comparisons

148. Although, for the reasons that I have given, I do not consider that the rationality test derived from scheme cases has any part to play outside a consideration of the appropriateness of a plan within an assenting class, there are other concepts that have been developed in scheme cases and cases involving challenges on the grounds of unfair prejudice to CVAs that can be modified and applied to the question of whether to impose a plan on a dissenting class under Part 26A. These involve what have come to be known as the "vertical comparison" and the "horizontal comparison".

149. These expressions were first used judicially by Etherton J in the context of an unfair prejudice challenge to a CVA in Prudential Assurance Co Ltd v PRG Powerhouse Ltd [2007] EWHC 1002 (Ch) but have since been adopted in the context of Part 26 and Part 26A. The vertical comparison involves a comparison of the position of the particular class of creditors in question under the restructuring proposal with the position of that same class in the relevant alternative. The horizontal comparison compares the position of the class in question with the position of other creditors or classes of creditors (or members) if the restructuring goes ahead.

150. In relation to schemes, the use of the vertical comparison was explained by David Richards J in T&N Limited [2005] 2 BCLC 488 at [82] under the general heading of "fairness",

> "I find it very difficult to envisage a case where the court would sanction a scheme of arrangement … which was an alternative to a winding up but which was likely to result in creditors, or some of them, receiving less than they would in a winding up of the company, assuming that the return in a winding up would, in reality be achieved and within an acceptable time-scale."

151. The logic is obvious. If a scheme is proposed as an alternative to a winding up but would be likely to result in a class of creditors being worse off than in a winding up, the decision of the majority in that class to vote in favour could be seen as irrational. It would thus not be fair for the court to impose the scheme upon the dissenting minority. The likely outcome in the alternative winding up thus provides a floor, below which the likely outcome under the scheme should not go.

152. In Part 26A, the vertical comparison finds similar expression in Condition A in section 901G(1) under which the cross-class cram down power is not exercisable

unless the court is satisfied that the dissenting class will be no worse off than in the relevant alternative.

153. At [65], the Judge accepted that satisfaction of Condition A was a necessary jurisdictional requirement for cross-class cram down but gave rise to no presumption in favour of sanction. I consider that he was right to do so. As I explained in Virgin Active at [224], once the court is satisfied that Conditions A and B have been met, it must still go on to consider whether to exercise its discretion in light of all the relevant factors and circumstances. That is apparent from the permissive terms of section 901G(2) which refer back to the discretion given to the court under section 901F ("*may* sanction"), and the very clear statement in paragraph [15] of the Explanatory Notes that the court may refuse to sanction a plan even if Conditions A and B are satisfied.

154. If and to the extent that Trower J might be taken to have suggested otherwise in DeepOcean at [48] when he remarked that satisfaction of Conditions A and B would mean that a plan had "a fair wind behind it" when it came to the exercise of discretion, that approach should not be followed. Indeed, as I have indicated above, Trower J subsequently accepted in ED&F Man at [48] that there was "no kind of presumption" that the court should exercise its discretion in favour of sanctioning a plan merely because Conditions A and B have been satisfied.

155. The court is not generally required to make a horizontal comparison between voting classes in scheme cases, because of the particular requirement of Part 26 that all of the classes must have voted in favour before a scheme can be sanctioned. If the rationality test (and its preconditions) is satisfied within each class, the affirmative vote in each class indicates that the different classes of creditors are all content with the allocation of the required compromises and anticipated benefits of the restructuring as between them.

156. The position is very different under Part 26A. Given the inherent nature of the cross-class cram down power which enables the assenting votes of one class to form the basis of imposing a restructuring plan which they approve upon a dissenting class that has not approved the plan, it is obviously appropriate for the court to conduct some form of horizontal comparison when deciding whether to sanction a plan in circumstances in which section 901G is engaged.

157. This point was first made explicitly by Trower J in DeepOcean at [63], when he said,

> "63. In my view, because a class' right of veto is removed by the operation of section 901G, justice may require the court to look at questions of horizontal comparability in the context of a cross-class cram down to see whether a restructuring plan provides for differences in treatment of creditors *inter se*, and if so whether those differences are justified. In particular the court will be concerned to ascertain whether there has been a fair distribution of the benefits of the restructuring (what some commentators have called the "restructuring surplus") between those classes who have agreed the restructuring plan and those who have not."

158. Zacaroli J expanded upon the same point in Houst Limited [2022] EWHC 1941 (Ch) ("Houst") at [29]-[31],

> "29. Finally, an important factor – particularly in considering sanction where the cross-class cram-down power is engaged – is whether the plan provides a fair distribution of the benefits generated [by] the restructuring (or, per Dr. Riz Mokal, the "the restructuring surplus" …) between those classes who have agreed and those that have not. In DeepOcean (above), Trower J pointed out at [63] that this raises similar issues to the "horizontal comparator" in a company voluntary arrangement. The court is required to see whether the plan provides for differences in treatment of creditors *inter se* and, if so, whether the differences are justified.
>
> 30. In doing so, a relevant reference point is the treatment of the creditors in the relevant alternative. The court will look to see whether the priority, as among different creditor groups, applicable in the relevant alternative is reflected in the distributions under the plan. A departure from that priority is not in itself, unlike the position in the closest equivalent procedure in United States federal bankruptcy law, the Chapter 11 plan, fatal to the success of the plan. The US Chapter 11 procedure contains an "absolute priority rule" so that, in essence, no junior class should recover until a senior class has recovered in full, and no senior class should recover more than it is owed. As pointed out in a paper published by Sarah Paterson of the London School of Economics (*Judicial Discretion in Part 26A Restructuring Plan Procedures)*, given that consideration was given by the UK government to including a modified form of the absolute priority rule in Part 26A (see also Virgin Active at [289]), its exclusion must be taken to have been deliberate.
>
> 31. In considering whether there has been a fair distribution of the benefits of the restructuring, it may be relevant to take account of the source of the benefits to be received under the restructuring, for example whether they come from the assets of the Company or from third parties willing to support the restructuring: see DeepOcean, at [64]."

159. I agree with both Trower J and Zacaroli J that a key issue for the court in exercising its discretion to impose a plan upon a dissenting class is to identify whether the plan provides for differences in treatment of the different classes of creditors *inter se* and, if so, whether those differences can be justified. I also agree with Zacaroli J that an obvious reference point for this exercise must be the position of the creditors in the relevant alternative.

160. This exercise cannot, however, properly be carried out merely by asking whether any dissenting creditor will be any worse off as a result of the restructuring plan than in

the relevant alternative. That would simply be to restate Condition A in section 901G. As a matter of principle, when the court exercises its discretion to impose a plan upon a dissenting class, it subjects that class to an enforced compromise or arrangement of their rights in order to achieve a result which the assenting classes of creditors consider to be to their commercial advantage. In my judgment, that exercise of a judicial discretion to alter the rights of a dissenting class for the perceived benefit of the assenting classes necessarily requires the court to inquire how the value sought to be preserved or generated by the restructuring plan, over and above the relevant alternative, is to be allocated between those different creditor groups.

161. It is this concept that has been encapsulated in the expression "the fair distribution of the benefits of the restructuring" or "fair distribution of the restructuring surplus": see DeepOcean and Houst (above). To similar effect, in the paper referred to in Houst at [30], Professor Sarah Paterson adopted a dictum of Mann J in the scheme case of Bluebrook Limited [2009] EWHC 2114 (Ch) ("Bluebrook") at [49] and suggested that the essential question for the court is whether any class of creditor is getting "too good a deal (too much unfair value)".

162. In the instant case, the horizontal comparison of the treatment of the Plan Creditors under the Plan was simplified by two factors. The first was that in the Relevant Alternative, the claims of all Plan Creditors would be unsecured and would rank equally for *pari passu* distributions in a formal insolvency of the Group. The second was that the Plan did not envisage a continuation of the business of the Group as a going concern. The Plan was designed simply to achieve a more advantageous realisation and distribution of the Group's assets in a wind down process controlled by management than would be the case in a formal insolvency.

163. The horizontal comparison required in this case was accordingly far more straightforward than in a case where, for example, it might be suggested that the relevant alternative was a different restructuring or sale process rather than a formal insolvency; or where the plan creditors had different priority rankings of secured and unsecured debts; or where the company proposed a complex restructuring of its debts in order to continue trading after the plan was implemented (c.f. the plan in Virgin Active).

164. It was against that specific background of the instant case that the Judge made his observations in [74], which bear repetition,

> "74. … The Court should take into account the horizontal comparator and will normally approve a plan if there is equal treatment between all creditors. Moreover, equal treatment will normally mean adherence to the *pari passu* principle. However, even if there are differences in the treatment of individual creditors or classes of creditors, the Court may still approve or sanction the scheme provided that there is a good reason or a proper basis for departing from the *pari passu* principle and for the differential treatment."

165. I agree with the Judge that in a case in which a "wind down" plan is proposed as an alternative to a formal insolvency in which the claims of all plan creditors would rank equally for a *pari passu* distribution of the debtor's assets, a court would normally

approve a plan which replicated that *pari passu* distribution in relation to the benefits of the restructuring over and above the distributions that could be expected in the relevant alternative.

166. I also agree with the Judge that in such a case, a departure from the principle of *pari passu* distribution of the benefits of the restructuring is permissible and can be approved by the court provided that there is a good reason or proper basis for that departure (or, as Trower J said in DeepOcean and Zacaroli J said in Houst, whether the departure is "justified"). But the question remains, by what criteria does the court determine whether a departure from the *pari passu* principle is "justified" by a "good" reason or a "proper" basis?

167. In my judgment, it is neither possible nor advisable to attempt to prescribe an exhaustive list of the criteria that might qualify. However, to give one obvious example, it is likely to be justifiable that creditors who provide some additional benefit or accommodation to assist the achievement of the purposes of the restructuring in the interests of creditors as a whole, should be entitled to receive some priority or a proportionately enhanced share of the benefits. That would give effect to the legislative intention that Part 26A plans should be a practical and effective restructuring tool. It was also the point made by Zacaroli J in Houst at [31], referring to what Trower J had said in DeepOcean at [64].

168. So, for example, it has been considered justifiable that creditors who provide new money to facilitate a restructuring should be entitled to receive full repayment of that new money under a plan in priority to the pre-existing creditors. The new money avoids an immediate cashflow insolvency and provides a breathing space for the debtor company to carry out the restructuring in the interests of creditors generally.

169. In other cases, of which ED&F Man is an example, some enhanced priority ("elevation") has also been extended to the existing claims of the providers of the new money. It should be acknowledged, however, that to date such cases have not been the subject of adverse argument and are likely to be highly fact sensitive. There might, for example, be no such justification for the elevation of existing debt if the opportunity to provide the new money was not in reality available on an equal and non-coercive basis to all creditors; if the new money was provided on more expensive terms than the company could have obtained in the market from third parties; or if the extent to which the existing debt was elevated was disproportionate to the extra benefits provided by the new money.

170. A further example of a justified departure from the principle of *pari passu* distribution of a debtor company's assets is the exclusion of the claims of trade creditors or employees from the ambit of a plan. Such exclusion results in those trade creditors or employees being paid in full from the assets of the company rather than being subjected to the same reduction of their claims as other unsecured creditors with whom they would rank equally in a formal insolvency. The usual reason is that the continued supply of goods or services by those creditors is regarded as essential for the beneficial continuation of the company's business under the plan: see e.g. Virgin Atlantic Airways at [63]-[67] and Virgin Active at [13].

171. It is also of significance that these examples of a departure from the principle that a plan company's assets should be distributed *pari passu* have some, albeit not precise,

analogies in established principles of insolvency law. It is, for example, permissible for an administrator to make a payment to a creditor in full otherwise than in accordance with the statutory rules as to priority if to do so is necessary or incidental to the performance of his functions, or if the administrator thinks it likely to assist achievement of the purposes of the administration: see paragraph 13 of Schedule 1 and paragraph 66 of Schedule B1 to the Insolvency Act 1986. In cases such as Collins & Aikman Europe SA [2006] BCC 861 at [30]-[31], and Nortel Networks UK Limited (14 January 2009, Blackburne J, unreported, but referred to in Nortel Networks UK Limited [2015] EWHC 2506 (Ch) at [31]-[34]), administrators were authorised to undertake to make payments to overseas employees otherwise than in accordance with English law so as to preserve the business of the company in an effort to achieve a more beneficial sale for the benefit of creditors as a whole.

172. Similarly, there is a long-established "salvage" principle of insolvency law under which, if a liquidator or administrator retains and uses property of a creditor (such as land leased to the company) in order to achieve a better realisation of the company's business and assets, the court can, as a matter of "common sense and ordinary justice", direct that liabilities to the creditor in respect of the property can be treated "as if" they were expenses of the liquidation. The result will be that they will have priority and be paid in full, rather than simply ranking for a *pari passu* distribution: see Lundy Granite, ex parte Heavan (1871) LR 6 Ch App 462 and Oak Pits Colliery (1882) 21 ChD 322, explained by Lord Hoffmann in Toshoku Finance UK plc [2002] 1 WLR 671, and further considered by this court in Jervis v Pillar Denton [2015] Ch 87.

Should the court ask whether a better or fairer plan is available?

173. At this stage in the analysis, it is convenient to address the Judge's decision, at [75]-[77], that when considering the fair distribution of the benefits of the restructuring, the court should not inquire as to whether a better or fairer plan might have been available. In that regard, the Judge relied upon what he considered to be remarks to that effect by Sir Alastair Norris in Amicus Finance at [45], and declined to follow the approach suggested by Zacaroli J in New Look at [191]-[196].

174. In Amicus Finance, a Part 26A plan was proposed to compromise the claims of consumers who had been mis-sold financial products by the plan company (Amicus). The plan involved payment of compensation at a discounted rate to the consumers, funded by the owners of the company who intended the company to continue to trade after the plan had been implemented. The plan was approved by all of the classes of creditors by the necessary 75% majority, except for one class of senior secured creditors in which a creditor which had provided a platform for consumers to make loans to the company held 49.9% of the votes and voted against the plan.

175. In giving his judgment, after setting out the facts, at [21], Sir Alastair Norris stated,

> "21. The meetings were duly held, and the application now before me is for the sanction of the proposed restructuring plan. On applications under Part 26A there is a natural tendency to focus upon the proposed scheme of arrangement in relation to the dissentient class of creditors. But the assenting classes of creditors must not be overlooked, and the scheme must be

> considered in relation to them in the same way as a scheme under Part 26. This latter approach is well settled, and I shall follow the established framework by identifying the relevant matters to consideration."

176. Sir Alastair then embarked, at [23] - [44], upon a conventional application of the Telewest approach to the assenting classes of creditors. At the end of that analysis, he applied the conventional rationality test to the assenting classes, referring to it at [41] as the "fairness" test and noting that it did not operate in Part 26A cases in precisely the same way as in Part 26 cases. He concluded his analysis in this respect, at [43], by stating that the plan was a rational one and that it was understandable why it was attractive to most creditors.

177. Sir Alastair then continued, at [45],

> "45. There is one submission of counsel for [the dissenting creditor] that I must specifically address. Counsel submitted that the scheme failed the "fairness" test purely and simply because none of the benefits (if any) from future trading accrued to the compromised creditors; the benefits accrued solely to the Amicus shareholders. I have previously expressed some sympathy with this view when considering schemes for the compromise of compensation claims against a company, where it is those who have been wronged by the company who sacrifice their redress to enable the wrongdoing company to be rescued for the benefit of its shareholders: Re Provident SPV Ltd [2021] EWHC 1341 (Ch) at [44]-[46]. But the situation here is very different. [The dissenting creditor] enabled investors using its platform to risk commercial advances to Amicus for reward, advances of which [the dissenting creditor] is now (on its own case) the sole beneficial owner. The context is an entirely straightforward commercial one in which it is very well established that it is not the role of the court to consider whether the scheme submitted for sanction is the best scheme or the only fair scheme or could be improved in some respect, but rather to assure itself that it is one approved by the requisite majority of properly informed and consulted creditors acting in accordance with their ordinary class interests and not oppressively in pursuit of some special interest: Telewest Communications plc (No.2) [2005] 1 BCLC 772, at [21]-[22] …."

178. After dealing with this point, Sir Alastair then turned to the question of cross-class cram down, continuing, at [46],

> "46. This brings me to the eighth question: is it appropriate for the court to exercise its jurisdiction to override the views of the dissenting class?"

That question occupied the remainder of the judgment from [47] – [78].

179. Accordingly, when Sir Alastair Norris' judgment in Amicus Finance is read in full, it is quite apparent that his comments in [45] that the court was not required to consider whether the plan was the best or fairest plan, or whether it could be improved in some respect, were directed only at the position within the assenting classes. In that regard, the decision is entirely consistent with my analysis in [121]-[128] above. I therefore do not consider that Amicus Finance stands as authority for the proposition that a court considering whether to exercise the power of cross-class cram down does not need to ask whether a fairer or improved plan might have been available.

180. New Look involved a challenge to a CVA. At [191]-[196], in considering the horizontal comparison, Zacaroli J said,

> "191. Whether unfair prejudice exists depends on all the circumstances, including those that would be taken into account in exercising the discretion to sanction a scheme … and in exercising the discretion to cram-down a class in a Part 26A plan.
>
> 192. Without attempting to define what all the circumstances in any case might be, I make the following four points which are of particular relevance on the facts of this case.
>
> 193. First, an important consideration is whether there is a fair allocation of the assets available within the CVA between the compromised creditors and other sub-groups of creditors. That will include considering the source of the assets from which the treatment of the different sub-groups derives, and whether they would or could have been made available to all creditors in the relevant alternative.
>
> …
>
> 195. … if assets that would, in the relevant alternative, have been available for all unsecured creditors are allocated in a greater proportion to other creditors (e.g. where critical creditors are paid in full), then the fact that the requisite majority was reached by reason of the votes of those creditors may point towards the CVA being unfairly prejudicial, even if there was an objective justification for their payment in full.
>
> 196. … in considering whether the allocation of assets is fair, the court is necessarily required to consider whether a different allocation would have been possible, so the principle adopted in scheme cases, against considering whether an alternative arrangement would have been fairer, needs to be modified."

In my judgment, Zacaroli J was entirely correct in this approach to the horizontal comparison in a CVA, and the point which he made in [196] applies equally to the same exercise in relation to a plan under Part 26A.

181. That was also the view taken by Adam Johnson J in GAS at [106],

> "106. … if the question to be addressed is one about the overall balance and fairness of the proposed plan in light of the relative treatment of the different creditor classes, I fail to see why that should not involve comparing the plan with other possible alternative structures. Points of comparison might well be helpful. Indeed, in many cases the basic challenge is likely to be: this is not fair - *things could and should have been done differently*. As I read it, Zacaroli J said something similar in Houst, because in addressing the question of fairness at para 37, he posited an alternative plan structure in which the cram-down power was sought to be used against the company's bank (rather than HMRC) and not the other way around (as was the case under the plan in that case)."

I agree with that analysis.

182. Accordingly, in my view the Judge was wrong to reject the Appellants' contentions in this regard. Ground 1 of the appeal is well-founded.

The principle of pari passu distribution

183. Before turning to consider the application of the principles which I have discussed to the appeal in the instant case, in light of its significance to the arguments, it is important to understand what the principle of *pari passu* distribution actually involves.

184. The *pari passu* principle can be traced back to section 2 of Henry VIII's Statute of Bankrupts 1542 (34 & 35 Henry 8 c.4), under which the assets and debts of a bankrupt were to be identified and appraised, and the assets sold,

> "… for true satisfaction and payment of the said creditors; that is to say, to every of the said creditors, a portion, rate and rate alike, according to the quantity of their debts …"

185. In *Goode on Principles of Corporate Insolvency Law* (5th ed) ("*Goode*") at [8-02], the principle of *pari passu* distribution is described in these terms,

> "The most fundamental principle of insolvency law is that of *pari passu* distribution, all creditors participating in the common pool in proportion to the size of their admitted claims….
>
> The principle is based on the notion that losses should be borne by unsecured creditors equally: as the Supreme Court has recently put it, the statutory provisions for rateable distribution embody "the fundamental principle of equality"."

The reference to the Supreme Court is to Lehman Brothers (International) Europe (in administration) No.4 [2018] AC 465 at [20] (*per* Lord Neuberger).

186. As the extract from *Goode* makes clear, the rationale for a *pari passu* distribution is to ensure that losses in an insolvency are borne equally, i.e. that any ultimate shortfall in the assets available for payment of the claims of creditors is borne rateably by all creditors. The concept is one of a *pari passu* distribution of a pool of assets under which payments are made at the same time and rateably to all creditors who have established their claims. It is vital to appreciate that no creditor should be paid any amount from the common pool ahead of other creditors who rank equally with him if to do so creates a risk that the other creditors will not be able to be paid the same rateable proportion of their claims. That explains why, for example, when declaring a dividend, a liquidator will make a provision for claims which have not been settled and for other purposes that might rank ahead of the claims of the creditors: see e.g. Rule 14.35 of the Insolvency (England and Wales) Rules 2016.

Analysis

Adherence to the principle of *pari passu* distribution

187. I therefore turn to the first main theme of the appeal. Under Grounds 3 and 4 the Appellants contended that the Judge wrongly failed to appreciate that the Plan materially departed from the principle of *pari passu* distribution of assets that would apply in the Relevant Alternative, thereby placing a materially greater risk of non-payment upon the 2029 Noteholders than the other Notes; and that no good reason had been shown for this differential treatment.

188. There were two aspects to this contention: the first was the preservation of different maturity dates requiring sequential payment of the different series of Notes, and the second was the priority given to the 2024 Notes under the Transaction Security.

Sequential payment of the different series of Notes

189. At [298], the Judge held that the provisions of the Plan under which the different series of Notes would be paid sequentially on their original maturity dates (or, in the case of the 2024 Notes, one year later than the original date) did not involve a departure from the *pari passu* principle. His stated reason for that conclusion was, "I have found that if the Plan is implemented, it is likely that the Plan Creditors will be paid in full".

190. When the true nature of the principle of *pari passu* distribution of assets is appreciated, it can be seen that the Judge's reasoning was wrong. The Judge had simply found, at [217], that,

> "*on a balance of probabilities* … if the Plan was implemented, the Group would be *more likely* to realise the sums forecast in the BCG Report than the Knight Frank Report and that it is likely that the 2029 SUNs will be repaid in full."
>
> (my emphasis)

The central finding that the outcome forecast in the BCG Report was more likely than the outcome forecast in the Knight Frank Report was only a finding reached on the balance of probabilities. Nor did it logically justify a conclusion that the outcome forecast in the BCG Report was more likely than not to be achieved. Crucially, neither finding provided any assurance that sufficient sums would be realised by the Group under the Plan to pay all the Noteholders in full.

191. The material risks for the 2029 Noteholders in this regard can be illustrated by the fact that the BCG Report forecast that the amount of €3.684 billion required to pay the Notes in full would only be exceeded by a margin of €400 million under the Plan (referred to in argument as the "available headroom"). This margin arose from proceeds from asset sales estimated by BCG at €6.7 billion, which were reduced to €4.1 billion by payments of bank debt, interest and tax. However, as the Judge recorded in the Judgment at [201], Mr. Wolf made various adjustments to this figure in his evidence, with the result that the available headroom was significantly reduced to €309 million. This meant that the margin for error in the forecasted property values

upon which the Plan was based was only about 4.6% (€309 million/€6.7 billion). The Judge recorded at [201] that in cross-examination, Mr. Wolf agreed that this was "a very small margin for error". It should also be borne in mind that this was not simply a current valuation of properties, but a forward-looking projection that assumed and relied on an anticipated recovery in the property market. In short, as the Judge accepted at [291], "it will be ambitious for the Plan Company to pay off the 2029 [Noteholders] in full".

192. The same error of logic was repeated in the second part of [298]. There the Judge acknowledged that he might have found that the Plan involved a departure from the *pari passu* principle if he had accepted the valuation evidence in the Knight Frank Report, but he stated that he had not accepted that evidence. The reason that the Judge had not accepted the Knight Frank Report was simply that he found it more likely that the predictions in the BCG Report would be achieved. Again, however, there was no certainty whatever that this would be so.

193. Given the existence of these material risks that the Group might fail to realise the sums forecast in the BCG Report, the payment of the different series of Notes sequentially under the Plan thus carried the risk that the Group would pay the earlier dated Notes in full, but would run out of money from realisations before being able to pay the 2029 Notes. As I have pointed out above, adherence to the principle of *pari passu* distribution of the Group's assets would have eliminated that risk by proportionate distributions being made rateably to all Noteholders from time to time. Put shortly, sequential payments to creditors from a potentially inadequate common fund of money are not the same thing as a rateable distribution of that fund.

194. The Judge's second reason for finding that the Plan would not depart from the principle of *pari passu* distribution was in [299], in which he stated,

> "If the Group falls significantly short of [the forecasts in the BCG Report], then in my judgment the most likely outcome is that this will trigger an acceleration of all the Notes, enforcement of the Transaction Security and distribution in accordance with the *pari passu* principle subject to repayment of the Secured Parties."

That reasoning, based upon the Judge's acceptance of the Plan Company's Alternative Case was, however, based on similar flawed logic to the Judge's first reason, and contained a number of further errors.

195. The first mistake, again, was that the Judge's findings as regards the likely outcome in the Alternative Case were necessarily forward-looking and were arrived at on the balance of probabilities. They provided no certainty whatever that the predicted sequence of events would in fact occur.

196. The second point is that the Judge's reasoning was based upon an assumption that the predicted realisation values in the Knight Frank Report would be accurate, rather than those in the BCG Report. He accepted that this would result in an LTV covenant breach at the end of 2024, an acceleration of the Notes, and an enforcement process being commenced before any scheduled payments had been made to any of the Noteholders. But there was no logical basis for the Judge to assume that this was the

only other alternative to success of the Plan. It is entirely possible – indeed inherently likely - that neither BCG's nor Knight Frank's predictions would turn out to be 100% accurate, and that the asset values and realisations obtained might therefore fall somewhere between the two extremes that they identified. There is also force in the point made by Mr. Smith KC that the values predicted in the BCG Report might more readily be achieved in respect of properties that were easy to sell earlier in the process but would be less likely to be achieved with the more difficult sales later in the process.

197. Taken together, there was a material possibility that the LTV covenant would not be breached until <u>after</u> some payments had been made in full in respect of some of the earlier dated Notes. Again, this gave rise to a material risk that there would be inadequate funds available in an enforcement to pay the remaining Notes, including the 2029 Notes. In that event, the principle of *pari passu* distribution would not have been adhered to in respect of all of the Noteholders.

198. The third point is that even if the Knight Frank predictions turned out to be accurate, and even if the events in the Alternative Case occurred as predicted, the 2024 Notes had priority under the Transaction Security over the other series of Notes. The occurrence of a process of acceleration and enforcement of that security would thus prioritise the repayment to the 2024 Notes and would not result in the same *pari passu* distribution to all Noteholders as would have been the case in the Relevant Alternative.

199. Accordingly, the Judge was in my view wrong to conclude that the Plan did not depart from the principle of *pari passu* distribution of assets that would have applied in the Relevant Alternative. The Plan represented a clear departure from that principle.

200. Curiously, having made his findings in [298] and [299] that the Plan did not depart from the principle of *pari passu* distribution, the Judge then correctly and neatly summarised in [300] – [301] the very reasons why that conclusion was wrong. He said,

> "300. I readily accept that the exercise in which all of the valuation and financial experts were engaged was inherently uncertain and that the three alternatives which the parties presented to the Court did not involve clear alternatives but more of a spectrum. I also accept that I do not have a crystal ball and that I cannot be certain that the 2029 [Noteholders] will be paid in full or even that they will recover on a *pari passu* basis if the Plan Company defaults … Whilst I was satisfied that this was a likely outcome, it remains far from certain.
>
> 301. I must accept, therefore, that the Plan involves a greater risk for the 2029 [Noteholders] than it does for the Plan Creditors holding earlier-dated notes and it is possible (although, in my judgment, unlikely) that they might be worse off if they have to wait for the Plan to be implemented than if the Group was put into an insolvency process now."

Those are precisely the reasons why the Plan did not respect the principle of *pari passu* distribution, the essential purpose of which, as I have indicated, is to eliminate the risk that creditors might end up bearing the losses of an insolvency unequally.

201. At [302], the Judge then gave a series of reasons for concluding (as he put it) that it was "not unfair to require the 2029 Noteholders to accept a greater level of risk than the other Plan Creditors, and I am prepared to sanction the Plan even though it may have that effect". Unfortunately, because the Judge had wrongly failed to appreciate that this increased risk existed precisely because the Plan did not comply with the principle of *pari passu* distribution, he failed to address squarely the critical requirement that he had (correctly) accepted at [74], namely that the court could approve a plan in such circumstances "provided that there is a good reason or a proper basis for departing from the *pari passu* principle and for the differential treatment" (my emphasis).

202. Had the Judge sought to address the test that he had himself formulated in [74], he would undoubtedly have concluded that there was no good reason or proper basis for the Plan's adherence to sequential payments in accordance with the maturity dates of the Notes. That is because, as the Judge stated at [302(7)],

> " …. Despite the volume of evidence filed by the parties, I was not given a compelling reason why the Plan Creditors wished to preserve the maturity dates and not to agree to harmonise them at the outset. If they had agreed to this, a great deal time and intellectual effort might have been saved in demonstrating to the Court why a default would result in a *pari passu* distribution."

203. The Judge also failed to appreciate or address the further significance of this point, namely the parties could easily have produced a fairer plan that eliminated the different treatment of the different series of Notes by agreeing to harmonise the dates. The reason that the Judge did not do so is because, for the reasons that I have explained, he had earlier wrongly concluded (in reliance on the dicta in Amicus Finance) that he did not need to inquire as to whether the Plan could have been fairer or could have been improved. This was a point that he reiterated in the preceding sub-paragraph [302(6)],

> "(6) I accept Mr Bayfield's submission that as a matter of law I do not have to be satisfied that the Plan is the best plan available or that it could not be fairer."

204. Although the Judge thus failed to address the critical question he had identified at [74], he did give a series of reasons at [302] for sanctioning the Plan, even though the retention of different maturity dates imposed a greater risk of non-payment on the 2029 Noteholders. In my judgment, none of those reasons were well-founded, and certainly not sufficient to overcome the fundamental unfairness to the Appellants of the unjustified departure from the *pari passu* principle.

205. The Judge's first reason – at [302(1)] - was that preserving the existing maturity dates of the Notes (apart from the 2024 Notes) "reflects the commercial risks which the [2029] Noteholders assumed when they purchased them." That is wrong. The

relevant "commercial risk" that 2029 Noteholders took when purchasing the 2029 Notes was the risk that the Group might become unable to pay its debts – the so-called "insolvency risk". But in that event, the bargain with the 2029 Noteholders was that all outstanding series of Notes would rank equally in a formal insolvency and receive *pari passu* distributions from a common pool of assets. The Plan did not respect that bargain.

206. The Judge's second set of reasons spanned [302(2)]–[302(4)]. The Judge first repeated his finding that it was "most likely" that the 2029 Notes would be paid in full under the Plan, and then repeated his further finding that if the Plan's primary purpose were to fail, the 2029 Noteholders would likely be able to accelerate the Notes, would be likely to recover more under the Alternative Case than in the Relevant Alternative, and would likely not be treated differentially. For the reasons that I have already given, these findings, reached on the balance of probabilities, simply encapsulated the risk of differential treatment leading to non-payment rather than mitigating the unfairness that this feature of the Plan involved. The reference to the Relevant Alternative also did no more than restate satisfaction of Condition A and ignored the question of whether there was a fair distribution of the benefits of the restructuring.

207. At [302(5)] the Judge placed reliance upon the fact that a majority of the 2029 Plan Creditors supported the Plan. He said that he gave greater weight to this because a number of the 2029 Noteholders did not have holdings of the 2024 Notes.

208. For reasons that I have explained, I accept that it is permissible for a court considering whether to exercise the cross-class cram down power to have some regard to the level of support for the plan, short of the required 75% majority, within a dissenting class. However, as I have also indicated, that should require no less scrutiny by the court of the representative nature, completeness of information and absence of extraneous motives of those comprising the majority, than would be required if the class were to have voted in favour by the required 75%; and the court cannot simply apply a rationality test to a majority short of 75%. Instead, it must engage with the underlying commercial issues.

209. Moreover, in a case in which a horizontal comparison shows that a plan allocates the benefits of the restructuring differentially between the assenting and dissenting class in a material respect, and no justification has been given for that, it would, I suggest, take a compelling reason to persuade the court to sanction the plan nonetheless. The Judge's analysis in [302(5)] came nowhere near providing such a reason.

210. In particular, the Judge did not, in this section of his analysis, address the extent to which the majority of the 2029 Noteholders voting in favour of the Plan also held Notes in the classes of earlier-dated Notes. All he said was that "a number of the 2029 Plan Creditors do not have holdings in the 2024 Notes". But that ignored the fact that apart from those who held 2024 Notes, many of the 2029 Noteholders who voted in favour of the Plan had holdings in the other series of 2025, 2026 and 2027 Notes that also stood to benefit from sequential payment under the Plan.

211. The factors that the Judge ultimately relied upon in this respect were identified at [302(9)],

> "(9) Ultimately, I am persuaded by Mr. Bayfield's very final oral submission at the end of the hearing. If the Plan works, he submitted, everyone is better off and the best judges of this are the Plan Creditors themselves, who voted by the requisite majority in every class for the Plan and by 62% in the dissenting class. Given the balance of risk, the right exercise of discretion is to give the management of the Group the opportunity to implement it."

212. That reasoning was also echoed in the very final paragraph [344] of the Judgment,

> "344. For all of these reasons I am satisfied that it was appropriate to sanction the Plan and to give effect to the votes cast by the majority of the Plan Creditors in all classes including the 2029 Notes."

213. As I have already set out, I consider that reliance upon the overall level of voting across all classes of creditors is not something that should be taken into account in conducting the horizontal comparison and deciding whether it is fair or appropriate to cram down a dissenting class. By his acknowledgement in [302(9)] that what ultimately persuaded him to sanction the Plan was that "everyone is better off and the best judges of this are the Plan Creditors who voted by the requisite majority in every class for the Plan", the Judge treated both satisfaction of Condition A, and the overall votes in the assenting classes, to be relevant and important factors in the exercise of his discretion. Both those conclusions were wrong. Indeed, in placing significant weight upon them, the Judge disregarded his own comments at [65] that satisfaction of Condition A was merely a jurisdictional requirement and did not give rise to any presumption that a plan should be sanctioned, and his further qualification at [66] that the overall support for a plan was "not [an] important or decisive factor".

214. In his analysis in this respect, the Judge also did not deal with a point to which he had alluded earlier in his Judgment at [84], and upon which Mr. Bayfield KC placed significant reliance on appeal, namely that the Plan was supported by about 65% by value of "pure" 2029 Noteholders – i.e. those who had no cross-holdings in any other series of Notes. When that point is investigated in greater detail, as it was on appeal, it does not provide the court with anything like the confidence that the Plan should be regarded as fair to the 2029 Noteholders notwithstanding the differential risk of non-payment to which the class was exposed.

215. The detailed report of the Chair of the Plan Meetings shows that there were 35 entities which only held 2029 Notes, of which 28 voted in favour of the Plan. However, those entities held a total of €23.7 million by value of the 2029 Notes, amounting to only about 3% of the total face value of €800 million. Moreover, 8 of those voting in favour held only the bare minimum investment of €100,000, and 15 had holdings of less than €500,000. On any view, that cannot be regarded as a representative cross-section of the class of 2029 Noteholders.

216. Additionally, there is real force in Mr. Smith KC's point that the holders of such small investments in the 2029 Notes might well not have had the time, resources or inclination to analyse the merits of the Plan carefully for their series of Notes, and might well have been unduly influenced in their decision by the overall thrust and

tone of the Explanatory Statement, which was (to say the least) considerably less informative than it should have been in a number of critical respects.

217. The Explanatory Statement summarised its conclusions and recommendations for Noteholders at paragraphs 3.28 – 3.29 in Part 2. It did not distinguish in any material respect between the treatment of the different series of Notes,

> "3.28 Based on BCG's assessment and following the implementation of the Restructuring Plan and the Restructuring, the Group is forecast to repay the [Notes] in full as they fall due (as amended in accordance with the Proposed Amendments) or, in some cases, potentially earlier than their stated maturity. As of the date of this Explanatory Statement, BCG has reached the conclusion that, by way of comparison, the distribution that would be received by Plan Creditors in the Relevant Alternative (being formal insolvency or bankruptcy proceedings of the Plan Company and certain key Group companies) would be significantly less than the face value of the Notes.
>
> 3.29 Having consulted with its legal and financial advisers, the Plan Company accordingly considers that the Restructuring Plan is likely to result in a materially higher return for each class of Plan Creditors than in the Relevant Alternative …"

218. Whatever a sophisticated entity with a greater level of investment might have been able to deduce from a review of the Comparator Analysis in the BCG Report annexed to the Explanatory Statement, at no point did the Explanatory Statement (which ran to a total of 111 closely spaced pages even without appendices), draw attention to the fact that by preserving sequential payment dates for the various series of Notes, the Plan departed in a material respect from the *pari passu* distribution of assets to Noteholders that would have applied in the Relevant Alternative. There was simply no attempt to explain the difference in treatment and the risks involved for the different series of Noteholders in this respect when compared with the Relevant Alternative.

219. Further, in a detailed and apparently comprehensive Section 5 to the Explanatory Statement headed "Risk Factors", which itself ran to 16 pages, there was no mention whatever that the effect of making payment in accordance with sequential maturity dates was to place a greater risk of non-payment under the Plan on the 2029 Noteholders than the earlier series of Notes.

220. The only two places in the total of 111 pages at which the Explanatory Statement could even realistically be thought to have come close to identifying the point for 2029 Noteholders was in one paragraph dealing with the question of class composition, and one paragraph dealing with the objections voiced by the Appellants to the Plan.

221. The first of those paragraphs, 3.21 in Section 3 dealing with the legal aspects of the Restructuring stated,

> "The Plan Company did consider whether it would be appropriate to place all of the Plan Creditors into a single class for the purpose of voting on, and if thought fit, approving the Restructuring Plan (on the basis that the [Notes] are all unsecured claims and would have the same rights in an insolvency). However, despite the equality of treatment amongst the [Notes] (other than the 2024 [Notes]) under the Restructuring Plan, in light of differences between the maturity dates and contractual interest rates of the different series of [Notes], and the difference of opinion indicated by the results of the Consent Solicitation, the Plan Company considered it prudent that Plan Creditors be divided into six separate classes."

222. That paragraph was completely muddled, if not actually misleading. Although it alluded to the requirement in Hawk that the comparison of rights in a restructuring which is being put forward as an alternative to a formal insolvency must be by reference to creditors' rights in the insolvency, it also wrongly referred to the Plan as providing "equality of treatment" to the Noteholders, when the reality was that the Plan maintained the differences in the timing of payment of them.

223. Paragraph 6.47 in Part 1, setting out the background and reasons for the restructuring, was no more informative and also did not engage substantively with the *pari passu* issue. It stated,

> "On 17 February 2023, Akin Gump (on behalf of the AHG [the Appellants]) notified White & Case [for the Plan Company] by letter that the AHG intends to vote against, and oppose the sanctioning of, the Restructuring Plan. The letter provided a high level summary of the AHG's grounds for opposing the Restructuring Plan, including that it considers the Issuer Substitution invalid and unenforceable as a matter of German law and that the Restructuring Plan would not be capable of recognition in Germany unless and until the German court has determined the validity of the Issuer Substitution. The AHG also alleges that the Restructuring Plan results in unequal treatment of *pari passu* creditors. The AHG has yet to particularise its complaints in detail. Nevertheless, the Group is confident that the Issuer Substitution is effective as a matter of German law, that the Restructuring Plan treats all classes of creditors fairly and leads to materially better recoveries for all creditors than the relevant alternative, and that the Issuer Substitution and the Restructuring Plan would be recognised by the German courts."

224. Mr. Smith KC did not suggest that the inadequacies of the Explanatory Statement in these respects was an independent ground of appeal, but he maintained that they fatally undermined any confidence that the court could have in the support for the Plan among the 65% of the small cohort of "pure" 2029 Noteholders. I accept that submission.

The priority given to the 2024 Notes by the Transaction Security

225. At [306(1)], the Judge appeared to acknowledge that the provisions of the Plan which gave enhanced priority under the Transaction Security to the claims of the 2024 Noteholders amounted to an alteration of the priority which the 2024 Noteholders would have in the Relevant Alternative. However, at [302(3)], he restated his earlier view that because of his findings as to the likely outcome under the Plan and in the Alternative Case, this did not involve a departure from the *pari passu* principle.

226. For similar reasons to those that I have already given at [198] above, that conclusion was wrong. There was no assurance that all Noteholders would be paid in full under the Plan, and even if the Transaction Security was enforced as envisaged in the Alternative Case, the 2024 Noteholders would be paid in priority to the other Noteholders, rather than ranking equally with them as would have been the case in the Relevant Alternative.

227. By reason of this error, the Judge thus did not directly address the relevant test that he had proposed at [74] of his Judgment. Instead, at [306], he accepted a submission by Mr. Bayfield KC that the question he should ask was whether the priority given to the 2024 Notes meant that the Plan was so flawed that the Court should not sanction it. However, when addressing that question, at [306(2)], the Judge found that giving the 2024 Noteholders priority over the other Noteholders was a *quid pro quo* for their agreement to defer the maturity date of the 2024 Notes by a year to 2025, and he held that this was "a good reason why an honest intelligent person might approve the Plan".

228. At the hearing of the appeal I was sceptical of this justification, but on reflection I consider that if the Judge had asked himself the right question that he posed at [74], he could reasonably have concluded that this was a good reason or proper basis for a departure from the principle of *pari passu* distribution that would have applied in the Relevant Alternative.

229. The deferral of the maturity date was designed to facilitate the achievement of the purposes of the Plan by ensuring that the Group would not need to find the €400 million plus interest needed to repay the 2024 Notes on their due date. Instead, the Group could have a longer period within which to implement the realisation of assets to pay that liability in accordance with the Management Case. In that respect, and in contrast to the other series of Noteholders who were not required to give any such deferrals, the deferral by the 2024 Noteholders could properly be considered to be an additional accommodation or benefit given by them to the Group for the benefit of the Plan Creditors as a whole. In that regard, it would be consistent with the approach in the type of cases to which I have referred in paragraphs [168]-[170] above.

230. It is true that in the Relevant Alternative, the Group would have entered a formal insolvency before any extension of the maturity date of the 2024 Notes from a date at the end of July 2024 to 2025 could have taken effect. But that does not prevent the Plan Company from relying on the extension of the maturity date if the Plan becomes effective as a reason for the grant of priority security. In the same way as the beneficial continuation of the supply of services or goods by employees or trade suppliers to a plan company can be a legitimate reason for continuing to pay them in full outside a plan, I see no reason why the continuation of credit by the 2024

Noteholders to the Plan Company could not justify an elevation of the priority of their claims above other creditors.

231. The Judge did not expressly consider whether the enhanced security given to the 2024 Noteholders was a proportionate response to the extra year's extension of their loans, taking into account, for example, the enhanced interest that the 2024 Noteholders stood to receive over that period. Instead, as I have indicated, he simply held that this was "a good reason why an honest and intelligent person might approve the Plan". It is unclear whether the Judge took this view from the perspective of the creditors in the classes of Noteholders who had approved the Plan, or from the perspective of the 2029 Noteholders who had not. However, this aspect of the Judge's reasoning was not criticised by the Appellants.

232. Accordingly, I would not have allowed the appeal on the basis that the grant of priority to the 2024 Noteholders was a departure from the principle of *pari passu* distribution that was unfair to the 2029 Noteholders.

Conclusion on the pari passu arguments

233. For the reasons that I have given, I consider that the Judge was wrong to sanction the Plan which preserved the sequential payment of the different series of Notes, leaving the 2029 Notes to be paid last, because it thereby departed without good reason or justification from the principle of *pari passu* distribution that would have applied to all series of Notes in the Relevant Alternative.

234. Standing back for a moment, I consider that this conclusion is not surprising or at odds with the legislative intention behind the introduction of the cross-class cram down power in Part 26A.

235. The Group and the SteerCo arrived at a proposed deal in 2022 which they intended should be put into effect by the consent solicitation. On the basis that it would be given effect in accordance with the contractual regime under the Notes, the parties were, of course, free to negotiate on whatever basis they chose. The basis for those negotiations was alluded to in the Plan Company's skeleton argument for the appeal, and seems to have been based upon the differential pricing of the Notes in the bond markets while the Group was a going concern,

> "The bond markets have always attributed materially different prices to the six series of [Notes] so as to reflect their different temporal priorities, and this was the basis on which the Plan was negotiated."

236. When the deal negotiated by reference to traded prices failed to attract consensual support, it seems to have been assumed that the same deal could simply be transplanted into the Part 26A regime without any further consideration or modification, and the opposition from the 2029 Noteholders overridden by cross-class cram down. But that ignored the fact that Parliament clearly intended that the use of the cross-class cram down power in Part 26A should have, as a relevant reference point, the position in which creditors would find themselves in the relevant alternative to the proposed plan.

237. What the proponents of the Plan therefore appear to have overlooked, or chosen to ignore, is that although the bond markets might have attributed different prices to the different series of Notes to reflect the different times at which they were payable, that was not the relevant metric for seeking to invoke the power of cross-class cram down. That required a reference to the Relevant Alternative in which all Notes would rank equally. If that were the relevant metric for trading the Notes, they would all have been priced equally, and the deal should have reflected that.

238. In short, it is not surprising that a deal negotiated by reference to a materially different frame of reference than the Relevant Alternative should fail to fulfil the necessary requirements to justify the court exercising its power under Part 26A to impose it on a dissenting class of the Noteholders.

Retention of equity by the shareholders of the Parent Company

239. Although subsumed by the Appellants within Ground 4 of their appeal, I should deal separately with an argument that the Plan was also unfair to the 2029 Noteholders because it required them to bear the greatest risk of non-payment, but left the shareholders of the Parent Company, who would rank below them in a formal insolvency, still holding their shares (albeit diluted to 77.5% by the additional 22.5% of new shares issued to the providers of New Money under the restructuring).

240. The argument was advanced in the Appellants' skeleton argument on the basis that it represented a further departure of the Plan from the principle of *pari passu* distribution that would have applied in the Relevant Alternative, and that there was no justification for this.

241. I do not accept that submission. Even putting aside the fact that the Plan relates to the Plan Company and the argument is advanced by reference to the status of the shareholders in the Parent Company (a Luxembourg company), the principle of *pari passu* distribution of assets in an insolvency does not require the shareholders of a company to forfeit their shares. The only relevant principle in this respect under English law is that there should be no distribution of assets to shareholders until after all creditors have been paid in full: see e.g. section 107 of the Insolvency Act 1986 and Armstrong Whitworth Securities Limited [1947] Ch 673 at 689.

242. The Plan does not in any way infringe that principle. As Mr. Bayfield KC pointed out, the Plan Creditors are not required to accept any reduction under the Plan of the amount of the claims that they would be entitled to make in the Relevant Alternative, and no distributions will be made under the Plan of any surplus assets to the existing shareholders of the Parent Company unless and until all of the Noteholders, including the 2029 Noteholders, have been paid in full. So far as adherence to the principle of *pari passu* distribution of assets in the Relevant Alternative is concerned, there is thus nothing in the point.

243. However, as recorded by the Judge at [323], and repeated on appeal, Mr. Smith KC's alternative way of putting the Appellants' submissions was altogether more adventurous. He asserted that, in economic terms, where a company would be insolvent in the relevant alternative, it is the "in the money" creditors who would stand to receive something in that relevant alternative who effectively "own" the company. His contention was that for the purposes of assessing the fairness of a plan

under Part 26A, it is *prima facie* those creditors who alone should stand to benefit from any excess value generated over and above the amount required to repay their debts.

244. Mr. Smith KC accordingly submitted that in the absence of any other factors justifying the retention of equity by the shareholders, a company that would be insolvent in the relevant alternative and promotes a restructuring plan in which there is a prospect of a solvent surplus must provide for the compulsory cancellation or reallocation of the existing shares in the company among the creditors who would be "in the money" in the relevant alternative.

245. Importantly, Mr. Smith KC further confirmed in argument that the logic of his contention dictated that the existing shares should be compulsorily cancelled or transferred to the in the money creditors for no consideration (i.e. that they should be confiscated or expropriated).

246. Although the Judge indicated at [324] that it was these submissions that gave him the greatest concern about approving the Plan, he rejected them. I consider that he was right to do so, albeit that I do not think that they have the force that the Judge thought they had.

247. Mr. Smith KC founded his submissions in this respect on what I had said in Virgin Active. In that case, I considered an argument by a dissenting class of landlord creditors, who were being required under the plan to accept substantially reduced payments in respect of their claims, that it was unfair to require them to accept such a reduction when the shareholders were being permitted to retain their equity in the company, and hence stood to benefit from its continued trading after the restructuring. I was not, however, required to consider the submission now made by the Appellants that a plan under Part 26A might actually have to provide for the confiscation of the shares held by the members of the company and their transfer to the plan creditors.

248. At [238], I referred to a line of scheme cases including Tea Corporation Limited [1904] 1 Ch 12 ("Tea Corporation"), Bluebrook and Noble Group. In those cases, the essence of the proposal was that the business and assets of the failed company should be transferred to a new company to be owned by those who would be entitled to share in a distribution of those assets in a formal insolvency. By this route, the shareholders and any creditors who would be out of the money in the formal insolvency would be left behind in the shell of the old company and the benefits of future trading would be enjoyed by those who would be in the money in a formal insolvency. The cases determined that where the legal rights of the out of the money creditors or shareholders against the scheme company were not being altered, it was not necessary to make them parties to the scheme or convene a class meeting of them.

249. At [242], I summarised what I understood to be the established approach in such cases,

> "242. That established approach in relation to scheme cases reflects the view that where the only alternative to a scheme is a formal insolvency in which the business and assets of the debtor company would be held on the statutory trusts for realisation and distribution to creditors, that business and assets

> in essence belongs to those creditors who would receive a distribution in the formal insolvency. The authorities take the view that it is for those creditors who are in the money to determine how to divide up any value or potential future benefits which use of such business and assets might generate following the restructuring …"

250. One of the major changes introduced in 2020 was designed to ensure that out of the money creditors and shareholders could be bound to a plan under Part 26A. In that respect, at [244], I cited paragraph 5.148 of the *Government's Response*, published on 26 August 2018, to its 2016 consultation entitled *Review of the Corporate Insolvency Framework.* That response proposed the introduction of what later became Part 26A. It stated,

> "The Government agrees with the majority of respondents that a procedure that allows for the cross-class cram down of dissenting classes of creditors, subject to safeguards, would be a useful addition to the UK's business rescue tools. The introduction of such provisions will help the UK maintain its position as a leading global restructuring hub. The restructuring plan will represent a streamlined procedure in which dissenting classes of creditors, most importantly those who are 'out-of-the-money' (i.e. those who, under the order of priority for creditor repayment in administration or liquidation, would not receive any dividend), may be bound to an arrangement that is in the best interests of all stakeholders. The Government also agrees with those respondents who opined that the existence of such a procedure may well encourage more consensual restructurings."
>
> (my emphasis)

251. In Virgin Active I also referred, at [249], to the provision in section 901C of the 2006 Act that creditors with no genuine economic interest in the plan company can be bound by a plan but need not be summoned to a class meeting to consider it. I stated,

> "249. The logic of this point is that if creditors who would be out of the money in the relevant alternative could be bound to a plan which effects a compromise or arrangement of their claims without even being given the opportunity to vote at a class meeting, the fact that they have participated in a meeting which votes against the plan should not weigh heavily or at all in the decision of the court as to whether to exercise the power to sanction the plan and cram them down. Nor is it easy to see on what basis they could complain that the plan was "unfair" or "not just and equitable" to them and should not be sanctioned. That point was made expressly by Trower J at the end of paragraph 51 of his judgment in DeepOcean."

252. Applying these principles to the facts of Virgin Active, I concluded that it was for the secured creditors, who would be in the money in the relevant alternative but were

accepting a compromise of their claims, to decide, for rational commercial reasons, whether to share any of the value that might be obtained from the restructuring with the shareholders by permitting them to retain some or all of their equity in the revived company. I held that the views of the out of the money landlords in this respect carried no weight by comparison. In holding that the shareholders' retention of their equity was not unfair to the dissenting landlords, I also placed reliance on the fact that the shareholders were providing some new money and waiving some of their own claims to benefit the restructuring. These two possible justifications for a departure under a plan from the order of priority that shareholders would occupy in the relevant alternative, have been referred to (borrowing terms used in Chapter 11 cases in the US) as "gifting" and the provision of "new value".

253. Mr. Smith KC did not contend that my approach in Virgin Active had been wrong: he sought to take it further. His point was that in the instant case, the shareholders of the Parent Company were adding nothing of commercial value, because the business of the Group was not intended to continue after the restructuring, and they were not providing any new money. Thus, he contended, there was no basis upon which the shareholders should have been permitted to share in any potential benefits generated by the Plan, and hence their shares should have been cancelled or transferred to the Plan Creditors.

254. In essence, although Mr. Smith KC did not say so expressly, the Appellants were contending that the SteerCo had missed a trick when settling for an issue of new shares amounting to only 22.5% of the enlarged equity share capital of the Parent Company to the providers of the New Money. By implication, he was saying that if the SteerCo had conducted their negotiations and struck their deal with the Group by reference to Part 26A rather than the earlier consent solicitation, they could and should have insisted on the existing shares being cancelled or transferred to the Plan Creditors for nothing.

255. In addressing these arguments, I first note that the Appellants did not suggest that the supposed failure to confiscate the existing shares in the Parent Company was particularly unfair to them, or to the class of 2029 Noteholders, as opposed to any other Noteholders or class of Noteholders. Nor did they take issue with the term of the Plan under which the SteerCo and any other Noteholders who provided New Money to support the restructuring would be entitled to share in 22.5% of the enlarged equity of the Parent Company.

256. Secondly, and as recorded by the Judge at [326(1)] the Appellants did not suggest that the SteerCo had acted in anything other than a commercially rational way when negotiating only a 22.5% stake in the enlarged share capital in return for providing New Money. It follows that the Appellants did not contend that it was irrational for SteerCo to have agreed to leave the existing shareholders in place. Although the Group was not intended to survive as a going concern, this might, for example, have been perceived as appropriate to maintain good relations with the shareholders during the smooth wind down of the Group's business in accordance with the Management Case under the Plan.

257. Thirdly, the Appellants did not suggest (still less provide any evidence of Luxembourg law to support a contention) that a viable mechanism existed under which, as a term of the Plan or even the wider restructuring, the existing shares in the

Parent Company (incorporated in Luxembourg) could be cancelled or compulsorily transferred out of the hands of their current owners and into the hands of the Plan Creditors. At least at first blush, such a confiscation would have required some form of parallel proceeding in relation to the share capital of the Parent Company, over which the English court has no obvious basis to exercise its jurisdiction under Part 26 or 26A. Mr. Smith KC objected that this point had little merit given that it was the Group that had chosen to bring its restructuring to the English court. That objection might have had more traction if the Appellants had also been contending that the Issuer Substitution was an artificial device and the application under Part 26A should not be entertained, but as I have indicated, the Appellants did not make that argument.

258. Finally, my provisional view is that there is no jurisdiction under Part 26A to sanction a compulsory cancellation or transfer of the shares in a debtor company for no consideration. Although, given my views on the other grounds of appeal, it is not strictly necessary to decide this point of principle, and it was argued less fully than the other grounds, I nevertheless consider that it is appropriate to set out the reasons for that provisional view. That is because, as Mr. Smith KC acknowledged, his argument applies both to the question of whether Part 26A permits the cancellation or compulsory transfer of the shares in a plan company, and also to the question of whether Part 26A permits the extinction of debts owed to creditors, in each case for no consideration. These are questions of wider importance to the restructuring community engaged in the formulation of Part 26A plans.

259. The essence of Mr. Smith KC's argument was that such a power is inherent in the terms of Part 26A. He also contended that, at least so far as shareholders and creditors who would be out of the money in the relevant alternative are concerned, this would not give rise to a result for such shareholders or creditors that was commercially any different from the position that they would be left in under a Part 26 scheme of the type referred to in Bluebrook or Noble Group.

260. In support of his thesis, Mr. Smith KC pointed to the legislative history and the Explanatory Notes to which I referred in Virgin Active, that make it clear that one of the aims of Parliament in introducing the cross-class cram down power in Part 26A was to provide a new "streamlined" procedure which would enable a company in financial difficulties to be restructured in a single court process. This would mean that the company would not have to resort to the two-stage process involving a Part 26 scheme of arrangement in conjunction with an administration that had evolved from the approach taken in cases such as Tea Corporation and Bluebrook: see e.g. paragraph 9.9 of the Government's *Review of the Corporate Insolvency Framework* (above).

261. In such a two-stage process, a scheme of arrangement would be used under which the claims of the creditors who would be in the money in a formal insolvency would be discharged as part of a restructuring under which a newly formed company would assume liability for those claims (in whole or in a reduced amount) and issue equity to the in the money creditors. The scheme company would go into administration and its business and assets would be the subject of a "pre-packaged" sale to the new company in consideration of the discharge and assumption of the liabilities to the scheme creditors. The end result of the two-stage process would be that the business and assets would be owned by the new company which would in turn be owned by the in the money creditors who might also have debt claims against that new company.

The out of the money creditors and the shareholders of the scheme company would be left behind in an empty shell.

262. Such a two-stage process was needed because it was not legally or practically possible under Part 26 either to extinguish the claims of out of the money creditors for no consideration, or to cancel or compulsorily transfer the existing shares in the scheme company for no consideration. That was essentially for two reasons.

263. The first reason is that if it were actually intended to extinguish the legal claims of creditors or confiscate their shares, it would have been necessary to make them parties to the scheme. But under Part 26, such classes of creditors and/or shareholders would inevitably exercise their right of veto by voting against a scheme that simply extinguished their claims or confiscated their shares for nothing. They would instead hold out, either to be paid a small amount to compensate them for the enforced surrender of their rights, or (in the case of shareholders) to be allowed to retain some reduced proportion of the shares in the scheme company to reflect their importance to the continuation of the business.

264. When Parliament enacted Part 26A, it is clear that it intended to deal with this problem by introducing the possibility of cross-class cram down to remove the ability of a dissenting class of out of the money creditors or shareholders to veto a restructuring: see e.g. the *Government's Response* cited at [250] above, and paragraph 9 of the Explanatory Notes.

265. The second reason was that there is a long-standing line of authority that the central statutory concept of a "compromise or arrangement" in Part 26 does not include a confiscation or expropriation of rights without compensating advantage. That principle was most clearly expressed in NFU Development Trust Ltd [1972] 1 WLR 1548, where, after referring to dicta in Alabama, New Orleans, Texas and Pacific Junction Railway Co. [1891] 1 Ch 213 at 243, Brightman J held, at 1555C-D,

> "…Section 206(2) of the Companies Act 1948 [the equivalent of sections 895(1) and 901A(3)] is dealing with what is described as a "compromise or arrangement between a company and its creditors or a company and its members." The word "compromise" implies some element of accommodation on each side. It is not apt to describe total surrender. A claimant who abandons his claim is not compromising it. Similarly, I think that the word "arrangement" in this section implies some element of give and take. Confiscation is not my idea of an arrangement. A member whose rights are expropriated without any compensating advantage is not, in my view, having his rights rearranged in any legitimate sense of that expression."

266. In that regard, in contrast to the clear statement that Parliament intended to remove the right of veto and to enable dissenting creditors and shareholders to be bound to a restructuring plan under Part 26A, there is not the slightest indication anywhere in the legislative history or in the legislation itself that Parliament intended to introduce any power to sanction the extinction of creditor claims or the confiscation of shares for no consideration. Still less is there any indication that such expropriation should not only

be permitted, but should in some situations be mandatory, as Mr. Smith KC contended.

267. The introduction of a new statutory provision that permitted debts or shares to be extinguished or expropriated for no consideration would have been highly controversial. That is not only because of the very nature of confiscation or expropriation of legal rights and property, but also because, contrary to Mr. Smith KC's argument, it would have very different consequences for the affected creditors or shareholders than the existing two-stage process that I have described above.

268. Although the two-stage process resulted in out of the money creditors and shareholders being left behind in the shell of the old company, the pre-packaged sale of the business and assets would be carried out at a value determined by an administrator, who was an independent officer of the court, who owed duties to them, and whose decisions could be challenged in court. Moreover, and importantly, because the scheme would not have extinguished the debts owed to the creditors or deprived the shareholders of their shares, they would retain the necessary standing to pursue any remedies available to them in respect of the failure of the scheme company.

269. A power to extinguish claims and confiscate shares for no consideration under a Part 26A would potentially permit the plan company itself to continue to trade profitably, free from the burden of the debts which would be out of the money in the relevant alternative, and for the sole benefit of the in the money creditors. Unlike under the two-stage process, the creditors would also actually acquire ownership of the existing company, displacing the existing shareholders, for no consideration. That result would be achieved without the safeguard of any independent officeholder, and on the basis of valuation evidence put forward by experts instructed by the management of the plan company or by the creditors themselves. Importantly, and in contrast to the two-stage process, the out of the money creditors whose debts would be extinguished and the shareholders who would have been divested of their shares would also have no standing after the plan was sanctioned to take proceedings to complain about how the company had become insolvent in the first place.

270. In contrast to the clear statement about removing a right of veto for out of the money creditors or shareholders, none of these points are referred to or discussed in any way in any of the legislative history or the Explanatory Notes. There is simply no indication that Parliament intended to introduce such a new power of confiscation or expropriation. Quite the reverse. Parliament deliberately chose to use, as the central concept of Part 26A, precisely the same wording of "compromise or arrangement" as in Part 26. Although Parliament thereby doubtless intended parties to have the same flexibility in designing restructuring plans under Part 26A as they have in relation to schemes under Part 26, the use of the same expression confirms that Parliament did <u>not</u> intend to introduce a power to sanction a confiscation or expropriation of rights for no compensation under Part 26A.

271. That conclusion is the one reached by Professor Jennifer Payne in her influential work on *Schemes of Arrangement* (2nd ed., 2021) at page 319,

> "Crucially, the restructuring plan allows for the cramdown of whole classes of creditors and shareholders. The intention

> underpinning the Act is that shareholder equity can be transferred, diluted or extinguished as part of a court-approved restructuring plan. This aligns the restructuring plan with Chapter 11 but stands in contrast to cross-class cramdowns elsewhere in the world (such as Singapore) which are confined to creditor classes. It is therefore possible for the restructuring plan to include provisions for shareholders that will involve a reduction in their equity interest in the company and which, provided that these provisions involve more than just a confiscation of their interest and so still represent a 'compromise' of their rights, will be capable of being imposed on them under the cross-class cramdown procedure. It is notable that amongst the amendments to the Companies Act 2006 that the 2020 Act makes to facilitate the implementation of restructuring plans, there is included a disapplication of pre-emption rights. These powers are likely to be welcomed by those seeking to rescue financially distressed companies."
>
> (my emphasis)

272. That view also appears to be shared by many judges in the field. So, for example, in Gategroup at [141]-[142], Zacaroli J held that the same broad meaning is to be given to the expression "compromise or arrangement" in Part 26A as in Part 26, but that it does not permit a "mere surrender or forfeiture",

> "141. In the case of a scheme under Part 26, the requirement that there be a "compromise or arrangement" between the company and its creditors or a class of them has been given a broad interpretation. All that is required is some element of give and take, as opposed to mere surrender or forfeiture: see Re Savoy Hotel Limited [1981] Ch 351, per Nourse J at 359D–F; Re Lehman Brothers International (Europe) (in administration) [2018] EWHC 1980 (Ch); [2019] BCC 115, per Hildyard J at [64].
>
> 142. In Virgin Atlantic Airways [2020] EWHC 2191 (Ch); [2020] BCC 997, at [38], Trower J said that there was no reason to think that the phrase "compromise or arrangement" in section 901A was intended to be interpreted any differently. The same approach was adopted by Sir Alistair Norris in Re PizzaExpress Financing 2 plc [2020] EWHC 2873 (Ch) at [27] and by Trower J in DeepOcean at [43]. I agree."

273. In Smile Telecoms Holdings Ltd [2022] EWHC 740 (Ch), [2023] 1 BCLC 352, Mr. Smith KC advanced the same arguments that he now makes in the instant case to justify the extinction of out of the money creditor claims for no consideration: see [27]-[29]. On the facts, I did not need to decide the issue whether that was permissible under Part 26A, because I found that the creditors were being given a small payment under the plan in exchange for the extinction of their claims: see [30]-[31].

274. However, in Re Prezzo Investco Limited [2023] EWHC 1679 (Ch), a case in which there was no contrary argument on the point, Richard Smith J accepted Mr. Smith KC's argument. After referring briefly to the authorities (but not including Professor Payne's book) he stated, at [43],

> "43. The question arises whether the "give and take" requirement applies in relation to a Part 26A plan in respect of creditors who are "out of the money" in the Relevant Alternative, specifically whether an "arrangement" encompasses creditors not required to be given any valuable compensation for the release or cancellation of their rights under the plan, there being no "take" by those plan creditors. The point was considered in Smile Telecoms and GAS (convening hearing), albeit neither court ultimately needed to decide it. I accept the Company's submission that, in the context of a Part 26A restructuring plan, the concept of an "arrangement" cannot require some form of consideration to be provided to "out of the money" creditors. As Mr. Smith KC submitted, Part 26A provides for the sanction of a plan against the dissenting vote of a creditor class under the Court's "cram-down" jurisdiction in section 901G of the Act. Since the related statutory condition is that such a class should be "no worse off" than if the plan had not been sanctioned, if it would receive nothing in the alternative scenario, it follows that the Act envisages the compromise of their claims under a plan under which they would also receive nothing."

275. I do not agree with this reasoning. It does not follow from the introduction of the cross-class cram down power and the terms of Condition A that Parliament also intended to introduce a power to extinguish claims or confiscate shares for no consideration. There is a clear conceptual difference between the way that Part 26A gives effect to the stated intention of Parliament to remove the possibility that an out of the money class of creditors or members could exercise a right of veto over a restructuring (on the one hand), and what would be an unstated and unheralded introduction of a power to confiscate rights and property (on the other). The removal of a veto is achieved under Part 26A by providing in section 901C that the court can decline to summon a meeting of a class of creditors or shareholders who have no genuine economic interest in the company; and by giving the court the power under section 901G to sanction a plan under section 901F notwithstanding that a class meeting that has been held has not voted in favour by the required 75% majority in value. It does not follow that Parliament also intended that creditors or shareholders should be liable to confiscation of their rights and property for no consideration. Richard Smith J's reasoning simply does not engage with these points or with the significance of the legislature's use of the same words of "compromise or arrangement" in Part 26A that are used in Part 26.

276. It should also be reiterated that a decision under section 901C to exclude creditors or shareholders from voting on the basis that they have no genuine economic interest, or to determine that Condition A is satisfied under section 901G, is one that will be taken by the court on the balance of probabilities and on the basis of opinion evidence as to

what is most likely to occur if the plan is not sanctioned. That would not be a firm foundation upon which to base an expropriation of rights and property.

277. Further, although creditors or shareholders who are likely to be out of the money in the relevant alternative may not have the commercial leverage to contend that they should be paid very much in exchange for their rights, there is no indication in any of the legislative history or from the early Part 26A cases that requiring them to be paid a modest amount to compensate them for the extinction of their debts, or for the cancellation of their shares, would unduly impede the restructuring process.

278. For the reasons that I have given, I would reject this aspect of the appeal.

<u>The other grounds of appeal</u>

279. In light of the conclusion which I have reached in relation to the main grounds of appeal, it is not necessary to express any view on Grounds 7 and 8. These would involve a detailed review of the Judge's findings of fact and disputed issues of German law. They were not strongly relied upon by Mr. Smith KC at the hearing of the appeal, and we heard very little, if any, argument on them. I therefore propose to say no more about them either way.

<u>Conclusion</u>

280. I would allow the appeal and set aside the Judge's Order sanctioning the Plan. By adhering to a sequential payment of the different series of Notes, the Plan departed in a material respect and without justification, from the scheme of *pari passu* distribution of the assets of the Group to Noteholders that would have applied in the Relevant Alternative. In my judgment, the Judge erred in principle in his approach to the exercise of his discretion under sections 901F and 901G to impose the Plan on the dissenting class of 2029 Noteholders.

Sir Nicholas Patten:

281. I agree.

Lord Justice Nugee:

282. I also agree.

THE HIGH COURT

[2022] IEHC 157

Record No. 2022/25 COS

IN THE MATTER OF MALLINCKRODT PLC.
AND IN THE MATTER OF PART 10 OF THE COMPANIES ACT 2014

Judgment of Mr. Justice Quinn delivered the 22nd day of March 2022 (Section 509)

1. On 14 February 2022, the directors of Mallinckrodt plc. ('the Company') presented a petition to this court for the appointment of an examiner to that company pursuant to s. 509 of the Companies Act 2014 ("the Act").

2. On that same day, an application was made for certain directions regarding service and advertisement of the petition and the court fixed the hearing of the petition for Monday 28 February 2022.

3. Also on 14 February 2022, the court appointed Michael McAteer of Grant Thornton, Dublin, as interim examiner of the Company pending the hearing of the petition.

4. On 28 February 2022, the court heard the petition. Counsel and solicitors appeared on behalf of a number of creditors and claimants. Certain representations were made for the most part in support of the petition. A number of creditors indicated that they were neutral or reserving their positions in relation to the proceedings generally. No party opposed the petition. This court made an order appointing Mr. McAteer examiner of the company. This judgment summarises the reasons for the decision to appoint the examiner.

5. The petition was verified by an affidavit sworn on 9 February 2022 by Mr. Stephen Welch, Chief Transformation Officer of the Company.

6. The petition was accompanied by the following: -

   (a) As required by s. 511 of the Act, a report of an Independent Expert, in this case Mr. Mark Degnan, partner in Deloitte LLP, Ireland and;

   (b) As required by s. 512 (2) (b) of the Act, proposals for a scheme of arrangement in relation to the company's affairs.

7. In circumstances described in more detail below, on 12 October 2020 the company and many of its subsidiaries and affiliates ("the Group") filed a case pursuant to Chapter 11 of the US Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware. On 3 February 2022, the court (Judge John T. Dorsey) delivered a ruling finding that the Fourth Amended Plan of Reorganisation ("The Plan") satisfied the statutory requirements of the US Bankruptcy Code and overruling a number of objections made to the Plan, with one exception which is not directly relevant to this decision. The opinion of the court was delivered after hearings held over the course of 16 days in November 2021 and January 2022 having considered evidence and submissions made in opposition to the Plan.

8. It was a condition of the confirmation of the Plan and its implementation that a scheme of arrangement under Part 10 of the Act consistent with the Plan be confirmed by this Court and implemented.

9. The court has been informed that an appeal has been filed from the ruling of Judge Dorsey.

The Company and the Group

10. The Company is the parent company of a group which comprises approximately 104 companies directly or indirectly owned or controlled by the Company. These include companies incorporated and trading in Ireland, the UK, Luxembourg, Switzerland, Bermuda, France, the Netherlands, Germany, Canada, Poland, Spain, Sweden, Belgium, Italy, Australia, Japan, and a number of states with the USA including Delaware, Massachusetts, New Jersey, California, and New York.

11. The Group has its origins in a business established in 1867 in St. Louis, Missouri when two brothers founded G. Mallinckrodt & Company for the purpose of supplying local pharmacists with medications. The group designs, manufactures and sells medical and pharmaceutical products. The subsidiaries of the Company are divided into two principal business segments, namely the "Speciality Brands Division" and the "Speciality Generics Division".

12. The Speciality Brands Division focuses on autoimmune and rare diseases in speciality areas such as neurology, rheumatology, nephrology, pulmonology and ophthalmology, as well as immunotherapy and neonatal respiratory critical care therapies and non – opioid analgesics. Speciality brands are promoted directly to physicians, hospitals and surgical centres and the division has its own direct sales team of approximately 300 persons.

13. Branded products include Acthar, Inomax, Ofirmev, Therakos, and Amitiza. In the year 2020, this division was responsible for generating net sales exceeding $2 billion. The most valuable product in the specialty brands division was Acthar, which is a gel used for a variety of treatments including treatment of infantile spasms in infants and children under two years of age.

14. The Speciality Generics Division offers a portfolio of over 20 generic product families, most of which are controlled substances, including opioids, regulated by the Drug Enforcement Administration (DEA). This division operates one of the largest controlled substance pharmaceutical businesses in the United States and its products include generic products for pain management, substance abuse disorders and active pharmaceutical ingredients. It is the only producer of Acetaminophen/paracetamol in the North American and European regions. The division manufactures both finished dosage products and ingredients sold to and used by third parties to create finished products.

15. Unlike the brands division, the generics division does not promote its products and ingredients, including opioid, directly to physicians, hospitals, or others but instead sells finished products primarily to distributors and intra group.

16. For the year 2020, net revenues generated by the generics division were in excess of $689 million.

17. The research and development function represents a significant and valuable portion of the Group’s resources, consisting of highly qualified individuals holding PhD., Pharm. D. or Medical Doctor degrees.

18. The group functions in a highly regulated environment under oversight by governmental agencies and entities around the world which regulate the development, testing, manufacturing, distribution, marketing and selling of pharmaceuticals and medical devices. The agencies to which the group are subject include but are not limited to the following: -

    (a) In the United States, the FDA, the Department of Health and Human Services, the Drug Enforcement Administration, the Environmental Protection Agency, the Customs Service and State Boards of Pharmacy;

    (b) Health Canada;

    (c) The Medicines and Health Care Products Regulatory Agency in the United Kingdom;

    (d) The Health Products Regulatory Authority in Ireland;

    (e) The European Medicine Agency, and agencies established in Member States of the EU;

    (f) The Pharmaceuticals and Medical Devices Agency in Japan.

19. The group has production and research facilities located in Ireland, the United Kingdom, the United States and Japan.

20. The global enterprise headquarters of the group is situated at Blanchardstown Dublin, in a facility owned by a wholly – owned subsidiary Montjeu Limited. Another Irish incorporated subsidiary, Mallinckrodt Pharmaceuticals Ireland Limited (“MPIL”), owns the equipment, fixtures and fittings at that facility.

21. The facility at Blanchardstown also operates as a manufacturing and R&D facility for the speciality brands division which manufactures Acthar, and which conducts research and development.

22. The Company does not have any direct employees. The group as a whole employs approximately 2,795 persons worldwide. Of that number, 2,470 are employed in the United States and 325 outside of the United States, which includes 110 employees resident in Ireland.

23. MPIL provides day to day services to the Company, including audit, human resources, finance, legal, marketing and IT services. MPIL has a total of 103 employees, all of whom are resident in Ireland.

24. According to the petition and the affidavit of Mr. Welch, the Company is the "nerve centre" of the Group and is central to its worldwide operations. It is the principal body controlling the governance of the group. Through its board of directors, it is responsible for making or approving strategic decisions and actions taken by the business of the Group. It is the vehicle through which all investor and shareholder relations are conducted. The activities of the company range from operational and administrative matters through to strategic direction, finance and, most importantly in the context of the events of recent years, restructuring discussions and negotiations with key stakeholders. All these activities are undertaken under the supervision of the Company's directors and senior management team.

25. The board has a number of standing committees through which these matters are dealt with including an audit committee, a governance and compliance committee, human resources and compensation committee, and a science and technology committee. In addition, there was established a strategic review committee, focused on the strategic options in the context of the group's liabilities generally, including direct and indirect financial obligations, and its litigation and other contingent liabilities.

Financial indebtedness of the company

26. The petition describes the financial indebtedness of the Group in excess of $5.1 billion. Approximately $3.5bn of this debt is secured and $1.695bn is unsecured.

27. The Company is not the principal borrower or issuer of notes, but has guaranteed all of the financial indebtedness except for sums of circa $15 million due under certain "legacy debentures", issued by subsidiaries.

28. Much of the debt is long term debt, with the exception of a revolving credit facility of $900m. However, amounts due in respect of certain senior notes include a sum of $617 million due in August 2022 and $529m due in October 2023. A term loan of $1.4bn is due for repayment in September 2024.

29. Whilst the Group had been "servicing" its debt in the ordinary course, with the benefit from time to time of certain extensions and restructurings, the combined effects of debt and the litigation described below were the drivers for a restructuring in recent years and the Chapter 11 filing in October 2020.

30. The commencement of the Chapter 11 proceedings in Delaware had the effect that all of the obligations of the Company as guarantor were immediately and automatically accelerated and became due and owing as at the Chapter 11 filing date. However, any enforcement proceedings in respect of debt stand postponed as a result of the automatic stay conferred by the Chapter 11 proceedings.

Litigation

31. The Group, including the Company, is from time to time subject to legal proceedings and claims including government investigations, environmental matters, product liability matters, patent infringement claims, personal injury, employment disputes, contractual disputes and other commercial disputes. This is not unusual for a global business of the

kind owned and operated by the Group. In circumstances where the business of the group has been generating revenues exceeding $2.7 billion per annum, in the ordinary course the Group has sufficient revenues and resources to manage the risk of such litigation and at the same time service financial indebtedness and generate profits. However, in the period of three years prior to the Chapter 11 filing, a number of companies in the group have been named as defendants in significant numbers of what are described as "out of the ordinary" legal proceedings commenced in the United States.

32. There are broadly two categories of such litigation namely as follows: -

(i) The opioid litigation;

(ii) The Acthar litigation.

Opioid Litigation

33. In the opioid litigation, claims are made by multiple states, counties, a territory, and other governmental persons or entities, private plaintiffs and other industry participants. The claims relate to sales, marketing, distribution, reimbursement, prescribing and dispensing of prescription opioid medications. In excess of 3,000 such cases are pending against the Company. The vast majority of claims, namely 2,614, are cases filed by counties and cities in the United States, various native american tribes and other US – Government related persons or entities. Claims have been filed also by hospitals, health systems, unions, health and welfare funds, and by attorneys general for numerous individual states. The claims are based on alleged misrepresentations and/or omissions in connection with the sale and marketing of prescription opioid medications. It is claimed that the practices of the Group led to increases in the sales of prescription opioid products and that "*the failure to take and maintain effective steps to prevent the diversion of medications from their intended lawful usage was a substantial cause of the opioid crisis which still prevails in the US."*

34. Between 2017 and the filing date the Group incurred in excess of $100 million defending opioid litigation. Prior to the filing the Group was incurring legal expenses alone in excess of $1 million per week defending opioid litigation.

35. The petitioners say that they have meritorious defences to these claims but the extreme cost risk and the uncertainty of litigating thousands of such cases across the United States caused the group to seek bankruptcy protection in order to address "*runaway costs, eliminate the uncertainty associated with those cases, and prevent a proverbial race to the courthouse that would come at the expense of all the debtor's stakeholders".*

The Acthar litigation

36. These proceedings have their roots initially in certain disputes between one of the companies in the group, Mallinckrodt ARD LLC, incorporated in the state of California, and the Centre for Medicare and Medicaid Services of the United States Department of Health and Human Services. The dispute concerns pricing and rebate claims. Certain adverse judgments have already been made against Group companies. Claims are made by federal and State authorities, by individuals persons and other industry participants

alleging anti-competitive practices, violation of consumer protection laws, and unjust enrichment.

37. One element of the Acthar litigation is sounded in certain claims under the False Claims Act, again referable to pricing arrangements. It is said that due to provisions in the False Claims Act for treble punitive damages, certain companies in the group are exposed to a potential liability of more than $1.9 billion.

38. Again, the petitioners say that the Group has meritorious defences to the claims, but that the scale of the litigation has become untenable and triggered the need to file for Chapter 11 protection and for a full restructuring.

Restructuring

39. During 2019 and into 2020 the Group engaged with lenders, noteholders and representatives of litigants with a view to reaching a consensus to facilitate a resolution of all the disputes faced by the group as a result of the litigation and, in parallel, to restructure its financial indebtedness.

40. Significant settlements were achieved during the course of 2020 with representatives of opioid claimants and Acthar related plaintiffs. These settlements involved economic provisions, through funded trusts which would assume liability for the claims and provide for settlements over a stipulated number of years and what are described as "*go forward operational parameters for the conduct of the company's business with a view to reducing the risk going forward arising from the events the subject of the litigation".*

41. In February 2020 the first opioid settlement was concluded with representatives of plaintiffs which provided for the establishment of a trust comprising assets of $1.6 billion and the provision of warrants for 20% of the equity in the company.

42. Later iterations of the opioid settlement provided for the enhancement of the amount of that trust to the level of $1.725 billion and the addition of other assets.

43. In September 2020, a settlement was concluded in principle with the Department of Justice which it was said would resolve most Acthar related claims against the group.

44. In tandem with these discussions negotiations were ongoing with the company's financial creditors.

45. Ultimately, a Restructuring Support Agreement was negotiated. The initial participants in this were the companies, the holders of substantial majorities of noteholders, 50 United States Attorneys General, and the Executive Committee representing opioid plaintiffs. After the filing for Chapter 11, further parties joined in the Restructuring Support Agreement including numerous multi – state governmental entities which are plaintiffs in the opioid litigation, and term lenders to the Group.

46. The Restructuring Agreement envisaged implementation through a combination of the confirmation and consummation of a Chapter 11 plan and an Irish law scheme of

arrangement, based on the Chapter 11 Plan, which would be proposed by an examiner appointed to the Company.

47. The essence of the opioid settlement as refined is the establishment of a series of trusts for the benefit of different categories of opioid claimants, funded with $1.725 billion in structured cash payments, contributions from the Group's interests in certain claims against third parties, and warrants to acquire 19.99% of the shareholding of the Company. Opioid claims will be processed in the relevant trusts and the rules of the trusts will govern the admission of claims and distributions of the assets established in those trusts.

48. The settlement of what were referred to as the federal/state Acthar claims is based on a payment of c. $260 million to the Department of Justice over a period of seven years in return for releases by the relevant agencies of their Acthar related claims.

49. The Chapter 11 Plan itself is complex and treats 26 classes and subclasses of creditors.

50. As regards financial indebtedness, the Plan envisages no or limited impairment of certain categories of secured creditors, and the restatement of certain unsecured facilities and notes. A principal feature is that the existing share capital of the Company would be cancelled and 100% of the new shareholding will be issued to the holders of certain guaranteed unsecured notes in a form of debt for equity swap, subject to the provisions for the opioid trusts to acquire warrants representing 19.99% of the restructured share capital of the Company.

51. It is not necessary in this judgment to describe the details of the restructuring plan, save to note that it was a condition of the confirmation of the Plan that this Court make an order pursuant to s. 541 of the Act confirming the draft scheme of arrangement appended to the petition "without material modification" and that such scheme should become effective in accordance with its terms.

52. It is acknowledged by the petitioners that any examiner appointed to the Company would be required to form an independent view of the draft scheme of arrangement or any other proposals he may formulate with respect to the Company. This is of central importance because the Act confers on an examiner appointed by this Court the duty of formulating proposals for a scheme of arrangement and making his recommendation to this Court in respect of them.

53. Because the Company is registered in Ireland, it is necessary to invoke Part 10 of the Act to give effect to the proposed debt for equity swap in favour of the guaranteed unsecured notes claims and to effect the necessary ancillary steps for that process. These steps include the cancellation of existing equity and extinguishment of equity interests including unexercised equity interests, the issuance of new equity and the amendment of the company's constitution. Whilst these steps form a key part of the restructuring, it is said that they cannot be implemented solely through the United States Chapter 11 Plan.

54. It is important to emphasise that nothing I say in this judgment is an endorsement or approval of the terms of the Chapter 11 Plan or of the draft scheme of arrangement annexed to the petition. The function of the court on this hearing is confined to the question of the appointment of the examiner. The assessment of the merits of a proposed scheme of arrangement will be a matter for any hearing to confirm such proposals pursuant to s. 541 of the Act.

Representations

55. Counsel for Deutsche Bank Trust Company Americas, the indenture trustee for unsecured guaranteed noteholders stated that his client was neutral on the petition.

56. Counsel for a group of first lien term noteholders supported the petition.

57. Counsel for an ad hoc group of unsecured guaranteed noteholders supported the petition.

58. Counsel for the Revenue Commissioners confirmed that Revenue are not a creditor of the Company, but applied to be a notice party in the proceedings having regard to the trading status of the Company and certain subsidiaries in the State. Revenue had no objection to the petition.

59. Counsel for the US Department of Justice, described as the "settled federal state Acthar claims" adopted a neutral position.

60. Solicitor for the official Committee of Opioid Related Claimants and their Future Claims representative said that her clients support the petition and are anxious that the restructuring proceed and be implemented as early as possible.

61. A Solicitor appeared for the Governmental Plaintiffs Ad Hoc Committee, which is a group of US States and a Plaintiffs Executive Committee and supported the petition.

62. A Solicitor for the Official Committee of Unsecured Creditors supported the petition.

63. A Solicitor for two institutions (Dearfield Partners LP and Dearfield Private LP) holding the majority of the second lien notes supported the petition.

Avon Holdings I LLC and Attestor Limited

64. Counsel for Avon and Attestor indicated that his clients, being non-governmental entities, had made a number of claims against companies in the Group arising from the sale of Acthar gel. The claims are based on allegations of anti-competitive, illegal and fraudulent activity, sale of products at anticompetitively inflated prices, deceptive trade practices, state insurance fraud, tortious interference and unjust enrichment. The quantum of their pre-petition claims is $6.2bn. The quantum of their claims in respect of the period after the Chapter 11 filing, referred to as "administrative claims", is $265m.

65. Under the Plan, admitted administrative claims are paid in full. In the Chapter 11 proceedings the Hon. Judge John T. Dorsey has made rulings against the Avon proofs of debt and their administrative claims. These rulings are under appeal. Counsel submitted that when it comes to consideration of a scheme of arrangement under Part 10, such a

scheme should reflect or recognise the possibility that these appeals would be successful. He said that if proposals for a scheme of arrangement under Part 10 of the Act were presented, which did not provide for the eventuality of admission in respect of his claims in the event of the appeal from Judge Dorsey's decision succeeding, he would object to such proposals.

66. Counsel acknowledged that the threshold for the appointment of an examiner is met on the petition and supporting evidence before this court. Therefore he was not opposed to appointment of an examiner. However, he wished the petitioners, the examiner and the court to note that he may have fundamental objections to make to proposals for a scheme of arrangement under the Act if it reflects the treatment of his client in the manner upheld by Judge Dorsey.

Jurisdiction and centre of main interests

67. Section 509 of the Act provides: -

"(1) Subject to subsection (2), where it appears to the court that—

(a) a company is, or is likely to be, unable to pay its debts,

(b) no resolution subsists for the winding up of the company, and

(c) no order has been made for the winding up of the company,

the court may, on application by petition presented, appoint an examiner to the company for the purpose of examining the state of the company's affairs and performing such functions in relation to the company as may be conferred by or under this Part.

(2) The court shall not make an order under this section unless it is satisfied that there is a reasonable prospect of the survival of the company and the whole or any part of its undertaking as a going concern.

(3) For the purposes of this section, a company is unable to pay its debts if—

(a) it is unable to pay its debts as they fall due,

(b) the value of its assets is less than the amount of its liabilities, taking into account its contingent and prospective liabilities, or

(c) the circumstances set out in section 570 (a), (b) or (c) (deemed inability to pay debts by reason of failure to meet a statutory demand or to satisfy the amount of any judgment, decree or order of any court in favour of a creditor) are applicable to the company.

(4) In deciding whether to make an order under this section, the court may also have regard to whether the company has sought from its creditors significant extensions

of time for the payment of its debts, from which it could reasonably be inferred that the company was likely to be unable to pay its debts".

68. The company is incorporated and registered in Ireland under the Act and is a company for the purposes of s. 509.

69. S. 1002 of the Act extends to a public limited company the provisions of Part 10 relating to examinership.

70. Article 3.1 of Council Regulation EC No. 2015/848 on Insolvency Proceedings (the 'Regulation') provides that the place of the registered office of a company is presumed to be its centre of main interests in the absence of proof to the contrary. That presumption applies to the Company, and no evidence to the contrary has been proffered.

71. Having regard to the extensive international interests of the company Mr. Welch has given evidence which demonstrates that since July 2020 the centre of main interests has been located in Ireland. In 2015 the company had located certain principal executive functions to the United Kingdom. This was reversed in 2020. The evidence is that since that time its principal activities have been conducted in Ireland. In particular, in August 2020 the Company entered into a services agreement with MPIL, its Irish subsidiary, whose employees perform much of the administration of the Company's affairs.

72. Having regard to the difficulty for directors in travelling to Ireland since March 2020 board meetings of the Company have taken place virtually with directors dialling in from the United States and other locations outside of Ireland. The evidence is that were it not for the effects of the Covid-19 pandemic the board would have travelled to Ireland for all meetings held since July 2020. The petitioners say that, up to 31st January, 2022 at least, the Irish Revenue have disregarded, for Irish corporation tax purposes, the fact of the presence of directors outside of Ireland when they would have been present in Ireland but for the pandemic. No meetings of the board have been held in the United Kingdom since February 2020.

73. Having regard to the presumption contained in Article 3.1 of the Regulation and the evidence of Mr. Welch I find that the company has its centre of main interests in the State and accordingly these are main proceedings for the purpose of the Regulation.

Parallel proceedings

74. In *Re Sean Dunne (A Bankrupt)* [2015] IESC 42 the debtor was adjudicated a bankrupt in the US and a creditor later petitioned for his bankruptcy in Ireland. The Supreme Court affirmed the jurisdiction of this Court to open bankruptcy proceedings where the statutory preconditions in the Bankruptcy Act 1988 were met, and notwithstanding the extant proceedings in the US concerning the debtor. Although that decision concerned the bankruptcy of a natural person I am satisfied, taking into account all the information before the court as to the objectives of the proceedings in this case, that there is no reason in principle why the "Dunne" approach should not be followed in an appropriate company case.

75. There is also precedent for this court appointing an examiner and confirming a scheme of arrangement in parallel with Chapter 11 proceedings (see *Re Weatherford International plc* (ex tempore, 12 December 2019) [Record No. 2019/348 COS])

76. In reaching this conclusion I am also informed by the consideration that certain of the key features of the proposed restructuring cannot be implemented through the Chapter 11 plan, notably the provisions concerning the cancellation of shares, the issue of new shares and warrants and amendments to the constitution of the Company.

Section 509(1)(a)

77. Section 509(1) requires that the company "is or is likely to be, unable to pay its debts".

78. The financial status of the company, both on a balance sheet basis and on a cash flow basis, is detailed extensively in the petition, the verifying affidavit of Mr. Welch and in the report of the Independent Expert. Key features of this information may be summarised as follows: -

(1) The Company has guaranteed substantially all of the financial indebtedness of the Group standing at almost $5.2bn. The guarantee obligations have crystallised as a consequence of the Chapter 11 filing and are therefore due and owing by the company, subject only to the Chapter 11 moratorium.

(2) The balance sheet of the company itself, on a standalone basis without consolidation by reference to the Group, shows that as at the period ended 31 December, 2021, even on a going concern basis, the company had a net asset deficiency of $162.2m.

79. It is clear therefore that the company meets the test of being "unable to pay its debts" within the meaning of s.509(1)(a).

Reasonable prospect of survival

80. Section 509(2) provides that the court shall not appoint an examiner "unless it is satisfied that there is a reasonable prospect of the survival of the company and the whole or any part of its undertaking as a going concern".

81. The first question which this raises is the identification of the "undertaking" of the company. It is well established that a pure holding company which does not itself perform any undertaking, cannot demonstrate that it operates a going concern which is capable of survival as such. (See *Re Tivway Limited* [2010] 3 IR 49, *Re Vantive Holdings (No. 2)* [2009] IEHC 409 and *Re Tuskar Resources* [2001] IR 668).

82. The uncontroverted evidence of Mr. Welch is that the Company is central to the worldwide operations of the Group. He describes its operational role, its responsibility in terms of strategic direction of the group, its role in relation to shareholder and investor engagement and communications, and its central role regarding the implementation and stewardship of the restructuring of the Group, both on its own behalf and on behalf of the group as a whole.

83. Mr. Welch refers to the company's direct role in communications and commercial negotiations with stakeholders, retention and instruction of advisers, and representation of the company and the group before the US Bankruptcy Court. He says that the business assets and affairs of the group are all managed under the direction of the board of directors of the company. Mr. Welch has detailed the frequency of meetings of the board, both in person and telephonically, and the participation of its members in meetings of the full board and of the relevant standing and *ad hoc* committees.

84. I am satisfied from the un-contradicted evidence of Mr. Welch, and the contents of the Independent Expert's report on the subject, that the company has an undertaking in its own right and it is therefore appropriate to assess whether the company and all or part of its undertaking has a reasonable prospect of survival as a going concern.

Report of the Independent Expert

85. The report ("IER") of the Independent Expert Mr. Degnam prepared on 9 February, 2022 accompanies the petition as required by s.511 of the Act.

86. The IER examines the trading history and background to the filing for examinership and the restructuring measures which have been undertaken prior to the presentation of the petition. He has examined financial projections prepared by the petitioners for each of the years to December 2025. These illustrate a steady albeit moderate growth in net sales and consistent gross profit figures over that period. The expert says that he has examined the assumptions around the growth and turnover figures which are contained in the projections, by reference to each of the market sectors in which the Group operates. He has identified and taken into account certain challenges which will continue to face the company including the uncertain rate of recovery from the Covid-19 pandemic, increased competition across all of the group's product lines and the necessary costs of maintaining strategic long term investment in research and development.

87. The expert refers to the provisions of the Chapter 11 plan relating not only to the financial settlement with lenders, note holders and with opioid related and other litigation claimants, but also the requirement that the company and the Group comply in the future with what is referred to as the "opioid operating injunction order". This is an order with respect to the future operation of the group's opioid business, which will bind not only the group itself but any subsequent purchaser of the group's opioid business. The expert states that his opinion as to whether the company has a reasonable prospect of survival is based on the historic performance and future projections of the group post restructuring and his discussions with management in respect of each of these matters and an in depth review of the plan of reorganisation which has been formulated. He says that the trading and cash flow position of the group over the last three years has been "materially and negatively impacted by litigation and claims relating to opioid, Acthar and other matters with net losses (including extraordinary, one time charges) of nearly $2 billion incurred during this period". The expert continues "without settlement or resolution, future liabilities relating to these claims which cannot be reliably quantified are broadly estimated to be in the region of billions or trillions".

88. The expert notes that the Covid-19 pandemic continues to present risks and challenges and uncertainties but he notes that the group has continued to manufacture supply and deliver its products without major interruptions and that it is engaged in a number of initiatives to support the fight against Covid-19.

89. Having analysed all of these matters the independent expert expresses the opinion that the company and its undertaking has a reasonable prospect of survival as a going concern.

90. The expert then identifies the essential conditions which he believes would need to be satisfied before the company had its undertaking to survive as a growing concern as follows:

(a) The appointment of an examiner to the company pursuant to Part 10 of the Act.

(b) The formulation and confirmation by the High Court of Ireland of a scheme of arrangement with respect to the company that is materially consistent with the terms of the Chapter 11 plan, and the satisfaction or waiver of all other conditions precedent specified in the Chapter 11 plan and

(c) The consummation of the Chapter 11 plan and the transactions contemplated thereby.

91. In his conclusion the expert states as follows.

> *"8.17 A liquidation of the company would result in a significant deficiency in the region of $5.239 billion. When comparing the estimated outcome position, the reorganised debtors which emerge as a going concern, which is one of the key assumptions in which the valuation analysis is based, is more advantageous to the creditors of the company as a whole."*

The expert continues:

> *"The members of the company shall receive no distribution on account of the existing issued share capital of the company prior to the effective date under the plan. On the effective date the existing shares and all and any rights attaching or relating thereto will be cancelled. Notwithstanding that the rights of the members and their respective shareholders are cancelled under the plan I have concluded that based on the above information and the proposals put forward by management, an attempt to continue the whole or part of the undertaking would likely be more advantageous to the creditors as a whole than a winding up of the company."*

92. The report of the Independent Expert is a comprehensive analysis of the Company's financial and trading history and its current status and prospects. I accept it as evidence that the company and all or part of its undertaking has a reasonable prospect of survival as a going concern.

93. The conditions identified by the Independent Expert for such survival relate principally to the processes envisaged by this petition including the formulation and confirmation of a scheme of arrangement and consummation of the Chapter 11 plan *"and the transactions thereby contemplated."*

94. The evidence at the date of the hearing of this petition is that the bankruptcy court in Delaware has approved the plan. Whilst certain elements of that court's ruling remain under appeal, the evidence of the status of those proceedings and of the widespread support for the plan before that court is sufficient to establish that there is no reason to believe at this time that the conditions identified by the Independent Expert cannot be complied with.

95. Two further aspects of the information before the court are of assistance in arriving at this conclusion which I shall refer to briefly. These are the judgment of the bankruptcy court in the state of Delaware, and the report of the interim examiner.

Opinion of the Honourable Judge John T. Dorsey 3 February, 2022

96. In the context of the assessment of whether the company and all or part of its undertaking has a reasonable prospect of survival, it is noteworthy that the Opinion was delivered following a consideration of evidence and submissions at a lengthy contested hearing. A number of objections had been raised regarding such matters as classification of claims releases and exculpation provisions, the application of the "best interests of creditors test" test and the "unfair discrimination" test, a proposal for a management incentive plan, and, importantly for this court's decision under s.509, a question regarding the feasibility of the Group.

97. S. 1129 (a) 11 of the US Bankruptcy Code provides that confirmation of a plan must not be "likely to be followed by the liquidation, or the need for further financial reorganisation of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganisation is proposed in the plan". This is commonly referred to as the "feasibility" requirement. One creditor objected to the plan's feasibility. Judge Dorsey analysed the evidence of the company itself, by reference to financial projections, EBITDA projections and a sensitivity analysis performed on the projections. He accepted the evidence and found that the plan was unlikely to be followed by liquidation or a need for further reorganisation. It is not necessary for me to compare or contrast the "feasibility" test with the requirement in s. 509 (2) that there be established a "reasonable prospect of survival". Nonetheless I am informed by the findings of that court, on a contested hearing, regarding feasibility which are consistent with the evidence before me that the Company has a reasonable prospect of survival as a going concern.

The interim examiner

98. On 14 February, 2014 Mr. McAteer of Grant Thornton was appointed interim examiner. Before the court on the hearing of the petition was an affidavit of the interim examiner sworn 24 February, 2022 to which there was exhibited his interim examiner's report.

99. It is well established that the evidence of the person proposed to be appointed examiner cannot be regarded as conclusive for a decision to appoint him. That does not preclude

the court from considering his report, made to the court as on officer appointed by the court. In particular, in this case it is clear from the report of the interim examiner that he recognises, as he must, that if appointed his function under the Act will be to act independently in formulating proposals for a scheme of arrangement in accordance with Part 10.

100. The interim examiner states his opinion that the company has a reasonable prospect of survival. Having noted that the chapter 11 plan confirmation ruling is under appeal he makes the following comment: "*In my view the Chapter 11 Plan formed a viable basis for formulating a scheme of arrangement which would:*

- *Restructure the company's liabilities in a sustainable way;*
- *Give the company reasonable prospect of trading on a sustainable basis in the future;*
- *Treat creditors fairly;*
- *Produce a better outcome for creditors, employees and other stakeholders than insolvency, and*
- *satisfy the requirements of Part 10 of the Companies Act, 2014."*

101. The interim examiner states that he does not believe it would be in the interests of the creditors, employees or other interested stakeholders for him to formulate new proposals which were materially different to or inconsistent with those approved by the US court and he does not believe that such an approach would be viable. He concludes by stating *"I expect that the scheme of arrangement will be very similar to the draft scheme exhibited by the company to the petition and will be consistent with and give effect to the Chapter 11 plan".*

102. Counsel for Avon and Attestor expressed concern at the above statement, having regard to the potential objections it identified regarding the treatment of its claims in the Chapter 11 Plan (see paragraph 65). However, counsel acknowledged that these issues are not for determining on the hearing of the petition.

103. The core function of an examiner appointed by this court is to perform his own independent examination of the affairs of the company, where possible to formulate proposals for a compromise or a scheme of arrangement for consideration by the members and creditors and ultimately by this court and to make his recommendations to the court.

104. Although it is clear from the petition, the affidavit of Mr. Welch and the report of the independent expert that the fundamentals of a restructuring plan for the Company and the Group are at an advanced stage, it remains the duty of the examiner to perform his functions independently in pursuance of the objectives of Part 10. I find the report of the

interim examiner of assistance and it is consistent with the evidence before the court as to the prospects for the survival of company.

Conclusion

105. The uncontradicted evidence is that a successful examinership and successful implementation of a scheme of arrangement, in combination with implementation of the Chapter 11 plan are likely to produce a better outcome for creditors of the Company and the Group than the most likely alternative of a winding up of the Company.

106. The majority of impaired classes of claimants in the Chapter 11 process voted in favour of the Plan and it is informative that the US Bankruptcy Court has sanctioned the Plan as fair and equitable, not unfairly discriminatory and feasible. A proposal for a scheme of arrangement will still require to be tested in this court by reference to the established principles of Irish law, but it is informative that the Plan has been so widely supported in the Chapter 11 proceedings. None of the creditors or interested parties who voted against confirmation of the plan or who objected at the hearing before Judge Dorsey have objected to the appointment of an examiner.

107. The evidence is that a successful outcome will safeguard the employment of the Groups 2,890 employees including the 116 who are resident in the State of whom 110 are employed by Irish subsidiaries of the company.

108. Although s. 512(2)(b) of the Act requires that a petition be accompanied by any proposals for a compromise or scheme of arrangement which have been prepared, it is relatively unusual for proposals in such an advanced form to accompany a petition. Nonetheless there is precedent for such good practice, notably in *Re Eircom Limited* (2012), where the restructuring had been advanced even before the presentation of a petition to the point of voting by certain classes, and securing "lock in" and voting agreements with significant participants.

109. I am satisfied that the Company is unable to pay its debts, that it and all or part of its undertaking has a reasonable prospect of survival as a going concern, and that the appointment of an examiner and the formulation of appropriate proposals for a scheme of arrangement will facilitate such survival. I have therefore confirmed the appointment of the examiner.

THE HIGH COURT

COURT 16

[2022] IEHC 270

RECORD NO. 2022/25COS

IN THE MATTER OF MALLINCKRODT PUBLIC LIMITED COMPANY

AND

IN THE MATTER OF PART 10 OF THE COMPANIES ACT 2014

EX TEMPORE JUDGMENT DELIVERED BY MR. JUSTICE QUINN ON WEDNESDAY, 27TH APRIL 2022

APPEARANCES

FOR THE DIRECTORS OF MALLINCKRODT PLC:

MR. BRIAN KENNEDY SC , MR. STEPHEN WALSH BL

INSTRUCTED BY: ARTHUR COX SOLICITORS

FOR MR. MICHAEL McATEER: MS. KELLEY SMITH SC, MR. JOHN LAVELLE BL

INSTRUCTED BY: A&L GOODBODY SOLICITORS

FOR THE FIRST LIEN AGENT: MS. BARBARA GALVIN, EVERSHEDS

FOR THE GOVERNMENTAL PLAINTIFF

AD HOC COMMITTEE: MR. RUAIRI RYNN, WILLIAM FRY

FOR THE AD HOC FIRST LIEN

LENDER GROUP: MR. MICHAEL MURPHY, McCANN FITZGERALD

FOR AD HOC COMMITTEE OF GUARANTEED UNSECURED NOTEHOLDERS:MR. DECLAN MURPHY BL

INSTRUCTED BY: MATHESON

FOR AVON HOLDINGS AND ATTESTOR: MR. LYNDON MacCANN SC

INSTRUCTED BY: DENTONS IRELAND

FOR THE REVENUE COMMISSIONERS: MR. CUNNINGHAM

INSTRUCTED BY: REVENUE SOLICITORS

FOR THE US DEPT. OF JUSTICE: MR. NIALL Ó hUIGINN BL

INSTRUCTED BY: WALKERS SOLICITORS

FOR THE SECOND LIEN NOTEHOLDERS: MR. GAVIN SIMONS, AMOSS

FOR THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS: MR. ROBIN McDONNELL, MAPLES

FOR THE OFFICIAL COMMITTEE OF OPIOID RELATED CREDITORS: MS. JUDITH RIORDAN, MASON HAYES & CURRAN

FOR THE GUARANTEED UNSECURED NOTES INDENTURE TRUSTEE: MR. CIARAN LEWIS SC

INSTRUCTED BY: DILLON EUSTACE

PROCEEDINGS COMMENCED ON WEDNESDAY, 27TH APRIL 2022, AS FOLLOWS

MR. JUSTICE QUINN DELIVERED JUDGMENT EX TEMPORE, AS FOLLOWS

1. MR. JUSTICE QUINN: This is my judgment on the application of the Examiner, Mr. McAteer, pursuant to section 541(3) of the Companies Act 2014 for confirmation of his proposals for a scheme of arrangement between Mallinckrodt plc and its members and creditors.

2. On the 14th of February, the directors of the Company petitioned for the appointment of an examiner and the Court appointed Mr. McAteer Interim Examiner. The petition was

heard on the 28th of February and, on that occasion, the appointment of Mr. McAteer was confirmed.

3. On the 22nd of March, I delivered a reserved judgment summarising the reasons why the Court was satisfied to appoint the Examiner. No party had objected to the appointment of the Examiner or to the jurisdiction of the Court in respect of these proceedings. I do not propose to repeat any of the detail contained in that judgment, but in it I considered the financial, legal and trading background to the presentation of the petition, and I referred to the proceedings in relation to the Company and approximately 60 of its subsidiaries which had been commenced in the Delaware Bankruptcy Court pursuant to Chapter 11 of the US Bankruptcy Court on the 12th of October 2020. Those proceedings related not only to the Company, which is the subject of this application, but also its subsidiaries trading in several jurisdictions.

4. I noted in that judgment that on the 3rd of February 2022, Mr. Justice Dorsey had delivered his ruling, finding that the Plan before him, which was the Fourth Amended Plan of Reorganisation for the Company and its subsidiaries, satisfied the requirements of the US Bankruptcy Code. He made that finding at the conclusion of a hearing which lasted for 16 days, at which witnesses gave evidence and experts gave evidence, and I will be referring in a little more detail to Judge Dorsey's findings later.

5. On the 2nd of March, the Bankruptcy Court issued the order confirming the Plan, with what were described in that order as "Technical Modifications" from the Fourth Amended Plan, and the order was given immediate effect.

6. A number of appeals are pending from the rulings of Judge Dorsey, but a stay on orders that he made has been refused. An appeal was brought against his refusal of a stay in relation to the Confirmation Order and that appeal in relation to the refusal of the stay has been refused by the District Court in Delaware.

7. The Plan before Judge Dorsey identified no less than 23 conditions precedent to the Effective Date of the Plan, and I will be returning to those conditions in more detail. The important point at the outset to note is Condition 11, which is to the effect that, as a precondition to the coming into effect of the Plan, that the High Court of Ireland should make a confirmation order in respect of a scheme proposed by an examiner pursuant to Part 10 of the Companies Act 2014, such scheme to be based on and consistent, in all respects, with the Plan and substantially in the form of a draft scheme of arrangement, which was included in the Plan Supplement and was annexed to the petition before this Court for the appointment of an examiner. It was also a condition that that scheme should have become effective in accordance with its terms or would become effective concurrently with the effectiveness of the Plan.

8. Correspondingly, the Examiner's proposals for a scheme now before this Court provide at section 5 that the Scheme will take effect and become binding on the effective Date of the Plan. The Effective Date for the scheme is defined in the proposals before me as the time

and date when all of the conditions precedent specified in Article VIII of the Plan have been satisfied or waived.

The Act

9. The application is made pursuant to section 541 of the Act and I have been referred to the key elements of that section, which are that the jurisdiction of this Court to confirm a proposal for a scheme of arrangement arises where

> *"...at least one class of creditors whose interests or claims would be impaired by implementation of the proposals has accepted the proposals, and.*
>
> *(b) the court is satisfied that—*
>
> *(i) the proposals are fair and equitable in relation to any class of members or creditors that has not accepted the proposals and whose interests or claims would be impaired by implementation, and*
>
> *(ii) the proposals are not unfairly prejudicial to the interests of any interested party."*

10. Section 543 governs objections to confirmation by the Court of proposals. It identifies grounds such as material irregularity or acceptance of proposals by improper means and, importantly, a ground, namely, that "the proposals unfairly prejudice the interests of the objector."

11. Section 543 has not been invoked by any party in the hearing before me. Nonetheless, the onus is on the Examiner to satisfy the conditions identified in section 541(3), namely, that the Scheme is fair and equitable and not unfairly prejudicial to the interests of any party.

Representation

12. Before I turn to the substance of the proposals, it is relevant to note that of those who participated at the confirmation hearing yesterday, only one party objected to or opposed confirmation of the proposals. That was Avon Holdings LLC and Attestor Limited, which are related companies represented by Mr. MacCann S.C.. I refer to these parties as Acthar Claimants. One party expressed neutrality, namely the Guaranteed Unsecured Note Indenture Trustee.

13. All of the other parties who participated indicated their support for confirmation of the Scheme. They included the Company, the Revenue Commissioners, the holders of Guaranteed Unsecured Notes, the holders of First Lien Term Loans, the First Lien Collateral Agent, the Second Lien Senior Secured Notes, the Official Committee of Unsecured Creditors, the Official Committee of Opioid Related Claimants and the Future Claims Representative. Counsel for the Federal Acthar Claimants indicated that it was not opposing the confirmation of the Scheme.

14. Mr. Rynn, solicitor, appeared on behalf of the Governmental Plaintiff Ad Hoc Committee. This Committee comprises seven US states and the Plaintiffs' Executive Committee. This party had on previous occasions in this Court indicated its support for confirmation of the

proposals. It has at all times indicated its support for the Chapter 11 Plan, for the proposals before this Court and for the restructuring as a whole, and it did not indicate in the hearing yesterday that it was withdrawing this support. Its only objection was to the hearing proceeding yesterday in the light of unresolved issues which it described concerning its part in the satisfaction of certain of the conditions precedent. I will come back to that issue in more detail when I am dealing with the materiality of the conditions. But this party did not voice opposition to the confirmation of the proposals.

The Acthar Claimants

15. Mr. MacCann on behalf of Avon and Attestor, who I will refer to as the Acthar Claimants, indicated that his clients were owed almost $3 billion, of which $2.6 billion related to pre-petition claims and a sum of $265 million represented post-petition or "administrative claims" as they are described under the Plan. He indicated that there were three of the rulings made by Judge Dorsey in the course of the Chapter 11 proceedings to which he had objected and in respect of which he has filed appeals.

16. Firstly, Judge Dorsey had denied the admission of the pre-petition claim that was essentially a proof of debt claim. Secondly, Judge Dorsey denied the admission of administrative claims, being claims arising after the presentation of the Chapter 11 petition in August 2020. Thirdly, the Acthar Claimants have lodged an appeal against the order confirming the Plan. Mr. MacCann did not invite this Court to re visit those rulings in themselves. He has lodged his appeals and has fairly said that he will be pursuing them in the relevant appeal courts in the ordinary course under US law, but he says the following: That with the exception of the specific treatment of shareholders and of preferential creditors, the proposals in their treatment of all other creditors is entirely referential; that although the Scheme states that certain creditors are not impaired by it and other creditors are impaired by it, that all of the creditors, apart from Revenue and the preferential creditors receive their treatment as far as concerns dividends or other form of return not under the provisions of the proposals, but under the terms of the Plan. He says that the Scheme says no more than that those creditors will receive what they are to receive under the terms of the Plan and otherwise goes on to provide simply that on payment or provision in accordance with the terms of the Plan, their claims are fully discharged, distinguished and settled.

17. The Acthar Claimants regard the Plan as unfair and inequitable which is why they voted against the Plan and voted against the Scheme here. Mr. MacCann says that because the Scheme does not in itself provide for any specific treatment other than by reference, it, in effect, cannot be considered as a stand alone scheme.

18. When the Court was giving directions in relation to this hearing on the 8th of April, it was indicated that a modification of the proposals would be sought by the Acthar Claimants. The Court fixed a timetable for the delivery of affidavits and legal submissions between that date and the confirmation hearing. Acthar were directed, by agreement, to deliver their affidavit evidence, if any, by the 12th of April and legal submissions by the 22nd of April, thereby enabling the Examiner and the Company or any other party to reply before the hearing on the 26th of April. No such affidavit or submissions were delivered. Acthar

confirmed in correspondence through their solicitors, Dentons, and in court yesterday that they were not seeking to introduce any evidence, which would include, obviously, any evidence to rebut the evidence put forward by the Examiner, or to make any legal submissions. They stated simply that they intended to oppose confirmation of the Scheme and invited this Court in its discretion to take that opposition into account when considering whether the Examiner had made out the proofs required for confirmation.

19. It was acknowledged that this was a very narrow ground of opposition. Mr. MacCann indicated that although he wasn't adducing any evidence or legal submissions, he says that because of the onus which rests on the Examiner under the section, the Court must satisfy itself that the proposals are fair and equitable. That proposition is correct. But, again, he says that because the proposals on their face are silent as to the treatment of creditors except by reference to their treatment in the Plan, this Court has to satisfy itself that the Plan itself is not unfairly prejudicial to any interested party, including the Acthar Claimants. His submission is that this Court should not simply "rubber stamp" the decision of Judge Dorsey. He says that when comparing the treatment of creditors, because they are dealt with under the terms of the Plan, the fairness and equity or any lack of fairness and equity has to be examined by reference to the substance of the Plan and not the bare provisions of the proposed scheme now before this Court. He acknowledged that he was not inviting this Court to conduct or re visit the substantive fairness hearing undertaken by Judge Dorsey, but simply that the Court should not simply rubber stamp that and it must itself be satisfied that the Irish law test in section 541 has been met.

20. In response to further exchanges in court, it was submitted on behalf of the Acthar Claimants that one of the questions which was troubling them concerned the class treatment, namely, the classification of creditors. It was said that there has been created a large number of classes, who, from a liquidation perspective, would all be regarded as equally ranking unsecured creditors. It was acknowledged that the genesis of the claims may be different as between the classes. Some are trade creditors, others are unsecured bondholders, others what were referred to by counsel as "price gouging" claimants. It was said that these are all fundamentally unsecured claims, but that they are being treated in a fashion whereby they participate in different pots of money and I will be coming to the Plan in a moment and that this could result in a different percentage dividend for one group of unsecured creditors as against other unsecured creditors. The submission is that this is a form of discrimination. It is acknowledged that this question arose before Judge Dorsey. Mr. MacCann submits that this amounts to an unfair treatment or cannot be shown to be fair and equitable as far as the Irish test is concerned. He says that the class in which the Acthar Claimants have been placed, which limits them to participation in an identified pot and I will come to the detail of that is a form of discrimination as against other creditors who are also unsecured.

21. Despite counsel having said that there would be no evidence or legal submissions proffered on these issues, there is no doubt that this argument as to discrimination is a legal submission by Acthar. No advance submissions were made as directed by the court

on 8 April 2022. It also seems to me, that if one were to examine this point as a ground of objection, it would be necessary to hear evidence. It took a 16 day hearing before Judge Dorsey to examine these issues, and the very manner in which classes have been established was examined by Judge Dorsey. I have not been invited to and it would not be appropriate to conduct a similar hearing in relation to a plan which has already been considered in the proper forum, namely the court in Delaware.

22. Mr. MacCann added that although he was not endorsing the findings of Judge Dorsey and, of course, he is appealing those he was not saying anything adverse in respect of what Judge Dorsey had said. He said that his instructions on this were very limited and he had nothing more to say about Judge Dorsey's Opinion in the course of this hearing. He acknowledged that that, therefore, was now under appeal and ultimately a "US law fight".

23. The Examiner says that to the extent that different classes are formed and receive different treatment, that is a consequence of the Chapter 11 Plan, rather than the proposals, and that the effect of the proposals is, in general, merely to confirm the treatment of each class in the manner set out in the Plan and to provide as a matter of Irish law for the discharge of their claims. The submission continues that there is in fact no unfair difference in treatment for different classes of creditors under the Chapter 11 Plan, and it is said that the question of the fairness of treatment as between different classes has been considered as part of the US Confirmation Order and that the US Bankruptcy Court, having rejected the objections and, in particular, the claims that the Plan unfairly discriminated, that that should be the end of the matter. This amounts to a submission that this court should perform only a "rubber stamping" exercise of the analysis performed by Judge Dorsey. He conducted a 16 day hearing, he heard witnesses, and there is no suggestion that a comparable hearing has been proposed here. To have such a hearing on fundamentally the same issues would, of course, be inappropriate where the appropriate forum has been invoked and no party has made any suggestion that Delaware was not the appropriate forum in which to hear those issues, even in relation to the Company, which is the first named debtor in the Chapter 11 proceedings.

Conclusion on the Acthar Submission

24. There are good reasons why the scheme is proposed for confirmation by this Court in respect of the Company. This is the appropriate forum for the treatment of shareholders and for provisions which will affect the share capital of the Company. But even with those good reasons, it is unusual that, apart from the treatment of preferential creditors, all of the provisions for the treatment of creditors are contained in the proposals only by reference to the Plan. I do not say that that is in any way improper or, in the unusual circumstances of this case, inappropriate. The claims in many cases are against multiple companies in the group and the parent company was not necessarily an obligor or a debtor in respect of each and every one of the claims treated in the Plan. But a scheme which is entirely referential as far as the treatment of creditors is concerned is unusual and this Court must consider whether it has sufficient evidence before it to determine

whether the Examiner has discharged the onus of establishing that the proposals are fair and equitable and not unfairly prejudicial to any interested party.

25. In conducting this exercise, it seems to me that a significant part of the evidence is to be found in the Opinion of Judge Dorsey. In the judgment which I delivered on the 22nd of March, I indicated that those were findings of a court of law which was competent and whose jurisdiction to consider a Plan for the Company was not contested and which this Court was entitled to take into account in relation to the appointment of the Examiner. Likewise, the court should take those findings into account on this application.

Principles Applying to Section 541

26. The tests to be applied, are set out, helpfully, in the submissions that have been filed by the Examiner and are not disputed. They are considered in judgments in *Re Antigen Holdings* [2001] 4 IR 600, *Re Traffic Group* [2008] 3 IR 253, *Re McInerney Homes* [2011] IEHC 4; [2011] IESC 31*, Re SIAC Construction* [2014] IESC 25 and the judgment in *Re Arctic Aviation Assets* [2021] IEHC 272.

27. It is clear from *Re McInerney Homes*, that the burden of proof rests on the Examiner. It is also clear that flexibility is an important element of the application of the test, even in assessing the question of whether the proposals are fair and equitable. *In Re McInerney Homes*, Mr. Justice O'Donnell said that:

> *"The Act of 1990..." as it then was "...appears to invite a Court to exercise its general sense of whether, in the round, any particular proposal is unfair or unfairly prejudicial to any interested party, subject to the significant qualification that the test is posed in the negative: The Court cannot confirm the scheme unless it is satisfied that the proposals are not unfairly prejudicial to any interested party."*

28. A comparison between the outcome for creditors under the Scheme of Arrangement and the likely outcome under relevant counterfactual scenarios in this case, a potential liquidation is a key feature of the analysis. I will be coming later to the Examiner's report in relation to that subject and what he and the Company have said in relation to this.

29. In *Re McInerney Homes,* Mr. Justice Clarke said that:

> *"...Given that the backdrop to an examinership is that a company is insolvent, it seems to me that very significant weight indeed needs to be attached to what would be likely to be the outcome of the alternative to examinership, whether it be liquidation, receivership or a simple withering of the company without any formal insolvency process."*

In the same case Mr. Justice O'Donnell agreed that this was "a vital test" in assessing the fairness of a scheme of arrangement.

30. I will be returning, as I said, to the report and the evidence, but the submission here and I am satisfied that it is borne out by the evidence is that if this company were to

enter into insolvent liquidation, there would be no dividend for preferential creditors, unsecured creditors or members.

31. In relation to the question of comparison of the treatment of other creditors or as between creditors, in *Re SIAC Construction*, Mr. Justice Fennelly said the following:

> *"Whether a set of proposals is unfairly prejudicial to any particular interested party will involve a comparison of the treatment of that party with any similarly situated interested party. The court will also take account of any aspects of either party's individual position which places it at either an advantage or disadvantage. The court will take account of the totality of the circumstances. The interests of each creditor will depend on its setting."*

32. Other relevant factors are a consideration of the outcome for shareholders   I will come to that later because it is clear that on a liquidation, there would be no return to the shareholders of this group of companies, in any event.

33. As for the support of creditors   again, the evidence from the Examiner's report is that there is overwhelming support for these proposals by creditors in accordance with the voting which took place on the 4th of April and I will be coming to those figures. And I have been referred to this feature of confirmation of schemes which is discussed in the judgment in *Re Arctic Aviation Assets* and also by Mr. Justice Barniville in *Re Ballantyne* [2019] IEHC 407, where he approved a statement in a judgment in *Re Ocean Rig UDW* that:

> *"Members and creditors are normally the best judges of what is in their commercial interest and are in a better place than the court to decide where their best interests lie."*

34. The preservation of employment has always been at the fore of the Court's consideration. It is often referenced in the context of discretion, but it has been elevated in a number of the cases to one of the dominant features of a consideration of the question of whether it is appropriate to confirm a scheme of arrangement. In *Re Traffic Group*, Mr. Justice Clarke said that:

> *"...a court should lean in favour of approving a scheme where the enterprise, or a significant portion of it, and the jobs or a significant portion of them, are likely to be saved."*

The proposals

35. It is not appropriate for this Court to simply apply a "rubber stamp" approach and it is necessary, therefore, to consider the terms of the proposals themselves. I have received comprehensive submissions from the Examiner and his report pursuant to section 534, but limited submissions in relation to the treatment of individual categories of creditors. It is necessary therefore to look both at the contents of the proposals and the referenced plan and the evidence of Mr. Welch on behalf of the Company in his affidavit verifying the

petition, sworn 9th of February where he describes comprehensively the intended financial treatment of each class of creditors under the terms of the Plan.

36. Turning to the proposals and taking account of the information of Mr. Welch in that initial affidavit of the 9th of February, which I understand to be still current information in terms of its description of the Plan, the first piece to note about the proposals is the treatment of members :

> *"The members shall receive no distribution on account of the Existing Shares under this Scheme or under the Plan. On the Effective Date, the Existing Shares and all and any rights attaching or relating thereto will be cancelled.*
>
> *The Examiner shall be entitled, as of the Effective Date, to execute on behalf of the Company and/ or the board of Directors all documentation necessary in connection with the cancellation of the Existing Shares…"*

The proposals then identify the classes of creditors and I'm going to briefly look at those because it is here that we can consider how each class has been treated and the financial outcome for those creditors.

Financial creditors

37. A number of the claims of creditors are described as not being impaired or at least not impaired by this Scheme. These include what are referred to as "other secured claims" and the First Lien Revolving Credit Facility Claims. In relation to these "financial debts", the essence of the Plan is that for those which are not to be impaired, there is either reinstatement of existing facilities, or, in certain cases for example, with the 2004 and 2005 First Lien Term Loan claims that the Company may elect to replace them with what are referred to as New Take Back Loans corresponding to the original loans. There will be a participation pro rata in relation to these new loans and potentially a cash payment. The First Lien Notes are also described as not being impaired and they are being substituted with "replacement notes" not impairing the original status of those creditors.

38. The holder of Second Lien Notes, will receive a pro rata share of New Second Lien Notes and a cash payment.

39. The first category of financial creditor to be substantially impaired is the Guaranteed Unsecured Notes. They are being restructured so that they will receive a share of what are referred to as Take Back Second Lien Notes. And, very importantly in terms of the fundamentals of the proposals, they will receive between them by way of a debt for equity conversion 100% of the New Mallinckrodt Ordinary Shares, subject to provisions elsewhere in the proposals for dilution on account of "Opioid Warrants" and a Management Incentive Plan.

The General Unsecured Claims Trust

40. The next group comprises classes who will participate in what is referred to as the General Unsecured Claims Trust, which is subdivided into a series of "pots".

41. The Acthar claims will receive a pro rata share of a fixed amount of $7.5 million and a certain cash amount from the General Unsecured Claims Trust. The Generic Price Fixing Claims, will participate for a pro rata share of an amount of $8 million. The Asbestos Claims will participate pro rata in a fixed amount or pot of $18 million. Environmental Claims will participate in a defined pot pro rata of $23.65 million.

42. A class of Other General Unsecured Claims will participate in a fixed pot of $23.65 million. I understand that to be the same amount that is referred to for the Environmental Claims.

43. The 4.75% Unsecured Notes will participate pro rata in a fixed portion of $56,991,000, with the possibility of an additional cash payment.

44. Each of these references to "additional cash payments" provides that the claimants may receive such amount of additional cash as may be necessary to comply with the provisions of the US Bankruptcy Code, which appears to be a protection against objection by reference to the fairness test in the context of the confirmation of the plan in Delaware.

45. For the class of Trade Claims there is a distinction in terms of the treatment of trade creditors between those who have voted to accept the Plan and have agreed to maintain what are referred to as "favourable trade terms" who will participate for a pro rata share of a pot of $50 million and those who have not voted in favour of the Plan and who have not agreed to maintain "favourable trade terms". The latter will participate in the fund of $23.65 million referred to earlier. This particular distinction of treatment would be unusual in a purely Irish law domestic scheme. But that does not mean that it is not fair and equitable, and no objection has been made in this court on this basis, a factor this court must take into account.

Opioid Claims

46. There is a series of classes referred to collectively as the "Opioid Claims". They are different types of claims arising from the design, production, promotion, marketing and distribution of opioid products. They include certain claims directly associated with opioid and claims by parties who have suffered indirect losses. The class include State Opioid Claims, the Municipal Opioid Claims, the Tribe Opioid Claims, US Government Opioid Claims, Third Party Payers, Hospital Opioid Claims, Rate Payer Claims and others. The Plan provides that a series of sub trusts will be established all under one master distribution trust referred to as the Opioid MDT II, into which over a period of seven years payments will be made by the companies totalling $1.725 billion.

47. The mechanics for the operation of this trust are described in Mr. Welch's verifying affidavit. There are three elements: There is the cash amount of $1.725m, which will be paid into that trust over a period of time; secondly, there is a provision whereby this trust may exercise warrants for a sum of up to 19.99% of the shareholding of the Company; and, thirdly, a provision for the transfer into this trust of the benefit of future claims against certain third parties. The evolution of this trust is the result of a long process of negotiation and participation by relevant representative committees, all with a view to

bringing a measure of finality to otherwise potentially open ended litigation. If it's not full finality, at least there is a process which will assist in resolving the claims of institutions and the direct claims of victims in respect of Opioid Related Claims. The objective of this structure is to avoid what would otherwise be "a race to the court" in the pursuit of such claims. Instead the plan places on an orderly footing the set aside of significant amounts to settle these claims. The plan refers to a suite of agreements and documents being entered into to establish the trust and sub-trusts and to govern their funding, administration and distribution into the future.

Other classes

48. Settled Federal and State Acthar Claims are claims by a number of State bodies which will participate in the proceeds of a settlement which was negotiated over a number of years, whereby over a period of seven years a total sum of $245 million will be set aside for the settlement of these claims.

49. The Scheme provides for the extinction of intercompany claims, and subordinated claims. Unexercised Equity Interests, which are sometimes characterised in other cases as creditor claims, will be extinguished and cancelled and the holders of any such claims will have no claim whatsoever against the Company.

The Acthar objection and opinion of Judge Dorsey

50. Apart from the general and uncontroversial proposition that the onus is on the examiner to prove that the proposals are fair and equitable, the only question which has been specifically identified to me by Acthar, a point made only in a very concise and limited submission, is the question of classification of creditors. This was considered in some detail by Judge Dorsey in section 5 of his Opinion and it is not necessary for me to repeat that in detail. But it's clear from an examination of that Opinion that many of the tests with which this Court is familiar were applied. In relation to the particular question of the allegation of discrimination and that creditors whose claims might otherwise sound at the same level namely, unsecured creditors have been treated to participate in separate pots which would yield a different dividend, Judge Dorsey examined extensive case law, principally US law related to the question of unfair discrimination. He observed that while a comparison between the recoveries between a preferred class and a dissenting class may be a preferred method, it is not the only acceptable approach. And he identified the fact that claims of equal priority may have separate origins and recoveries may be based on agreements with different level of lenders and others.

51. In relation to the absolute priority test and the application of pro rata principles, Judge Dorsey referred to case law of the Third Circuit to the effect that the Court should start by adding up all proposed plan distributions from the debtor's estate and divide by the number of creditors sharing the same priority, and he then said the following:

> *"This approach is relatively easy when there is a single debtor, and all similarly situated creditors have claims against that single debtor. The analysis becomes more complicated in a case like this one where there are more than 60 debtor*

entities with a complex financial structure, creditors that have claims against different debtor entities, and there is no substantive consolidation."

52. He referred to the example of Class 5 Guaranteed Unsecured Noteholders, whose claims are against almost all of the debtors in the corporate structure, and yet certain other classes of creditors, including some of the Acthar Claimants, may have claims against only one or two debtor companies.

53. He examined the different forms of waterfall analysis that were presented in evidence by the Company reflecting the fact that not all claimants have claims against the same debtors and that the value of claims against debtors within the group will differ. The essence of his ruling on this question is that flexibility is a feature of these schemes, provided there is a rational basis for the different treatments. And that flexibility in terms of the overall sense of fairness of the application of the Scheme is exactly what Mr. Justice O'Donnell was describing in *Re McInerney* and Mr. Justice Fennelly in *Re SIAC.*

54. It is not unusual in a scheme of arrangement under the Act that classes are formed which at first pass would appear to be indistinguishable in their ranking, especially among unsecured creditors. But as is fairly acknowledged by counsel for Acthar, the different genesis or origin of the claim frequently informs the classification of creditors in schemes of arrangement in this Court.

55. Judge Dorsey identified a concept of what he referred to as "pre bankruptcy expectations" of parties as a potential ground for different treatment. I have not seen this particular analysis applied or put in quite that way here, but I have no doubt that the different origins of claims can be a basis for different treatment achieving balance in the scheme, or, as in this case, for formulating a restructuring plan which allocates different specific funds or "pots" for claimants with claims of different origins, provided there is, as has been shown to be the case here, a justification for the different treatment.

56. Judge Dorsey referred also to the complexity that can arise in the absence of consolidation and that a relevant consideration can be and was in that case based on the analysis prepared by the Company and its experts.

57. Before I leave Judge Dorsey's Opinion, there are a number of further observations I will make in relation to his Opinion. He referred to the long history of the negotiation of the Plan and how this brought an end to the extraordinary scale, as he put it, of the litigation threat facing this group of companies. He noted that it was not necessarily an end to that process, but at least was a formula for resolving claims without a "race to the Court" and which would potentially otherwise lead to more limited returns to claimants. He also referred to other beneficial features of the Plan, including the very important Opioid Operating Injunction. That is a form of injunction appended to the confirmation ruling which governs the conduct of the Company in relation to the sales, distribution and marketing of opioid related products and so on, and the evidence was that this was fair to all concerned, including, in particular, future opioid claimants.

58. He also expressed the view that the trusts established for the benefit of Claimants were well funded.

59. Judge Dorsey referred also to the widespread support of the creditor body and he examined a number of other tests by reference to section 1129 of the US Bankruptcy Code, all of which are familiar to this Court in terms of its critical examination of a Scheme namely, whether the scheme has been put forward in good faith; whether it satisfied the "best interests of creditors" test; the question of feasibility, which goes to the question of the long term survival of the Company; and unfair discrimination.

60. No party has suggested that I should replicate the process of the Delaware Court and it is very clear that the Plan was examined by reference only to US law and it would not be appropriate for this Court to re open that examination. But the tests are very familiar to us in particular, as far as they concern such issues as to whether the Scheme is fair and equitable, discrimination, and issues such as feasibility. As I said earlier, it seems to me to be very clear that I can take into account the compelling judgment of Judge Dorsey and his rigorous analysis of the Plan as a whole.

Report of the Examiner

61. The evidence of the Examiner in relation to formulation and the effects of the Scheme of Arrangement is uncontradicted.

62. The Examiner says that following his appointment he reviewed the Chapter 11 Plan. He also reviewed the draft scheme of arrangement prepared by the Company "which in large part mirrors and gives effect to the Chapter 11 Plan as a matter of Irish law". He refers also to the consideration by the US Bankruptcy Court of the Chapter 11 Plan and that affected creditors had the opportunity to participate in that process and that many did so.

63. At the hearing of the petition the question arose as to whether it would be appropriate for the Examiner to simply adopt a scheme of arrangement based on a plan which has been put forward in the Chapter 11 proceedings. In my judgment of 22 March 2022, I referred to the duty of an examiner appointed under the Act to form his own view and formulate a scheme of arrangement. The Examiner has discharged that duty and performed his obligations under the Act. He says in paragraph 3.4 of his report that;

> *"In my view, the Chapter 11 Plan forms a viable basis for formulating proposals for a scheme of arrangement which would : restructure the Company's liabilities in a sustainable way; give the Company a reasonable prospect of trading on a sustainable basis in the future; treat creditors fairly; produce a better outcome for creditors, employees and other stakeholders than insolvency; and satisfy the requirements of Part 10 of the Companies Act 2014.*
>
> *I took the decision that the interests of the Company, creditors, employees and other interested stakeholders are best served by the formulation of a scheme of arrangement that is consistent with and implements the Chapter 11 Plan in Ireland."*

64. He says that, in performing his functions, he took the view that:

> *"...it would not have been in the interests of the Company, creditors, employees and other interested stakeholders for me to seek to formulate new proposals which were materially different to or inconsistent with those approved by the US Court. I did not believe that such an approach would have been viable.*

65. The Examiner explains   and this has been clear from the very outset of these proceedings from the presentation of the petition   that these proposals recognise that the primary restructuring process for the Company is the US Chapter 11 process.

66. He refers to the manner in which the proposals give effect to the Chapter 11 Plan and, in particular, he refers to the specifics of the cancellation of existing shares, the introduction of a new constitution to provide for the issuance of the new ordinary shares in the Company, the extinguishment and cancellation of unexercised equity interests, and the payment in full of preferential creditors. He considered it desirable to include in the proposals provisions in respect of creditors' claims which mirror those in the Chapter 11 Plan in order to enhance legal certainty about the effectiveness of the restructuring and ensure that the restructuring effected by the Chapter 11 Plan has automatic recognition within Ireland and within the European Union.

67. The Report records the outcome of the meetings of members and creditors. As far as quorate meetings were concerned, the number of creditor classes who voted in favour was 25 and 3 did not vote in favour. The number of impaired creditor classes voting in favour was 23 as against 2 who did not vote in favour.

68. In relation to the employees, the Examiner notes the fact that the Company itself does not have any direct employees, but that the Group employs approximately 2,890 people internationally, of which approximately 116 are employed by Irish subsidiaries of the Company. He says that the successful implementation of the proposals would ensure the continuity of employment for employees in the Group. In the event that the Chapter 11 Plan and the proposals are not implemented, the most likely outcome is that the Company would be wound up and that other Group entities would enter insolvency proceedings. He says it is very likely that all of these jobs would be lost, and he says that he believes that it is in the interests of employees that the Chapter 11 Plan and the proposals are implemented.

69. He refers then to the Statement of Assets and Liabilities at Appendix D to the Report, which shows in the Company itself assets as of the 10th of March 2022 having a value of $327 million; secured claims in the amount of $3.48 billion; unsecured claims of $23.35 billion; and an overall deficiency, he says, of $26.5 billion.

70. He then provides a liquidation outcome both in relation to the Group and in relation to the Company itself. In his liquidation outcome for the Company, he has treated the intercompany receivables, which in the Statement of Assets and Liabilities were at $323.2 million, as having a realisable value of nil and leaving, therefore, total realisable assets on

a liquidation analysis for the Company of $12.5 million; and secured creditors' claims again amounting to $3.48 billion, leaving a deficit even as regards preferential creditors. These tables illustrate that a winding up of the Company would result in no dividend being paid to any classes of unsecured creditors, whereas the Plan provides for returns to many classes of creditors. And he says that successful implementation of the proposals and the Plan would allow for a significantly better outcome for creditors than a scenario where the Company was wound up.

71. The Examiner refers to other important benefits of the proposals. The plan envisages a reduction in senior debt from $1.65 billion to $375 million, which increases the pool of funds available to unsecured creditors.

72. He concludes by saying that the restructuring envisaged by both the Plan and the proposals is fundamental to the overall reorganisation; that the reduction of approximately $1.3 billion in senior funded debt would facilitate the restructuring.

73. The Examiner says that an independent review of the Company's forecasted revenue and financial performance was undertaken by his Grant Thornton Corporate Finance colleagues and he is satisfied that implementation of the Plan would positively impact the financial position and the value of the subsidiary holdings. He concludes that the implementation of the Plan and the proposals will give the Company "a good prospect of operating on a sustainable basis in the future, and that this would be facilitated by confirmation of the Plan."

74. I accept the evidence of the Examiner as to the reasons for and the basis on which he formulated the proposals and that the proposals, reflecting the plan approved by Judge Dorsey, are fair and equitable to the interested parties.

Evidence of the company

75. Mr. Welch swore an affidavit on 21st of April 2022. Mr. Welch identifies the benefits that would flow from confirmation of the proposals. He says that he believes that the Plan and the proposals present a fair and balanced compromise between the interests of economic stakeholders in the Group and that the restructuring will result in a better outcome for stakeholders compared with a winding up.

76. He refers to the reduction of $1.3 billion in the senior financial debt of the Company.

77. In relation to the timing of this application, he identifies a number of features which he says would be disruptive and would potentially put the restructuring at risk, if confirmation were to be delayed.

78. He refers to such matters as financing and refinancing costs, business disruption, the ongoing cost of professional fees, and the basic risk that any delay in confirming the proposals would present to the prospect of consummating the entire restructuring through the Plan and these proposals. This evidence is uncontradicted.

Parallel insolvency proceedings

79. *In the Matter of Sean Dunne* the Supreme Court found that there was no bar to the opening of parallel insolvency proceedings in relation to the same entity, and this court considered that question when appointing the Examiner.

80. In *Re Weatherford International Limited,* insolvency proceedings were opened in three jurisdictions, namely the US, Bermuda, and in Ireland. The Scheme confirmed by this court contained provisions for the treatment of certain classes of creditors in accordance with the Chapter 11 Plan. This case is different in that, with very limited exceptions, the treatment of creditors is entirely by reference to the Plan.

81. This approach has been indicated from the very outset of the process. By the time the Examiner had been appointed, the Chapter 11 process had been ongoing for 18 months since August 2020. The parties affected and who participated in the process here have participated also in that process. Including the sole objector in this hearing, namely, the Acthar Claimants they voted in meetings and they participated in hearings before the Bankruptcy Court in Delaware. It is not said that any of those parties, including Acthar, ever protested that Delaware was not the appropriate forum for confirmation of a plan of reorganisation to treat their claims.

82. This does not mean that this Court should not consider the fairness of the treatment of the members and creditors which is to be adopted and confirmed and given binding legal effect both in the State and in the EU. I have already examined the proposals and for the reasons identified earlier and, applying the tests identified in the case law of this court, I am satisfied that the proposals meet the test in section 541 and are fair and equitable in themselves and not unfairly prejudicial to any interested party.

83. I have been referred also to case law concerning recognition in this jurisdiction of proceedings in other jurisdictions and, in particular, the cases of *Re Fairfield Sentry* [2012] IEHC 81, and *Banco Ambrosiano v Ansbacher*. But recognition of the foreign order, i.e. the confirmation of the plan, by the traditional method of an order in aid is not the remedy sought here. In this case, the Court was requested to open a full main proceeding and the Court found, based on the evidence presented in the petition, that the Company had its centre of main interests here.

84. A separate filing such as occurred here is the remedy a foreign officeholder would be obliged to seek if no cooperation or recognition order could be obtained in this jurisdiction. But that is not the only basis to invoke the jurisdiction of this court. There is no reason why a full or "main" proceeding within this State could not be utilized which does both of the following: firstly replicates the restructuring plan and places beyond doubt its recognition in the State and in the EU, subject to the proper consideration of the treatment of interested parties; and, secondly, regulates those features of the restructuring which are peculiarly suitable for this jurisdiction, notably the treatment of shareholders by cancellation and extinction, and the provisions for the issue of new shares going forward.

Shareholder correspondence

85. My attention has been drawn to correspondence received by the Examiner from a number of persons who claim to be shareholders a Mr. Edelman and also a group representing certain shareholders, namely, Buxton Helmsley. They have indicated certain objections to this process from the very outset, principally in correspondence. Mr. Edelman has filed an appeal in the District Court against the Confirmation Order. Each of these parties has been on notice of this hearing and has chosen not to come to this Court. The Examiner has complied with his obligation by exhibiting the form of appeal that has been lodged in the District Court by Mr. Edelman, but no objections have been made by them in this court either by way of evidence or legal submissions.

Conditionality and the Effective Date

86. I have been referred to 23 conditions precedent in Article VIII.A of the Plan. Mr. Welch's swore affidavits on 21st of April 2022 and on 25th of April 2022 in which he described all of these conditions and updated the Court on the status of the Company's expectations in terms of the satisfaction or waiver of those conditions. It is not necessary to deal with every one of them individually, but a number of them are material. Particular issues were raised by the Governmental Plaintiff Ad Hoc Committee during the course of the hearing yesterday, initially in the context of an application by that Committee for an adjournment of the confirmation hearing. I refused the adjournment, but the points raised are relevant to considering whether these conditions are so material that they should affect the Court's decision today.

87. In the affidavit of Mr. Welch of the 21st of April, he refers to the Plan conditions and he says that the Company is satisfied that if this Court makes an order to confirm the proposals, the debtors will be in a position to either satisfy or procure the waiver of each of the Plan conditions, and therefore intends to proceed with consummation of the transactions contemplated by the Chapter 11 Plan and the restructuring as soon as possible after the making of any scheme confirmation order.

88. Mr. Welch says that the debtors have set a target date of the 11th May 2022 for satisfaction or waiver of the Plan conditions and as the Effective Date for both the scheme and the Chapter 11 Plan.

89. The first condition in VIII.A.1 of the Plan is that the "Restructuring Support Agreement" should remain in full force and effect and not have been terminated. The Restructuring Support Agreement was negotiated at an early stage of the Chapter 11 process with the principal stakeholders affected by the filing, long before the finalisation of the Plan itself. Mr. Welch says that that agreement remains in full force and effect and that he knows of no reason why that Plan condition would not continue to be satisfied on the intended Effective Date.

90. Four conditions, numbers 2 to 5, were referred by Mr. Rynn on behalf of the Governmental Plaintiff Ad Hoc Committee.

91. The first of those is what is referred to as the Final Order Condition. It is a condition of the Plan that: -

"the Bankruptcy Court or another court of competent jurisdiction shall have entered the Confirmation Order in form and substance consistent with the Restructuring Support Agreement, such order shall be a Final Order, and to the extent that such order was not entered by the District Court, the District Court shall have affirmed the Confirmation Order."

92. Mr. Welch says that none of the parties to the Restructuring Support Agreement have indicated any objection to the form of the Confirmation Order and he says that it is possible for the Final Order Condition to be waived collectively by a number of parties, referred to as the "Waiver Right Parties". They are the debtors themselves, a proportion of what are referred to as the Required Supporting Unsecured Noteholders; the Governmental Plaintiff Ad Hoc Committee, which is defined in the Plan as the ad hoc group of US Government entities holding opioid claims; and a group referred to as the MSGE Group. Mr. Welch refers to correspondence with the representatives of the Governmental Plaintiff Ad Hoc Committee over the course of the last week. There was before the Court at the hearing yesterday, exhibited to an affidavit sworn by Mr. Rynn, an e mail written on the 25th of April in which, on behalf of the Governmental Plaintiff Ad Hoc Committee, Mr. Rynn referred to the fact that there were, he said, outstanding issues regarding the opioid "deferred cash payment terms." These are terms which form part of a suite of agreements related to the establishment of the Opioid Trusts under the terms of the Plan. He refers to Condition 2, the Final Order Condition and to a further Condition 3, which concerns final entry of the Opioid Operating Injunction Order and he says that he is instructed that:

"...the Ad Hoc Committee's position is that at the time of the hearing tomorrow..."

i.e. yesterday

"...there will be outstanding conditions precedents of the Plan and therefore the Scheme becoming effective for which there will be no certainty that they will be waived by the Ad Hoc Committee or otherwise be capable of being satisfied."

93. He then requested a two week adjournment to facilitate further engagement with a view to resolving issues relating to these agreements.

94. He referred also to Plan Condition 4 and 5. Plan Condition 4 is a condition to the effect that:

"All documents and agreements necessary to implement the Plan (including the Definitive

Documents, the Opioid MDT II Documents, the Opioid Creditor Trust Documents, the New Opioid Warrant Agreement, the Federal/State Acthar Settlement Agreements, and any documents contained in the Plan Supplement) shall have been documented in compliance with the Restructuring Support Agreement (to the extent applicable)."

95. There is a similar condition in VIII.A.5 concerning the execution of all other documents required to establish the trusts.

96. I am told that these documents include a Cooperation Agreement to which it is intended the Governmental Plaintiff Ad Hoc Committee will be a party.

97. Mr. Welch acknowledges that it is not possible for this Plan condition to be satisfied until consummation has occurred on the Effective Date, and then he refers to ongoing negotiations and possible waivers. He says that:

> *"With the exception of certain documents relating to financing, all of the principal documents and agreements necessary to implement the Plan are..." at the time of swearing that affidavit "...either in agreed form or close to being in final form."*

98. He continues that there is a significant number of other documents that are "ancillary" to those principal documents which are not yet finalised, and he says that "the Company is confident that it will be in a position to finalise all such documents, satisfy all conditions, and that such documents will be executed on the anticipated Effective Date."

99. In the context of considering whether to defer confirming the proposals by reason of conditionality it is appropriate to refer to a number of the other conditions, many of which are also material.

100. There is a condition concerning obtaining external consents and regulatory approvals. Mr. Welch says that he believes that these all have been or will be in place by the anticipated date.

101. There is a condition that the Bankruptcy Court will have confirmed that the Bankruptcy Code authorises the transfer and vesting of the Opioid MDT Consideration. Mr. Welch verifies that this is addressed by the Confirmation Order of Judge Dorsey issued on 2nd of March.

102. There is a condition that there be an order of the Canadian Court recognising the Confirmation Order. The affidavit of Mr. Welch sworn on the 25th of April verifies that this order was duly made by the Canadian Court on the 22nd of April.

103. The Confirmation by this Court of the proposals for a scheme of arrangement is referred to as Condition 11.

104. Condition 12 refers to the necessary clearance or waiver of conditions by the Irish Takeover Panel. There was handed into court a letter from the Irish Takeover Panel issued yesterday, the 26th of April, confirming that it has decided to grant a waiver of Rule 9.1 in respect of an obligation to make an offer which would be required by a "concert party" as a result of participation in the restructuring. That, I am informed, is the clearance letter necessary to satisfy Condition 12.

105. There is a condition in relation to unresolved claims by the Department of Justice (US), which it is said are addressed by the Plan itself.

106. There are conditions in relation to the discharge of professional fees and the establishment of a fee escrow account. These are matters which are largely within the control of the Company and do not involve the same degree of external participation as other conditions.

107. There are conditions associated with the payment of finance parties' fees, trustee fees, term loan exit fees and a condition that there remains extant a "cash collateral order". This was an order made at the outset of the Chapter 11 proceedings which entitles the Company and subsidiaries to utilise cash to which they might not otherwise have had access. This order was due to expire on the 30th of April 2022, but I have been informed that on the 24th of April Judge Dorsey made on order extending that period to the 30th of May.

108. It is clear from an overview of the conditions and the evidence before the Court in relation to the status of these conditions that there are numerous "moving parts" to the completion of the restructuring. It was clear from the very outset of these proceedings that there would always have been many moving parts between a confirmation order and the Effective Date. It seems to me that to suspend or delay the process of confirmation pending the satisfaction or waiver of all the conditions would put at risk not only the achievement of the target date – albeit that is only a target date – would potentially put at risk the success of the restructuring as a whole. It could cause significant delay and I'm told also would cause very significant professional costs to continue to be incurred.

109. The conditions referred to by the Governmental Plaintiff Ad Hoc Committee are not trivial. A number of submissions have been made as to what would occur if certain conditions precedent are not satisfied or waived, including the possibility, referred to in the Plan, of intervention by the Bankruptcy Court in the event of an impasse. It is not clear to me how that Court could override a withholding of a co-operation agreement or of a consent by an external party, but it is not appropriate or necessary for me to speculate today on how that would be resolved. The question is whether I should confirm proposals when there are so many conditions precedent which are still unsatisfied and not waived.

110. In the judgment in relation to *Re Arctic Aviation Assets* the question of confirmation of conditional schemes of arrangement was considered and I referred to the traditional approach of the Court, which is to lean against confirmation of a plan which remains conditional. I referred to case law from the early days of examinership following the passing of the Companies (Amendment) Act 1990 and said that the traditional approach of the Court had been to decline confirmation of proposals where the investment required to implement them has not been unconditionally committed.

111. I noted that there were good reasons why the Court as a general rule would lean against confirmation where there is an uncertainty or conditionality regarding the delivery of the investment, and that : -

"There is no rule which precludes the court from adopting a flexible approach in an appropriate case."

And I said there that:

"The special circumstances and complexity of a case may warrant the making of an order confirming proposals even where certain conditions remain to be fulfilled."

112. The Court should as a general rule be slow to confirm proposals where there is extensive conditionality. Doing so should be the exception, and the question arises as to whether this case is such an exception. There is also a risk that the conditions would never be satisfied or waived and that the Scheme may never become effective. That risk cannot be eliminated. Nor should I contemplate that such a situation would continue indefinitely. The company cannot remain under court protection indefinitely, and clearly could not do so if it emerged that any of the conditions precedent were no longer capable of being satisfied or waived.

113. For the consummation of the restructuring in this case to take effect, there are many moving parts involving participants in numerous jurisdictions required to cooperate and I am informed that unless a confirmation order is made, there will be a risk that the moving parts, many of which are embedded into the conditions, will not stop moving and that the target date for the Effective Date would be more difficult to achieve unless this Court takes the step of confirming the proposals. That of itself would not justify making a confirmation order.

114. If the proposals never come into effect, then the parties will not be bound by them and will later be free to pursue their own remedies instead of availing of the benefits under the Scheme and the Plan. Having regard to the benefits for stakeholders, it seems to me that the risk of a failure to consummate the restructuring because of delay creates a greater prejudice to the stakeholders as a whole than the limited prejudice which would flow from a confirmation order being made now, even if ultimately the proposals do not come into effect.

115. I have considered whether to only declare the Court's intention to confirm the proposals and to adjourn the matter before making a final order. That has some attraction in the light of the materiality of the conditions precedent and which remain unsatisfied and unwaived. But having concluded that the proposals meet the test for confirmation pursuant to s. 541, and that confirmation itself will facilitate the restructuring and the survival of the Company and all or part of its undertaking, I am satisfied that in this case I should now grant the application to confirm the proposals.

116. I am also comforted by the suggestion, which I adopt, that the matter be listed before this Court again. The date suggested is the 13th of May, which is two days after the target Effective date. There will be liberty to apply and if any insurmountable difficulty is encountered, an application can be made.

117. The form of the order will reflect that the Effective Date will be referential to the consummation of the Plan, namely that the scheme will come into effect simultaneously with the substantial confirmation of the Chapter 11 Plan on the Effective Date, as that term is defined in the Plan, being the date on which all of the Plan conditions have been satisfied or waived.

118. The form of the proposals before me contains a number of modifications which are essentially corrections and clarifications. The version of the proposals exhibited to the Examiner's affidavit sworn 21 April 2022 is the version which I confirm.

119. The new Constitution proposed to be adopted will come into effect at the same time.

120. The matter will be adjourned for mention to 13 May 2022 at 11:00 am and the Examiner will have liberty to apply.

In the matter of **Colonia Insurance (Ireland) Limited**
and in the matter of the **Companies Acts 1963** to **2003**
[2005] IEHC 115, [2005 No. 11 COS]

High Court 15th March, 2005

Company – Scheme of arrangement – Solvent company – Approval of court – Principles applicable – Companies Act 1963 (No. 33), s. 201(3).

The petitioner was a solvent company in the business of reinsurance of non-life insurance. It ceased to write new policies but had considerable run off liabilities. It proposed a scheme to establish a mechanism to shorten the time for quantifying and paying those liabilities.

Held by the High Court (Kelly J.), in ordering that the scheme of arrangement set out in the schedule to the petition be sanctioned, that in considering whether to approve a scheme of arrangement under s. 201 of the Companies Act 1963, for a solvent company, the court had to be satisfied that (i) sufficient steps were taken to identify and notify all interested parties; (ii) the statutory requirements and directions of the court were complied with; (iii) the classes of creditors were properly constituted; (iv) the issue of coercion did not arise; (v) the scheme of arrangement was such that an intelligent and honest man, a member of the class concerned, acting in respect of his interest might reasonably approve.

Re Osiris Insurance Ltd [1999] 1 B.C.L.C. 182 followed; *In Re English, Scottish and Australian Chartered Bank* [1893] 3 Ch. 385 approved.

Cases mentioned in this report:-

In Re English, Scottish and Australian Chartered Bank [1893] 3 Ch. 385; [1891-4] All E.R. 775; 62 L.J. Ch 825.

Re Osiris Insurance Ltd [1999] 1 B.C.L.C. 182.

Petition

The facts of the case are summarised in the headnote and are more fully set out in the judgment of Kelly J., *infra*.

Further to a motion on notice dated the 10th January, 2005, which was heard on the 14th January, 2005, the proceedings were entered into the Commercial list and directions were given that a creditors' meeting be duly advertised and convened and that notice of the hearing of the petition seeking sanction for the scheme be given to scheme creditors. By petition presented on the 28th February, 2005, an order was sought pursuant to s.

201(3) of the Companies Act 1963 sanctioning the proposed scheme of arrangement.

The petition was heard by the High Court (Kelly J.) on the 15th March, 2005.

Denis McDonald S.C. (with him *Paul Binchy*) for the petitioner.

Ex tempore

Kelly J. 15th March, 2005

1 This is the petition of Colonia Insurance (Ireland) Limited (the company). The company is solvent. It seeks the court's approval for a solvent scheme of arrangement pursuant to s. 201 of the Companies Act 1963, as amended.

2 The court is familiar with such schemes of arrangement in the case of insolvent companies but not in the case of solvent companies.

3 The company is proposing to enter into the scheme of arrangement for the following reasons.

It was incorporated in 1990 as part of the AXA Group. It was involved in the reinsurance of non-life insurance business. The company ceased to write any new business as of the 31st December, 2002. It continues to have liabilities in relation to the policies underwritten by it prior to the 31st December, 2002. These are known as "run off" liabilities. These liabilities are likely to last far into the future. The scheme proposes to establish a mechanism to shorten the time involved in quantifying and paying these "run-off" liabilities.

4 This is the first time that an Irish court has been faced with a proposed solvent scheme of arrangement in respect of an insurance company. In such circumstances it is appropriate to seek guidance and assistance from other jurisdictions. I find the judgment of Neuberger J. in *Re Osiris Insurance Ltd.* [1999] 1 B.C.L.C. 182 particularly helpful.

5 The functions of the court in considering whether to sanction a scheme are succinctly set out in a passage (which is derived from a number of decisions) in Buckley on the *Companies Acts* (14th ed.,1981), vol.1 at pp. 473 to 474, where it is stated as follows:-

> "In exercising its power of sanction the court will see, first, that the provisions of the statute have been complied with, second, that the class was fairly represented by those who attended the meeting and that the statutory majority are acting *bona fide* and are not coercing the

minority in order to promote interests adverse to those of the class whom they purport to represent, and, thirdly that the arrangement is such as an intelligent and honest man, a member of the class concerned and acting in respect of his interest, might reasonably approve.

The court does not sit merely to see that the majority are acting *bona fide* and thereupon to register the decision of the meeting, but, at the same time, the court will be slow to differ from the meeting, unless either the class has not been properly consulted, or the meeting has not considered the matter with a view to the interests of the class which it is empowered to bind, or some blot is found in the scheme."

6 The words of Lindley L.J. in *In Re English, Scottish and Australian Chartered Bank* [1893] 3 Ch. 385 at pp. 408 to 409 are also relevant:-

"Now, it is quite obvious from the language of the Act and from the mode in which it has been interpreted, that the Court does not simply register the resolution come to by the creditors or the shareholders, as the case may be. If the creditors are acting on sufficient information and with time to consider what they are about, and are acting honestly, they are, I apprehend, much better judges of what is to be their commercial advantage than the Court can be. I do not say it is conclusive, because there might be some blot in a scheme which had passed that had been unobserved and which was pointed out later.

While, therefore, I protest that we are not to register their decisions, but to see that they have been properly convened and have been properly consulted, and have considered the matter from a proper point of view, that is, with a view to the interests of the class to which they belong and are empowered to bind, the Court ought to be slow to differ from them. It should do so without hesitation if there is anything wrong; but it ought not to do so, in my judgment, unless something is brought to the attention of the Court to show that there has been some material oversight or miscarriage."

7 As Neuberger J. stated in *Re Osiris Insurance Ltd.* [1999] 1 B.C.L.C. 182, it is not the function of the court to act as a rubber stamp, although the court would be slow to differ with experienced insurance industry creditors who are familiar with the subject matter of the scheme.

8 I now turn to the advantages of the proposed scheme. They are as follows:-

(1) cost effectiveness in relation to both the company and persons making claims under the scheme;
(2) a greater level of finality;
(3) a fair mechanism which provides the scheme creditors with a reasonable opportunity to assert their claim and have the value thereof adjudicated;

(4) the very considerable advantage of early payment; and
(5) a monetary benefit.

9 There are five matters in respect of which I have to be satisfied. I will deal with them in order as set out below.

(1) The court must be satisfied that sufficient steps have been taken to identify and notify all interested parties. I am satisfied on the basis of the evidence before me that the company has taken all such necessary steps.
(2) The court must be satisfied that the statutory requirements and all directions of the court have been complied with. I am satisfied, based on the affidavit evidence before me, that the statutory requirements and directions of the court given pursuant to its order of the 14th January, 2005, have been complied with.
(3) The court must be satisfied that the classes of creditors are properly constituted. The two classes in the present case have been constituted using a common sense approach and with legal logic. Because a large proportion of the estimated claims of scheme creditors is due to scheme creditors who have a group association with the petitioner, it was correct to constitute them as a separate class of creditors.
(4) The issue of coercion is one which the court must consider but it does not arise in the present case.
(5) I am satisfied that the scheme of arrangement is such that an intelligent and honest man, a member of the class concerned, acting in respect of his interest might reasonably approve.

10 I have already identified the advantages of the scheme. The following disadvantages have been brought to the attention of the court at para. 21 of the petition as follows:-

"In considering the scheme the company has considered the following potential disadvantages to the scheme creditors and has laid these out in a clear manner in the explanatory statement to the scheme:-

(i) Failure to return a claim form. If any scheme creditor fails to lodge his claim form by the bar date or to exercise the option of asking the company to treat the information contained in and, if applicable, accompanying the voting form submitted for the purpose of the relevant creditors meeting as if it had been submitted as a claim form, that scheme creditor's claim will be valued at nil.
(ii) Estimated claims. It is likely that a number of claims will have to be estimated and in the circumstances scheme creditors may receive less, perhaps more, in respect of their claims than they

would have received had the claims developed to maturity in the course of the company's run-off in the traditional way."

11 In *Re Osiris Insurance Ltd.* [1999] 1 B.C.L.C. 182 Neuberger J. had to consider similar disadvantages and stated as follows at pp. 190 to 191:-

> "There is, indeed, a risk that any scheme creditor will receive less under the scheme than he would receive in the normal way. However, the concern that one has about that aspect appears to me to be outweighed by the following factors. First, as already indicated, this risk is greatest for the London Market policyholders, who will either be the sort of people who will have been able to take an informed view on the scheme and/or will have had access to brokers who would have been able to give them appropriate advice: they either voted in favour of the scheme or abstained; none voted against. Secondly, scheme creditors are just as likely, pursuant to the scheme, to receive a larger sum, as opposed to a smaller sum, than they would have received if they had pursued their claims in the run-off in the normal way. Thirdly, their claims are to be determined by independent and properly qualified persons. Fourthly, their claims will be settled more quickly, and they are likely to be paid significantly more promptly, pursuant to the scheme, than in the normal way. Fifthly, a scheme creditor will almost certainly save on the costs of pursuing a claim under the scheme than in the normal way."

12 The considerations listed by Neuberger J. in *Re Osiris Insurance Ltd.* [1999] 1 B.C.L.C. 182 also apply in the instant case. I am satisfied that the present proposed scheme of arrangement is such as an intelligent and honest man, a member of the class concerned and acting in respect of his interests, might reasonably approve. They have so approved without dissent.

13 I propose to exercise the power given to the court under s. 201 of the Companies Act 1963 and I will make an order under s. 201(3) sanctioning the scheme.

14 I propose to adopt the course of action required by Neuberger J. in *Re Osiris Insurance Ltd.* [1999] 1 B.C.L.C. 182 and direct that the creditors be written to and notified of the making of this order.

15 I order that a copy of my order be filed with the Registrar of Companies within 21 days of the date of its perfection.

16 The creditors are to be notified of the making of this order in the same manner as they were notified of the hearing of the petition. The notices should refer to the bar date and indicate that creditors must submit their claims within 90 days from the effective date of the scheme. I also direct that notice of the making of this order be advertised in the same manner as the hearing of the petition. This is to be done forthwith but in any event

within 21 days of the date of this order. There will be liberty to the company to apply should the need arise.

Solicitor on behalf of the petitioner: *Arthur Cox.*

Leesha O'Driscoll, Barrister

THE HIGH COURT

COMMERCIAL

[2020 No. 162 COS.]

IN THE MATTER OF NORDIC AVIATION CAPITAL DESIGNATED ACTIVITY COMPANY

AND

IN THE MATTER OF THE COMPANIES ACT 2014 TO 2018

AND

IN THE MATTER OF A PROPOSAL FOR A SCHEME OF ARRANGEMENT PURSUANT TO PART 9, CHAPTER 1 OF THE COMPANIES ACT 2014 TO 2018

JUDGMENT of Mr. Justice David Barniville delivered on the 11th day of September, 2020

Introduction

1. The applicant company, Nordic Aviation Capital Designated Activity Company (the "Scheme Company"), applied for orders under s. 453 of the Companies Act, 2014 (the "2014 Act"), sanctioning a proposed scheme of arrangement between the Company and certain of its creditors (the "Scheme Creditors") and for various related orders.

2. The Scheme Company is a major aircraft leasing company based in Limerick whose business has been severely affected by the COVID-19 pandemic.

3. The proceedings first came before me on 9th June, 2020 when the Scheme Company sought and obtained orders summoning meetings of the Scheme Creditors for the purpose of considering and voting on the scheme in the terms then being proposed. Various further orders were made in the course of the proceedings. The meetings of the Scheme Creditors proceeded on 9th July, 2020 (having been adjourned from 24th June, 2020). The scheme (in an amended form)(the "Amended Scheme) was unanimously approved at both meetings of the Scheme Creditors on 9th July, 2020 (in value 98% of the unsecured creditors and 91% of the secured creditors attended and voted in favour of the Scheme at the respective Scheme meetings). I made further directions in relation to the sanction hearing on 10th July, 2020.

4. The sanction hearing proceeded on 21st July, 2020. Solicitors and counsel representing an ad hoc group of the secured creditors of the Scheme Company (representing just under 50% in value of the debt owed to the secured creditors) and two ad hoc groups of unsecured creditors appeared at the hearing and supported the Scheme Company's application for court sanction in respect of the Amended Scheme. Having had the opportunity of considering the papers in advance, and having heard counsel for the Scheme Company and counsel and solicitors for the Scheme Creditors who were represented at the hearing, and in light of the enormous urgency of the matter, I gave an *ex tempore* judgment immediately following the hearing. I made an order pursuant to s. 453(2) of the 2014 Act that the Amended Scheme be sanctioned and further directed pursuant to Article 53 of Regulation (EU) No. 1215/2012 (the "Brussels Recast Regulation") that a certificate be issued certifying that the court had jurisdiction to hear and determine the application pursuant to Article 1(1), Article 4 and Article 8(1) of that Regulation.

5. While I provided my reasons for making these orders in my *ex tempore* judgment, I indicated that I would prepare a more detailed written judgment in due course having regard to some of the unusual aspects of the application, including the extensive ancillary releases of parties provided for in the Amended Scheme and the international jurisdictional issues which arose on the application and which had not been the subject of any previous judgment of the Irish courts. That is the purpose of this written judgment.

Factual Background

6. The factual background to the Scheme Company's application was set out in a very extensive grounding affidavit sworn on its behalf by Soren M. Overgaard, a director and Chief Executive of the Scheme Company, on 10th July, 2020 (the "grounding affidavit"). There was no dispute between the parties in relation to the facts set out in that grounding affidavit. Several other affidavits were sworn in the course of the proceedings, and it will be necessary from time to time to refer to some of those affidavits in the course of this judgment.

The Scheme Company

7. The Scheme Company is an Irish incorporated company with its registered office in Limerick. The Scheme Company heads the Nordic Aviation Capital Group of companies (the "NAC Group"). The NAC Group has 138 subsidiaries operating in 16 countries across the world. Sixty-five of those subsidiaries are incorporated under the laws of Ireland. The NAC Group is the world's largest regional aircraft lessor and the fifth largest commercial aircraft lessor in terms of the number of aircraft held.

8. The NAC Group has built a leading platform specially designed to meet the needs of customers in the regional aircraft sector. That platform leverages the NAC Group's scale, state-of-the-art maintenance operations, long-standing client relationships and access to capital to efficiently locate new and secondary market aircraft acquisitions and facilitate a rapid return to service for redelivered aircraft. The NAC Group's business model maximizes the useful life of aircraft and leverages superior knowledge of regional aircraft assets and ability to evaluate maintenance status to efficiently trade aircraft in the secondary market.

The NAC Group's Fleet

9. As of 31st March, 2020, the NAC Group's fleet consisted of 490 in-demand aircraft, with lease arrangements with 75 customers in 50 countries. Of these, 423 were leased, 31 were subject to a binding lease or letter of intent to lease between the NAC Group entities and a future lessee and 36 were Aircraft in Inventory (i.e. aircraft available for lease which were not currently subject to a binding lease or letter of intent).

10. The NAC Group's fleet is diversified across a variety of regional aircraft types, including ATR turboprops, Embraer regional jets and Bombardier aircraft (consisting of both turboprops and regional jets).

11. The NAC Group's aircraft are typically leased under operating leases, with agreements requiring the lessee to pay a monthly lease rental payment, and in many cases, include periodic payments for the maintenance of the aircraft (the "Supplemental Rent") based on usage. The lessee is responsible for paying monthly rental costs under the agreement regardless of hours flown or whether the aircraft is in use. As a lessor, the NAC Group receives the lease revenue and Supplemental Rent and also assumes responsibility for extending the lease term or redeploying the aircraft after the lease term expires. In some cases, the NAC Group may choose to sell an aircraft instead of re-leasing it. In line with industry practice, the NAC Group's leases are denominated in US dollars, which is also the functional currency of the NAC Group. Customers of the NAC Group include major international airlines such as Garuda, Azul, LOT Polish Airlines, Air Canada, AeroMexico and Deutsche Lufthansa.

Financing of the NAC Group

12. The NAC Group has in place a range of financing arrangements (the "NAC Group Debt"). As at 31st March, 2020, the NAC Group Debt was comprised of over 90 separate finance facilities, provided by over 85 different lenders, with a total sum of approximately US$5.923 billion advanced and outstanding under those facilities.

13. The NAC Group Debt can be separated into:-

(a) Unsecured debt in the sum of approximately US$3.697 billion (the "NAC Unsecured Debt"); and

(b) Secured debt in the sum of approximately US$2.226 billion (the "NAC Secured Debt")(together these are referred to below as the "Financing Arrangements").

14. The Scheme Company has guaranteed substantially all of the NAC Group Debt (which includes the payments under the finance leases). In addition, as explained below, pursuant to a Deed of Indemnity and Contribution dated 5th June, 2020 (as amended on 2nd July, 2020), the Scheme Company agreed to be liable as a primary obligor to the lenders under the Finance Lease Structures and the JOLCO Loan Agreements for any amount owing to them by the Finance Lessors and JOLCO Lessors (as those terms and arrangements are explained below).

NAC Unsecured Debt

15. NAC Aviation 29 Designated Activity Company ("NAC 29") is an Irish incorporated Company, having its registered office in Limerick. The Scheme Company is the sole shareholder of NAC 29.

16. NAC 29 is the primary obligor for the vast majority of the NAC Unsecured Debt (the "NAC 29 Debt"), with the exception of one unsecured facility whereby the Scheme Company is the primary obligor. The Scheme Company, however, has guaranteed all of the NAC 29 Debt.

17. The respective unsecured facilities (and the corresponding guarantees given by the Scheme Company) for the NAC Unsecured Debt are governed by English, German or New York law.

NAC Secured Debt

18. The secured facilities utilise, principally, three different forms of finance structure, being (a) Direct Secured Facilities, (b) Finance Lease Structures and (c) JOLCO Facilities.

(a) Direct Secured Facilities

19. The Direct Secured Facilities comprise finance of certain direct and indirect wholly owned subsidiaries of the Scheme Company (the "NAC Subsidiaries"), incorporated in Ireland, Singapore or Denmark. Each of those NAC Subsidiaries has furnished security directly to the respective lenders (the "Secured Lenders"). The Scheme Company guaranteed all of the Direct Secured Debt advanced to the NAC Subsidiaries, not just as surety, but also as a primary obligor (the "Secured Debt Guarantees"). As support for certain of those Secured Debt Guarantees, the Scheme Company separately furnished security over its shares in the relevant NAC Subsidiary. The Direct Secured Facilities and the corresponding Secured Debt Guarantees are governed by English or New York law.

(b) Finance Lease Structures

20. Some of the facilities that are governed by English or New York law are structured as a loan to an orphan special purpose vehicle (the "Lessor SPV"), which entered into a finance lease with the relevant NAC Group Company as finance lessee (the "NAC Lessee"). The payment obligations under the finance leases are guaranteed by the Scheme Company. The key structural features of this type of arrangement are that:-

(i) The obligations of the NAC Lessee under the finance lease are guaranteed by the Scheme Company in favour of the Lessor SPV (the "Finance Lease Guarantees");

(ii) The Lessor SPV assigns its rights under both the finance lease and the related Scheme Company guarantee to an agent (the "Secured Lease Agent"), who holds those rights for the benefit of the underlying lender (the "Finance Lease Lenders") and as security for the borrowings of the Lessor SPV; and

(iii) In the event of either the NAC Lessee defaulting under the finance lease, or the Lessor SPV defaulting under the loan, the Secured Lease Agent has the right to (i) accelerate the loan, (ii) enforce the assignment of the finance lease and Scheme Company guarantee, and (iii) require payment from the Scheme Company for the lease termination amount.

(c) JOLCO Facilities

21. A slightly different finance lease structure is used for the facilities which are termed the "Japanese Operating Lease with Call Option" ("JOLCO"). The JOLCO Lessors financed or refinanced the majority of the purchase price of the relevant aircraft, with the proceeds of loans from one or more lenders (the "JOLCO Loan Agreements"), which are governed by English law. Certain rights of the JOLCO Lessors against the Group lessees and NAC DAC have been assigned by way of security to a security trustee (the "JOLCO Security Trustee"), for the benefit of the lenders under the JOLCO Loan Agreements (the "JOLCO Lenders").

22. In these structures, an additional layer of equity financing was provided by certain Japanese tax investors who have effectively paid the "deposit" for the purchase of the aircraft.

23. Pursuant to the JOLCO Leases, the relevant subsidiaries of the Scheme Company (as lessees) agreed to lease various aircraft from the JOLCO Lessors. There are two classes of rent payable, A Rent and B Rent. The A Rent equates to the loan repayments that are due by the JOLCO Lessor to the lender. The B Rent is payable at the end of the lease period and effectively reimburses the Japanese tax investors for the amount of their original equity investment.

24. The NAC Lessees enter into sub-leases with third parties to generate income from the aircraft. The JOLCO Leases are governed by English law. The Scheme Company has provided a guarantee (with a customary "principal debtor" clause) in respect of the obligations of the lessees under the JOLCO Leases (the "JOLCO Lease Guarantees"). These guarantees are also governed by English law.

The Scheme Creditors under the Finance Leases and JOLCO Leases

25. In respect of the relevant Finance Lease Structures and JOLCO Structures, the Finance Lease Lenders and the JOLCO Lenders are treated as the applicable Scheme Creditors for the purpose of the Amended Scheme.

Financial Covenants

26. The Unsecured Facilities and the Secured Facilities (together the "Facilities") contain a number of financial covenants that are tested by reference to the financial position of the NAC Group as a whole, many of which are given on a harmonised basis. This means that a breach of any of these financial covenants would cause an event of default under a very substantial portion of the financing arrangements of the NAC Group.

27. While the events triggered by breaches of such covenants vary from facility to facility, there are several overarching similarities. For instance, the majority of the Facilities contain a minimum NAC Group interest coverage ratio, and in respect of all Facilities containing such ratio, the minimum ratio is 150% (at any time) or 180% (at the end of any quarter).

28. The maximum NAC Group value to NAC Group debt ratio under most of the Facilities is 375%, excluding only a few exceptional facilities under which the maximum value to debt ratio is 750% or 1,000%.

29. The minimum NAC Group value trigger under most of the Facilities is US$1,125,000,000, or in the case of ECA-backed Facilities, US$1,300,000,000 at the end of any quarter. Certain Facilities additionally require that the NAC Group maintain US$30,000,000 or US$40,000,000 in cash or cash equivalents.

30. By virtue of the Unsecured Debt Guarantees, the Secured Debt Guarantees, the Finance Lease Guarantees and the JOLCO Lease Guarantees (together the "Guarantees"), the Scheme Company is a primary obligor or equivalent under each of the Facilities.

31. The NAC Group's financing is structured such that certain Facilities have been borrowed by individual special purpose vehicles outside of the NAC Group, under which Facilities the Scheme Company is a primary obligor by virtue of the Guarantees.

32. Each Unsecured Lender, Secured Lender, Secured Lease Agent (on behalf of the Finance Lease Lenders) and JOLCO Security Trustee (on behalf of the JOLCO Lenders) has recourse to the assets of a NAC Group Company and/or outside special purpose vehicle (as applicable), either because:-

(a) their debts are formally secured over the assets of the borrower NAC Group Company and/or outside special purpose vehicle SPV (as applicable); or,

(b) in the case of the NAC 29 Debt owed by NAC 29 and its subsidiaries, because each Unsecured Lender in respect of that Unsecured Debt has the benefit of an unencumbered asset ratio covenant tested quarterly against the assets held by NAC 29 and its subsidiaries. The effect is that in practical terms, the rights of recourse to assets available to the Unsecured Lenders of NAC 29 and its subsidiaries mirror the rights of Secured Lenders over the other NAC Group companies and/or outside special purpose vehicles (as applicable) within the NAC Group.

Impact of the COVID-19 outbreak

Impact on the Aviation Industry

31. Human transmission of the highly infectious COVID-19 respiratory disease, caused by the SARS-Cov-2 virus, was reported in late 2019. COVID-19 was declared by the World Health Organization ("WHO") as a pandemic on 11th March, 2020 and has since spread globally over the course of 2020.

32. The outbreak of the COVID-19 pandemic caused many public health officials across the globe to recommend precautions to mitigate the spread of the virus which include restrictions on international air travel and government guidance or orders limiting the movement of individuals. Additionally, many businesses have restricted non-essential travel for their employees as a result of the outbreak. These factors have depressed demand for air travel and severely disrupted many airlines' operations.

33. Commercial air traffic has fallen dramatically due to the COVID-19 outbreak. Most airlines have significantly reduced their capacity, and many could implement further reductions in the near future.

34. The cancellation of flights, in the period since March, 2020 prompted many airlines to process significant volumes of cash refunds and issue large amounts of travel credits to customers. Cancellations and cash refunds have negatively affected airlines' revenues and liquidity, with many airlines expecting such negative effects to continue if government authorities extend existing orders or impose new orders or other restrictions intended to mitigate the spread of COVID-19, if businesses continue to restrict non-essential travel for their employees, or if cautious attitudes to travel continue to depress future ticket sales.

35. Aircraft manufacturers have observed a significant increase in the number of requests for payment deferrals, contract modifications, lease restructurings and similar actions.

36. There is significant uncertainty with respect to when commercial air traffic levels will begin to recover, and whether and at what point capacity will return to or exceed pre-COVID-

19 levels.

Impact on the NAC Group

37. The COVID-19 outbreak has had a significant impact on the NAC Group's business. Prior to the outbreak, the NAC Group's results were already dependent on the aviation industry, which is cyclical, economically sensitive to prevailing economic conditions and highly competitive.

38. The COVID-19 outbreak has, however, disrupted the NAC Group's lessee customers' ability to meet their obligations under their leases. Sixty-five out of the NAC Group's 75 customers officially requested various degrees of lease concessions, extending all the way to a complete standstill in payments. This resulted in a very significant decrease of billed lease payments and Supplemental Rent collected by the NAC Group. In particular, the NAC Group was only able to collect 23%, 20% and 34% of billed payments for the months of April, 2020, May, 2020 and June, 2020 respectively. Since the foundation of the NAC Group in 1990, the month of May, 2020 was the worst month on record for percentage cash collections. Based on current cash collection assumptions, the NAC Group anticipated that cash collections for the months of July, 2020 and August, 2020 would be 30% of billed payments.

39. As a result of the disruption to the market caused by the COVID-19 outbreak, the NAC Group experienced an unforeseen drop in cash collection and the market value of the aircraft which form the core part of the NAC Group's asset base was expected to deteriorate significantly.

40. As a consequence of these developments, it was anticipated that by the end of July, 2020 the NAC Group could potentially breach, among other things, certain of its Financial Covenants under the Financing Arrangements, which are tested quarterly, with the possible triggering of acceleration or prepayment events on the basis of certain other provisions, including material adverse effect clauses, third party lessee breaches of aircraft leasing agreements, aircraft going off-lease and/or restructuring actions taken by the NAC Group (the "Potential Breaches"). Furthermore, the uncertain liquidity position of the NAC Group meant that it was unlikely to be able to make scheduled principal and interest payments due under the Financing Arrangements while the current market conditions prevailed.

41. The NAC Group formed the view, therefore, that it was imperative that it be able to implement, as soon as possible, a series of arrangements with its lenders to defer the payment of principal in interest and final maturity amounts under the financing agreements and to waive any enforcement events which had already arisen or which might otherwise arise under any of the Financing Arrangements for the proposed period, namely, 30^{th} June, 2020 to 30^{th} June, 2021 (the "Waiver and Deferral"). That was the purpose of the Amended Scheme proposed by the Scheme Company which was the subject of this application for court sanction under Part 9 of the 2014 Act.

<u>NAC Group's response to the Covid-19 outbreak</u>

42. When it became apparent that the spread of COVID-19 would not be contained, the NAC Group began to actively assess both the anticipated reduction in lease rental cash-flows and a potential depression in the market value of aircraft that would result.

43. Based on a range of cash-flow scenarios generated by the NAC Group, a number of the NAC Group's credit facilities were identified as being at immediate risk of having certain of their respective covenants significantly challenged in near- to medium-term future. Based on those assessments, and with a view to relieving covenant pressure and maximising liquidity within the NAC Group as soon as possible, the NAC Group began to actively consider its options, including the option of requesting appropriate waivers and/ or amendments and/ or the re-financing of the relevant facilities as soon as possible.

44. The NAC Group also implemented a range of further actions, including actions to:-

(a) stop incurring costs considered not absolutely necessary for the running of the NAC Group's business;

(b) stop cash payments to non-current airline lessees and instead use available off-sets; and

(c) reduce all non-essential expenditure (including on aircraft and selling, general and administrative expenses), and implement a hiring freeze.

45. Management of the NAC Group also engaged with the original equipment manufacturers and secured agreement in relation to its capital expenditure programme, which resulted in a reduction of US$220 million worth of capital expenditure commitments during the proposed covenant waiver period.

46. In view of the rapidly deteriorating market conditions, Rothschild & Co and Clifford Chance LLP were appointed by the NAC Group in March, 2020, to advise on the financial and legal practicalities of seeking and securing a waiver of the Potential Breaches, and to make contingency plans for the NAC Group in the event that no such waiver was secured. McCann FitzGerald, the NAC Group's Irish solicitors, were engaged shortly thereafter. Rothschild & Co, Clifford Chance LLP and McCann FitzGerald continued to advise NAC DAC in relation to its options, liquidity, debt service and covenant analysis up to and including in its application for court sanction in respect of the Amended Scheme.

47. In circumstances where over 85 Lenders financed the NAC Group, and in light of the short time-frame available within which a waiver and deferral of the Financial Covenants had to be implemented, the NAC Group concluded in early April, 2020 that it would not be possible to agree bilateral waivers and deferrals with each Lender. It was concluded, on the basis of the advice received, that the only available option was to try and implement a waiver and deferral, in substantially the form of the "Waiver and Deferral" outlined below, by way of a statutory scheme of arrangement.

48. Therefore, the Scheme Company contacted a core group of Lenders during the course of April 2020 and May 2020, to discuss the challenges facing the NAC Group and the terms of a possible waiver and deferral to be implemented by way of a statutory scheme of arrangement.

49. As the NAC Group's operations are substantially run from Ireland and as the Scheme Company, NAC 29 and 65 of the NAC Group subsidiaries are Irish registered companies, it was decided to seek to implement the Waiver and Deferral by way of an Irish scheme of arrangement under Part 9 of the 2014 Act. In addition, at least one of the Scheme Creditors is Irish domiciled, Citibank Europe plc, which is owed the sum of approximately US$100 million by NAC 29 (as a co-borrower with Freyja Aviation One Malta Limited) which is guaranteed by the Scheme Company.

Deed of Indemnity and Contribution

50. The Scheme Company supplemented its existing obligations under certain of the Financing Arrangements by entering into a Deed of Indemnity and Contribution dated 5th June, 2020 (the "Deed of Indemnity and Contribution") which was subsequently amended by way of a Deed of Amendment and Variation dated 2nd July, 2020 (the "Deed of Amendment and Variation"). The Deed of Indemnity and Contribution and the Deed of Amendment and Variation are both governed by Irish law.

51. Under the terms of the Deed of Indemnity and Contribution (as amended), the Scheme

Company agreed:-

(a) in favour of the Lenders under each Finance Lease Financing Arrangement, that it would pay any amount and perform any obligation that the Finance Lessor under that Finance Lease Financing Arrangement is required to make payment of or perform; and

(b) in favour of the Lenders under each JOLCO Financing Arrangement, that it would pay any amount and perform any obligation that the JOLCO Lessor under that JOLCO Financing Arrangement is required to make payment of or perform,

(each being referred to as an “Indemnity Claim”).

52. In addition, the Scheme Company agreed that if any NAC Group entity and/or any Finance Lessor/JOLCO Lessor (“Special Purpose Entity”) became obliged to make payment of any indebtedness under the relevant Financing Arrangement, in circumstances where that indebtedness was also the subject of any form of guarantee, indemnity or similar assurance against loss granted by the Scheme Company (the amount of such indebtedness being the "Guaranteed Obligation"), the Scheme Company would pay to that NAC Group entity and/or Special Purpose Entity by way of contribution, an amount that is equal to the Scheme Company’s share (calculated on the basis the basis of the terms set out in the Deed of Indemnity and Contribution) (the “Relevant Share”) of the portion of the amount of that Guaranteed Obligation that was actually paid by that NAC Group Entity or, as applicable, that Special Purpose Entity, within five business days of receiving written demand for the same (each such claim being referred to as a "Contribution Claim").

53. Under its terms, the Deed of Indemnity and Contribution (as amended) was stated to expire:

(a) on 31st July, 2020 (or such later date as the Scheme Company might agree to in writing) in the event that the Amended Scheme had not become effective by that date, or

(b) if the Amended Scheme had become effective by the date referred to above, upon the final day of the Covenant Waiver Period.

54. The Scheme Company entered into the Deed of Indemnity and Contribution (as amended) in order to assist the implementation and effectiveness of the proposed scheme of arrangement. In his grounding affidavit, Mr. Overgaard explained the reasons why the Scheme Company entered into the Deed of Indemnity and Contribution (as amended). Essentially, the intention and object of it was that the Lenders to the Finance Lessors under the Finance Lease Financing Arrangements and the Lenders to the JOLCO Lessors under the JOLCO Financing Arrangements would have a direct claim against the Scheme Company (although they were already contingent creditors of the Scheme Company, as a result of the guarantees given by the Scheme Company under the respective leases which were assigned to the Lenders). It was felt that the Deed of Indemnity and Contribution (as amended) would bolster their status as creditors of the Scheme Company and, accordingly, the ability to include those Lenders as Scheme Creditors for the purposes of the Amended Scheme. It was further explained by Mr. Overgaard that if any NAC Group Company (including any NAC Finance Lessee), Finance Lessor or JOLCO Lessor became obliged to make payment of any indebtedness under a Financing Arrangement which is guaranteed by the Scheme Company, that NAC Group Company Finance Lessor or Finance Lessor would have an ability to seek a contribution from the Scheme Company (in accordance with the terms of the Deed of Indemnity and Contribution (as amended)). Mr. Overgaard explained that the existence of a contribution claim that those parties would have against the Scheme Company would facilitate the recognition of the Amended Scheme in the United States pursuant to Chapter 15 of the United States Bankruptcy Code. A legal opinion from Daniel M. Glosband (US Counsel) was exhibited by Mr. Overgaard to the grounding affidavit.

55. It should be noted that the Scheme Company's evidence (which I accepted) was that, by entering into the Deed of Indemnity and Contribution and the Deed of Amendment and Variation, the Scheme Company was not taking on any additional liability for which it was not already liable prior to entering into the Deed, or against which it did not have an ability to mitigate against and/or control, for the reasons explained by Mr. Overgaard.

The Proposed Waiver and Deferral

56. As noted earlier, the NAC Group's revenues primarily comprise lease income derived from the lease of aircraft to airlines. As a result of the COVID-19 outbreak in January, 2020 and the consequent global depression of demand for air travel, the NAC Group encountered an increased number of lessees withholding or deferring lease payments. As a result, the NAC Group experienced an unforeseen drop in cash collection and cash flow projections showed a deficit in cash flow from the end of July, 2020. The NAC Group also anticipated a potential depression in the market value of aircraft as a result of the COVID-19 outbreak. As a result, the NAC Group anticipated Potential Breaches, being breaches of certain of its financial covenants in the Financing Arrangements and the possible triggering of prepayment events on the basis of material adverse effect clauses and so on.

57. In those circumstances, the Scheme Company and the NAC Group formed the view that it would be necessary for the Lenders (amongst other things) to defer the payment of principal and interest and final maturity amounts under the Financing Arrangements and to waive any enforcement event which had already arisen or which would otherwise arise under any Financing Arrangement. The Waivers and Deferral terms which were proposed were described in detail in the Updated Scheme Circular provided by the Scheme Company for the purposes of the adjourned scheme meetings. The key aspects of the Waiver and Deferral sought were summarized by Mr. Overgaard in the grounding affidavit. They included financial and other covenant waivers for the period from 30th June, 2020 to 30th June 2021, the waiver of enforcement action against lessees in respect of waived enforcement events, an equity injection by NAC Luxembourg II SA (the direct parent of the Scheme Company) of US$60 million to the Scheme Company within five business days after the Scheme Effective Date, the deferral of principal repayments with all final maturity payments being deferred for specified periods, interest deferral, the provision of an agreed form of security to the unsecured lenders on certain terms, a cash sweep, as well as other important elements.

Consequences of a Failure to Implement the Proposed Waiver and Deferral

58. The uncontested evidence before the court was that the implementation of the Waiver and Deferral prior to the end of July, 2020 would enable the Scheme Company and the NAC Group to avoid breaching their covenants or otherwise triggering any enforcement event under the Financing Arrangements and ensure that they had access to sufficient liquidity to meet their obligations until at least 30th June, 2021 and also that the Waiver and Deferral would put the NAC Group in a position to meet future obligations, contingent on the recovery of the air travel sector and aircraft market values following the COVID-19 outbreak.

59. It was the further uncontested evidence before the court that, if the Waiver and Deferral was not implemented by the end of July, 2020, it was likely that an actual or potential event of default, including, among other things, an actual or potential breach of a financial covenant, would exist on that date in respect of one or more of the NAC Group companies and that such default might also trigger cross-defaults in one or more of the NAC Group's Financing Arrangements.

60. It was also the uncontested evidence before the court that, in addition to the above, if the Waiver and Deferral did not take effect, the Scheme Company and the NAC Group would run out of available cash required to continue operations at the end of July, 2020 and that the Scheme Company and the other NAC Group obligors would breach the terms of their respective Financing Arrangements, which would allow the Scheme Creditors to take enforcement action based on the resulting events of default and consequential cross defaults.

61. The consequence of all of this, on the evidence (which I accepted) was that the NAC Group companies might have had to make filings under Chapter 11 of the US Bankruptcy Code or there might have been an uncontrolled liquidation of the NAC Group. The consequential value destruction from the NAC Group being forced to take such steps would otherwise be avoided if the Scheme Creditors agreed to the Waiver and Deferral for the duration of the Covenant Waiver Period.

62. The Scheme Company put in evidence a report prepared by EY entitled "Entity Priority Analysis" dated 10th May, 2020 (the "EPA Report") for the NAC Group. The EPA Report provided an estimate of returns for the all creditors of the NAC Group under a theoretical break-up analysis of the NAC Group as at 31st March, 2020, assuming an entity by entity liquidation. This involved the cessation of trading, assignment of leases to the NAC Secured Creditors and the break up and sale of the remaining assets of the NAC Group assuming distressed values.

63. Based on various assumptions, the EPA report stated that the estimated average recovery of the NAC Group's unsecured financiers would be in the region of between 58.6%

and 63.2% and the estimated average recovery of the NAC Group's secured financiers would be in the range of between 62.4% and 70.2%.

The Scheme of Arrangement

64. While the Financing Arrangements are variously governed by English, German and New York law, as the Scheme Company is an Irish Company, with its headquarters in Limerick, with half of its board of directors being Irish nationals, with its operations being substantially run from Ireland and with 65 active Irish registered subsidiaries within the NAC Group (including NAC 29), it was proposed by the NAC Group and the Scheme Company to implement the Waiver and Deferral by way of an scheme of arrangement, under Part 9 of the 2014 Act.

65. Each Scheme Creditor under the Financing Arrangements was to be a Scheme Creditor in respect of the indebtedness owed to them by the Scheme Company as primary obligor under or in connection with the Financing Arrangements. The indebtedness owed to each Scheme Creditor by the Scheme Company as primary obligor was:-

(a) in respect of the NAC 29 Financing Arrangements, the amounts owed to the Scheme Creditors under the related guarantee and indemnity granted by NAC DAC in respect of the obligations of the NAC 29 Borrower;

(b) in respect of each Direct Financing Arrangement, the amounts owed to the Scheme Creditors under the related guarantee and indemnity granted by NAC DAC, in respect of the obligations of the Direct Secured Borrower under that Direct Financing Arrangements;

(c) in respect of each Finance Lease Financing Arrangement, the amounts owed to the Scheme Creditors in respect of that Finance Lease by the assignment to the Scheme Creditors of the related guarantee and indemnity given by NAC DAC to the Finance Lessor and by the Deed of Indemnity and Contribution (as amended); and

(d) in respect of each JOLCO Financing Arrangement, the amounts owed to the Scheme Creditors in respect of that JOLCO Financing Arrangement by the assignment to the Scheme Creditors of the related guarantee and indemnity given by NAC DAC to the JOLCO Lessor and by the Deed of Indemnity and Contribution (as amended).

66. Certain financing arrangements of the NAC Group were excluded from the Amended Scheme. Details of those excluded financing arrangements and other aspects of the Amended Scheme were explained in Mr. Overgaard's grounding affidavit.

Procedural Background

67. On 5th June, 2020, an application was made on behalf of the Scheme Company for various orders in connection with the proposed scheme. By order made on 9th June, 2020, I entered the proceedings in the Commercial List. I made certain other orders and directions.

68. First, I directed the summoning of the following meetings: (a) a meeting of the Secured Scheme Creditors and (b) a meeting of the Unsecured Scheme Creditors pursuant to s. 450 (3) of the 2014Act.

69. Second, in exercising the court's jurisdiction to summon meetings under s. 450(3), I gave directions pursuant to s. 450(5) that the appropriate scheme meetings to be held were, the meeting of the Secured Scheme Creditors and the meeting of the Unsecured Scheme Creditors.

70. Third, I directed that the scheme meetings take place on 24th June, 2020 and made directions in relation to the material to be provided to the Scheme Creditors. I also directed that the summoning of the scheme meetings be advertised.

71. Fourth, I gave directions in relation to the appointment of a chairperson of the scheme meetings (who was to be Mr. Overgaard).

72. Fifth, I gave directions in relation to the scheme meetings themselves (which provided for the remote participation at the meeting by the Scheme Creditors in light of the prevailing public health situation).

73. Sixth, I gave the Scheme Company permission to bring an application for the court's approval of the proposed scheme in the Commercial List, in the event that the scheme was approved by the requisite majority at the scheme meetings.

74. Finally, I confirmed the appointment of Mr. Overgaard as foreign representative in any proceedings under chapter 15 of the United States Bankruptcy Code with respect to the proposed scheme and directed that he, or such other appropriate person selected by the Board of the Scheme Company, be authorised to act as foreign representative in any proceedings under Chapter 15 in relation to the Scheme.

75. The Scheme Company complied with the various directions in relation to the summoning of the scheme meetings and the advertising of those meetings (as appears from Mr. Overgaard's grounding affidavit and from the affidavit of Elliot Roberts sworn on 9th July, 2020). I am satisfied on the basis of that evidence that the directions made by the court on 9th June, 2020, regarding notice of the scheme meetings, advertisement of the scheme meetings and the making available of documents to the Scheme Creditors were all complied with.

76. Mr. Overgaard was appointed as chairperson of the Scheme meetings on 24th June, 2020. However, the completed voting/proxy forms received from the Unsecured Scheme Creditors by the submission deadline indicated that the special majority of Unsecured Scheme Creditors required to approve the scheme pursuant to s. 453(2)(a) would not be reached. In order to continue discussions with the Unsecured Scheme Creditors and their advisors and to identify and address their concerns with the proposed scheme terms, the chairperson determined that it was appropriate, in the interests of the Scheme Creditors, to adjourn the scheme meetings until 9th July, 2020.

77. In the meantime, constructive engagement took place between the Scheme Company and its advisors and various groups of Lenders. The Scheme Company prepared an updated scheme circular and applied to the court on 2nd July, 2020 for further directions in relation to the adjourned scheme meetings. I made further directions on 2nd July, 2020. Those further directions included directions for the remote conduct of the adjourned scheme meetings and for the delivery of an Updated Scheme Circular which set out and explained the revised terms of the proposed scheme (which became the Amended Scheme). Evidence of compliance with the further directions made on 2nd July, 2020 was provided in Mr. Overgaard's grounding affidavit and in the affidavit of Elliot Roberts and the affidavit of Maya Dattani sworn on 16th July, 2020, which were before me on 21st July, 2020.

78. The adjourned scheme meetings proceeded on 9th July, 2020. Mr. Overgaard was appointed as chairperson of those meetings. The evidence established that the resolutions were approved by 100% in number and value of the Scheme Creditors present and voting at each of the adjourned scheme meetings (representing 98% in value of the Unsecured Scheme Creditors and 91% in value of the Secured Scheme Creditors). The Scheme Company's sole shareholder, NAC Luxembourg II SA, had resolved by written resolution to approve the terms of the amended scheme on 8th July, 2020.

79. By a further order dated 10th July, 2020, I listed the hearing of the application for sanction in respect of the amended scheme for 21st July, 2020 and gave directions in relation to the advertising of that hearing date and for persons intending to appear at the hearing to provide advance notice of their intention. Evidence of compliance with the directions made on 10th July, 2020 was provided in a sworn affidavit by Michael Murphy sworn on 21st July, 2020. Mr. Murphy's affidavit further confirmed that other waivers necessary for the Amended Scheme to achieve its intended effect had been agreed and executed by the relevant parties and that other necessary steps had been completed (including the provision of funds for the equity injection to the scheme Company of US$60,000,000).

The Hearing on 21st July 2020

80. The hearing proceeded on 21st July, 2020. In addition to the Scheme Company, two ad hoc groups of unsecured creditors and one group of secured creditors were legally represented at the hearing. Those parties confirmed that they were supporting the Scheme Company's application that the Amended Scheme be sanctioned. Having heard submissions from the parties, and having had the opportunity of considering the papers in advance of the hearing (including very helpful written submissions prepared on behalf of the Scheme Company), I gave my ruling on the application at the conclusion of the hearing in the form of an *ex tempore* judgment. I made an order sanctioning the Amended Scheme. I also granted a certificate pursuant to Article 53 of the Brussels Recast Regulation, certifying that the court had jurisdiction to hear and determine the Scheme Company's application pursuant to Articles 1(1), 4 and 8(1) of that Regulation. I indicated that I would elaborate on my reasons in the form of a written judgment which would address the legal issues which arose on the application, including some issues which had not previously been considered in this jurisdiction.

Court Sanction for Amended Scheme of Arrangement

Preliminary Issues

81. While the test to be applied by the court in deciding whether to sanction a scheme of arrangement is well established and has been considered and applied in a number of recent judgments of the Irish courts, it is necessary before turning to that test, and to the reasons why I considered that the various elements of the test were satisfied in the case of the Amended Scheme, it is necessary to address three preliminary issues which went to the jurisdiction of the court to approve the Amended Scheme.

82. Those three preliminary issues concerned (a) the jurisdiction of the Irish courts to sanction the Amended Scheme (as distinct from the recognition and enforcement of the Amended Scheme in other jurisdictions, including other European jurisdictions); (b) the effect (if any) of the Deed of Indemnity and Contribution (as amended) on the court's entitlement or discretion to sanction the Amended Scheme; and (c) the implications (if any) of the inclusion of the ancillary releases to the court's jurisdiction to sanction the Amended Scheme. I will deal with each of those issues in turn.

(a) Jurisdiction

83. The Scheme Company is a designated activity company (DAC) incorporated under the 2014 Act which has its registered office in Limerick. It is the head company in the NAC Group. The court's jurisdiction to sanction a scheme of arrangement between a company and its members or creditors (as the case may be) depends on the relevant company being a "*company"* to which Part 9 of the 2014 Act applies. Part 9, chapter 1 applies in the case of a *"compromise or arrangement"* which is proposed between a *"company"* and its creditors (or any class of them) or its members (or any class of them). Reading s. 10(1) and s. 964 of the 2014 Act together, it is clear that Part 9 of the 2014 Act applies to a company which is a designated activity company (DAC). That is so unless provision is otherwise made in Part 9. No such provision is made in that Part. The Scheme Company is, therefore, a *"company"* to which part 9 of the 2014 Act applies. Accordingly, the court had jurisdiction under Part 9 of the 2014 Act to consider and, if appropriate, sanction a *"compromise or arrangement"* between the Scheme Company and its creditors.

84. It should also be noted that, on the undisputed evidence before the court, the operations of the NAC Group (which is headed by the Scheme Company) are substantially run from Ireland. Not only is the Scheme Company a Company incorporated and registered in Ireland, but so is NAC 29, the borrower/issuer under the finance structure in respect of the unsecured facilities or financing arrangements referable to the NAC Group. As are 65 of the 138 subsidiaries in the NAC Group. In addition, as noted earlier, at least one of the Scheme Creditors is incorporated and registered in Ireland, Citibank Europe plc, which is owed the sum of approximately US$100 million by NAC 29, which debt is guaranteed by the Scheme Company.

85. In those circumstances, therefore, I was quite satisfied on the evidence that the court had jurisdiction to consider and, if appropriate, sanction a proposed scheme of arrangement between the Scheme Company and its creditors. A separate legal issue arose as to the likely recognition and enforcement of any order the court might make sanctioning the Amended

Scheme in other jurisdictions, including the United States and other European jurisdictions. I deal with that issue later in this judgment.

(b) Implications of Deed of Indemnity and Contribution (as amended)

86. As explained earlier, the evidence before the court (which I accepted) was that the purpose of the Deed of Indemnity and Contribution (as amended) was to create an indemnity claim and a contribution claim against the Scheme Company. Essentially, the two principal purposes of the deed were: (i) to create a primary obligation on the part of the Scheme Company, thereby creating a *"ricochet claim"* in the form of the contribution claim, which would assist recognition of the Amended Scheme in the United States pursuant to Chapter 15 of the United States Bankruptcy Code and (ii) the *"ricochet claim"* would also provide for or enable the releases of claims against the JOLCO Lessors, the JOLCO Lessees, the Finance Lessors and the Finance Lessees. The evidence also established to my satisfaction that, in entering into the Deed of Indemnity and Contribution (as amended), the Scheme Company was not taking on any additional liability for which it was not already liable prior to entering into the deed or which it did not have an ability to mitigate against or to control. In that regard, I accepted the evidence set out at para. 87 of Mr. Overgaard's grounding affidavit.

87. It was quite properly brought to my attention on behalf of the Scheme Company, that the implications of a company entering into a type of arrangement similar to the Deed entered into by the Scheme Company in the present case for the court's entitlement or discretion to sanction a proposed scheme, have been considered in a number of judgments of the English courts. My attention was drawn in particular to *Re A. I. Scheme Ltd* [2015] EWHC 1233 (Ch) (Norris J.), *Re Codere Finance* (UK) Ltd [2015] EWHC 3778 (Ch) (Newey J.) ("*Codere*"), *Re NN 2 NewCo Ltd* [2019] EWHC 1917 (Ch) and [2019] EWHC 2532 (Ch) (both Norris J.) ("*NN2 NewCo*") and *Re Lecta Paper UK Ltd* [2020] EWHC 382 (Ch) (Trower J.) ("*Lecta Paper*"). It is unnecessary for the purpose of this aspect of the judgment to discuss any of these cases in detail. It is, I believe, sufficient for me to record that I was persuaded that there was nothing in principle to prevent the Scheme Company from entering into the Deed of Indemnity and Contribution (as amended) in order to achieve the objectives outlined by Mr. Overgaard on behalf of the Scheme Company. I accept that it was a reasonable and commercial arrangement for the Scheme Company to have entered into and that it had reasonable commercial objectives, both of which may have enhanced the prospect of the Amended Scheme being sanctioned by the court and being recognised in at least one other jurisdiction, the United States. On the evidence before the court, I did not regard the Deed of Indemnity and Contribution (amended) as presenting any bar, whether jurisdictional or otherwise, to the court proceeding to consider, and if appropriate, to sanction the Amended Scheme.

(c) Ancillary releases

88. Another potential jurisdictional issue which arose in this application concerned the inclusion, as part of the Amended Scheme, of a waiver and deferral which would not only bind the Scheme Creditors as against the Scheme Company, but would also bind the Scheme Creditors as against all NAC Group companies who are debtors under the relevant facilities and (in relation to the Finance Lease financing arrangements and the JOLCO financing arrangements) as against the Finance Lessors and the JOLCO Lessors. The undisputed evidence on behalf of the Scheme Company was that the ancillary releases of the obligations of the debtor companies within the NAC Group, of the finance lessors and of the JOLCO lessors were necessary to give effect to the compromise and arrangement proposed under the Amended Scheme, on the basis that, without those releases, the NAC Group debtor companies, the Finance Lessors and the JOLCO Lessors would retain liability in respect of the amounts owed and to the relevant facilities, thereby undermining the effectiveness of the

Amended Scheme. It was urged on the court on behalf of the Scheme Company that, the inclusion of these ancillary releases in the amended scheme did not deprive the court of jurisdiction to sanction the scheme as a "*compromise or arrangement*" under Part 9 of the 2014 Act.

89. Having considered several impressive authorities from a number of different jurisdictions which have a statutory procedure very similar (albeit not identical) to that contained in Part 9 of the 2014 Act, and having considered my own judgment in *Re Ballantyne Re: plc* [2019] IEHC 407 ("*Ballantyne*"), I concluded that the inclusion of the ancillary releases in the Amended Scheme did not undermine the status of that scheme as a "*compromise or arrangement*" under Part 9 of the 2014 Act or otherwise deprive the court of jurisdiction to consider and, if appropriate, sanction the scheme.

90. In *Ballantyne*, the scheme at issue provided for the releases of claims which certain guaranteed noteholders might have had against (amongst others) the relevant scheme company and the guarantor. The scheme at issue provided for a release of the guarantor's liabilities. The application to sanction the scheme in that case was opposed. I rejected that opposition. In doing so, I adopted what has been referred to in the cases as a "pro-release" interpretation of Part 9 of the 2014 act, and concluded that it was open to the court to sanction a scheme which provided for the release of third party claims. I followed the judgment of Finkelstein J. in the Federal Court of Australia in *Re Opes Prime Stockbroking Ltd* [2009] FCA 813 ("*Opes Prime*") and the judgment of the Full Court of the Federal Court of Australia on appeal in the same case [2009] FCAFC 125. I also referred to and followed a number of the English judgments which were cited to me including *Re T&N Ltd (No. 3)* [2007] 1 BCLC 563 ("*T&N*") and *Re Lehman Brothers International (Europe) (In administration) (No. 1)* [2010] 1 BCLC 496 *("Lehman Brothers").* Each of those cases adopted a pro-release approach to the interpretation of statutory provisions very similar to

Part 9 of the 2014 Act. I concluded that it was appropriate to adopt the pro-release approach to the concept of a "*compromise or arrangement*" under Part 9. I was, therefore, satisfied in *Ballantyne* that I had jurisdiction to proceed to consider whether to sanction the scheme proposed in that case which included the relevant third-party releases.

91. The ancillary releases provided for in the Amended Scheme were somewhat different to those which were at issue in *Ballantyne*. In this case the relevant releases (comprising the waivers and deferrals contained in the Amended Scheme) were for the benefit of the NAC Group debtor companies, the Finance Lessors and the JOLCO Lessors, as well as for the benefit of the Scheme Company itself. However, while the detail of the releases provided for in the Amended Scheme may have been different to those which were considered in *Ballantyne*, and in the other cases referred to in that judgment, it did not seem to me that there was any real difference in principle between the releases provided for in the Amended Scheme here and those at issue in the cases considered in *Ballantyne* and in that case, itself.

92. It was my view that the inclusion of the ancillary releases in the Amended Scheme did not mean that that scheme no longer constituted a "*compromise or arrangement*" which could be sanctioned by the court under Part 9 of the 2014 Act. In that regard, I agree with the statement of Finkelstein J. in the Federal Court of Australia in *Opes Prime* that the words "*compromise and arrangement*" should be construed liberally and in a flexible manner. I also accept that it is consistent with the objectives contained in Part 9 of the 2014 Act to follow the approach set out in the "pro-release" cases to which Finkelstein J. referred to in that case (including *T&N*, *Daewoo Singapore PTE Limited v. CEL Tractors* [2002] 2 LRC 66 and *Re Metcalfe & Mansfield Alternative Investments II Corp.* [2008] ONCA 587). I further agree with his conclusion that:-

"*…provided that there is a sufficient nexus between a release and the relationship between the creditor and the scheme company, the scheme can validly incorporate the release." (*Per Finkelstein J. at para. 55).

93. The conclusions reached by Finkelstein J. were upheld by the Full Court of the Federal Court of Australia on appeal. I endorse the views of the Full Court set out in the following part of its judgment in *Opes Prime*:-

"*66. Doubtless there are limitations on the extent to which a scheme of arrangement purporting to be between a Company and its creditors or a class of its creditors can purport to affect property of the creditor that has no connection with the Company or the relationship of creditor and debtor between the creditor and the Company. The mere fact that a person or entity is a creditor of a Company would not, of itself, justify an arrangement between that person or entity on the one hand and the Company on the other whereby property of the person or entity were confiscated without any benefit to the person or entity. Such an arrangement would not be approved by the court pursuant to s. 411(4) (b)*[1].

67. A purported scheme of arrangement must involve some arrangement in a sense that is to be construed liberally. No narrow interpretation should be given to the expressions 'compromise' or 'arrangement'. An arrangement within the meaning of s. 411 connotes some element of give and take. A proposal that conferred no benefit on creditors and constituted the mere confiscation of interests would not be an arrangement within the meaning of s.

[1] This is a reference to s. 411(4) of the Corporations Act, 2001 being the statutory equivalent to s. 453 (2) of the 2014 Act

411. An arrangement must involve some bargain giving benefit to both sides. However, there is no reason to construe the term in s. 411 as restricting in any way the nature of the bargain that might be made between Company and creditors (Re: Sonodyne International Ltd. [1994] 15 ASCR 494 at 497 – 8), subject only to the additional requirement that the arrangement must be within the power of the Company and not in contravention of the Corporations Act.

68. *A scheme of arrangement between a Company and its creditors or class of creditors is no more than a proposal to vary or modify the Company's obligations in relation to its debts and liabilities owed to creditors or class of creditors. There is nothing to prevent the Company from posing, as part of the arrangement, a term to the effect that, in consideration of what the Company has provided under this scheme, the creditors will discharge not only the debts and liabilities of the Company, but also the liabilities of, for example, sureties for the same debts and liabilities of the Company.*

69. *It is permissible to incorporate in a scheme of arrangement an involvement or participation by an outsider, being a person or entity who is not a party to the scheme as a Company or creditor (see Re: Glendale Land Development Ltd (in liquidation) [1982] 1 ACLC 540). Such arrangements are commonplace in relation to schemes involving takeovers. A scheme of arrangement made between a Company and its creditors under s. 411 binds only the Company and the creditors. Nevertheless, there is no reason why a bargain might not be struck between a Company and creditors whereby the creditors are bound to enter into an arrangement with third parties. So long as there is some element*

of give and take, such that the creditors receive something in return for the benefit conferred on a third party, there is no reason in principle why that term could not be part of a scheme of arrangement as contemplated by s. 411.

70. *Questions of fairness, of course, are different…*

71. *…*

72. *There is simply no textual basis for the claim that a scheme cannot include a provision affecting the rights of a creditor against a third party and no basis for a gloss to that effect. All that is required is a compromise or arrangement between the Company and its creditors. These schemes are clearly between the scheme companies and their creditors.*

73. *There is also no principled basis for a restrictive approach. Provisions of s. 411 are intended to provide a flexible mechanism to facilitate compromises and arrangements between insolvent companies and their creditors as an alternative to liquidation. If there is an adequate nexus between a release or indemnity, on the one hand, and the relationship between the creditor and the Company, as creditor and debtor, on the other hand, there is no reason in principle why a scheme could not validly incorporate a release and indemnity such as is provided for in the schemes. The claims against Merrill Lynch and ANZ that are released and are subject to the indemnity arise out of dealings with the scheme companies. Thus, the claims of creditors against the scheme companies and the claims against Merrill Lynch and ANZ substantially* *overlap. The arrangement involves a settlement of claims that are significantly interrelated. Without the release, there could be no compromise or arrangement."*

94. I agree with those observations and conclusions and, in my view, they applied with equal force to the releases provided for in the Amended Scheme in this case.

95. My attention was also drawn by the Scheme Company to a recent judgment of the Court of Appeal in Singapore in *Pathfinder Strategic Credit LP v. Empire Capital Resources PTE Ltd.* [2019] SGCA 29 ("*Pathfinder*"). In that case, in a judgment delivered by Sundaresh Menon C.J., the Court of Appeal of Singapore considered (albeit on an *obiter* basis) the jurisdiction of the court to sanction a scheme which sought to compromise a debt between the creditor and a third party. It was argued by a group of objecting creditors that only third-party releases which are "*necessary*" to give effect to the proposed scheme may be compromised under a scheme of arrangement. Their argument was that given the nature of a guarantee, while a primary obligor may propose a scheme that involves the release of its guarantor's liabilities, a guarantor cannot propose a scheme that involves a release of the primary obligor's liabilities because such a release is not "*necessary*" for the compromise of liabilities between the guarantor and its creditors. I observe here that the releases to which objection was taken by the objecting creditors in *Pathfinder,* were very similar to the ancillary releases contained in the Amended Scheme at issue in the present case.

96. While it might be noted that the Court of Appeal of Singapore in *Pathfinder* was dealing with this objection by way of appeal from a decision of the first instance judge convening the relevant scheme meeting in respect of a proposed scheme, the court considered that it was appropriate to deal with the issue as one of jurisdiction (on the basis of a construction of the relevant legislation). In contrast, while I had to deal with the issue as an issue of jurisdiction, I dealt with it at the sanction hearing, rather than at an earlier stage of the procedure.

97. In dealing with the question of jurisdiction and the implications for the court's jurisdiction of the presence of the third-party releases at issue in the case, the Court of Appeal of Singapore in *Pathfinder* noted that the test which the first instance judge had formulated was whether there was a "*sufficient nexus or connection*" between the release of the third-party liability and the relationship between the company and the scheme creditors. The Court of Appeal agreed with the judge at the first instance that the decision of Finkelstein J. in *Opes Prime* was persuasive. The court found that there was "*much practical attraction*" in the "*sufficient nexus*" test (paras. 77 and 79).

98. The court in *Pathfinder* was satisfied that the "*sufficient nexus*" test reflected the law in Australia so far as schemes of arrangement were concerned and concluded that that was the appropriate test to be applied in Singapore under the relevant legislation there. It was not satisfied that a necessity test had to be applied. The court further concluded that there were no good reasons for drawing a distinction between a primary and a secondary obligation in the context of a guarantee for the purpose of determining jurisdiction under the relevant provisions of the legislation which was equivalent to Part 9 of the 2014 Act. On the facts, the court concluded that the debt owed by the other members of the corporate group, which included the scheme company in that case, to the relevant creditors was closely related to the creditor debtor relationship between those creditors and the scheme company. While the court found that the "*sufficient nexus*" test was the appropriate test, it held that even if the test of necessity were to be adopted, it would have been inclined to find that it was satisfied on the facts. The court stated (at para. 81) that:-

> "*In our judgment, having regard to the legislative context of s. 210 (1) any jurisdictional test would have to be applied in a commercially sensible manner*

particularly where a group restructuring is concerned. In this context, even if it was the guarantor and not the primary obligor who was the scheme applicant, a release of the third-party debt owed by the primary obligor to the scheme creditors would still be regarded as necessary, since otherwise liability and enforcement risks would merely be shifted between members of the corporate group and the overall restructuring objective would be entirely unmet. Indeed, without a release of the primary obligor's liability, it seems to us unrealistic to even expect a guarantor within the same corporate group to settle or compromise its contingent liability through a scheme of arrangement. In that context, the third-party releases must be viewed as necessary to give effect to the proposed scheme." (per Sundaresh Menon C.J. at para. 81)

99. At the hearing, I found those observations of the Court of Appeal of Singapore and its ultimate conclusions on the third-party release issue in *Pathfinder* to be persuasive and indeed compelling. It seems to me that they are particularly apposite to the releases provided for in the Amended Scheme. I was, and am, therefore, happy to endorse and apply that court's observations and conclusions to the releases contained in the Amended Scheme.

100. For completeness, I should note that my attention was also drawn to another recent Australian judgment, that of Gleeson J. in the Federal Court of Australia in *Re Tiger Resources Ltd.* [2019] FCA 2186 ("*Tiger Resources*"). In that case, the court adopted a pro-release approach and applied the approach taken by the Full Court in *Opes Prime* and by David Richards J. in *T&N*. Gleeson J. concluded that, consistent with the broad interpretation to be given to the term, the proposed scheme at issue was an "*arrangement*" within the meaning of the relevant Australian legislation.

101. Finally, I should make reference to the recent judgment of Trower J. in the High Court of England and Wales in *Lecta Paper UK Ltd*. (see citation earlier). The particular scheme at issue in that case provided for the release and discharge of the scheme creditors' claims under certain senior secured notes against, not only the scheme company, but also against the parent and all of the guarantors of those notes who were third parties for that purpose. Trower J. noted that it was "*well-established that a scheme of arrangement can release claims by a creditor against a third party where such a release is* <u>necessary</u> *in order to give effect to the arrangement*" (para. 20) (my emphasis). He concluded that, as a matter of principle, the same approach was applicable where two companies were jointly liable as co-obligors for the same debt and that if that were not to be the case, one of the principal obligors would remain liable for the entire debt and might be entitled to claim a contribution from the scheme Company. He observed that such a claim was capable of defeating the purpose of the scheme. He held, therefore, that in the case of two principal debtors, a scheme proposed by one could effectively provide for a release in favour of both the principal obligors in the same way as a scheme proposed by a principal debtor could provide for an effective release of claims against a guarantor (he referred in that context to *Codere* and *NN2 NewCo* (see citations earlier).

102. While Trower J. referred to the release at issue in that case as being "*necessary*" in order to give effect to the arrangement, I prefer to adopt the "*sufficient nexus*" approach referred to in *Ballantyne*, in the *Opes Prime* judgments and in *Pathfinder*, although I do not think that the judge was expressing a view one way or the other on the appropriateness or otherwise of the "*sufficient nexus*" approach, in circumstances where he found on the facts that the releases were clearly "*necessary*" for the scheme to be effective.

103. In deciding that the court had jurisdiction to consider the Amended Scheme, as being a "*compromise or arrangement*" within the meaning of that term in Part 9 of the 2014 Act, I applied the "*sufficient nexus*" test and concluded that there was a sufficient nexus or connection between the ancillary releases provided for in the Amended Scheme and the relationship between the Scheme Company and its creditors. I was satisfied that without those releases, the effectiveness of the Amended Scheme would be completely undermined. However, I went on to say that, even if the requirement was to establish that the ancillary releases were "*necessary*" to give effect to the Amended Scheme, I would have been satisfied that the test was met in this case, as a failure to provide for those releases would have completely undermined the effectiveness of the Amended Scheme. On either basis, therefore, I was satisfied that the court had jurisdiction to consider the Amended Scheme as a "*compromise or arrangement*" under Part 9 of the 2014 Act.

Test for Court Sanction for a Scheme of Arrangement Under Irish Law

104. The test to be applied by the court in deciding whether to sanction a scheme of arrangement is well established and has been considered and applied in a number of recent judgments of the Irish courts. In *Re Colonia Insurance (Ireland) Ltd* [2005] 1 IR 497 ("*Colonia*"), the High Court (Kelly J.) set out the test to be applied in the case of a scheme of arrangement in relation to a solvent company. The test was subsequently applied to takeover or acquisition schemes: In *Re Depfa Bank plc* [2007] IEHC 463 ("*Depfa*") (Kelly J.) and *In Re SCISYS Group plc* [2019] IEHC 904 ("*SCISYS*") (Barniville J.). The test has also been applied to schemes of arrangement providing for corporate restructuring in other situations, including schemes which provided for the migration to the ICSD Model of settlement (*In Re UBS EFTs public limited Company* [2019] IEHC 860 ("*UBS*"), *In Re Allergan PLC* [2020] IEHC 214 ("*Allergan*"), *In Re Xtrackers (IE) public limited Company* [2020] IEHC 330 ("*Xtrackers*") and *FundLogic Alternatives PLC* [2020] IEHC 428, (*"FundLogic"*) (all Barniville J.) and to schemes of arrangement concerning insolvent companies (*In Re Ballantyne plc* [2019] IEHC 407 (Barniville J.)). *Ballantyne* is the most relevant judgment for present purposes. I was satisfied that the test set out in *Colonia* and referred to, and applied, in those other cases was the appropriate test to be applied in considering the Company's application for court sanction in respect of the proposed scheme and I apply it here.

105. In summary, the test requires the court to be satisfied that the following five requirements have been fulfilled, namely, that:-

(1) Sufficient steps have been taken to identify and notify all interested parties;

(2) The statutory requirements and all directions of the court have been complied with;

(3) The class of members (in the case of a scheme of arrangement between the Company and its members) has been properly constituted;

(4) There is no improper coercion of any of the members concerned; and

(5) The scheme is such that an intelligent and honest person, being a member of the class concerned, acting in his or her interest, might reasonably approve of it.

106. In addition to those five requirements, the court must also be satisfied that the scheme is not *ultra vires* the Company the subject of the application. That might be the case where the scheme at issue involved the sale of the entirety of a company's undertaking, in circumstances where there was no power in the company's constitution permitting such a radical alteration in its position (for example: *In Re Oceanic Steam Navigation Co. Ltd* [1939] Ch. 41). There was no suggestion that the Amended Scheme was *ultra vires* the Scheme Company and I was satisfied that it was not.

107. I will now deal with each of the five requirements, or criteria, of the test derived from *Colonia* and considered and applied in the other cases referred to earlier.

(1) Steps to Identify and Notify Interested Parties

108. There was no issue in relation to the compliance by the Scheme Company with this first requirement. The affidavit evidence of Mr. Overgaard, Mr. Roberts, Ms. Dattani, Mr. Khan (sworn on 16th July, 2020) and Mr. Murphy satisfied me that the Scheme Company had taken all of the necessary steps to identify and notify all of the relevant parties, being the Unsecured Scheme Creditors and the Secured Scheme Creditors. The affidavit evidence provided on behalf of the Scheme Company demonstrated to my satisfaction that, having obtained directions from the court in relation to the notification of the original scheme meetings and the adjourned scheme meetings and of the sanction hearing, and having provided the information and materials referred to in the various orders made by the court, the Scheme Company had complied with those directions and had ensured that all of the relevant parties were identified and notified of the scheme meetings and of the sanction hearing.

109. In those circumstances, I was satisfied that, as required by s. 452 of the 2014 Act, all persons affected by the amended scheme were duly notified of the Amended Scheme by means of the Updated Scheme Circular and the other material furnished to the Scheme Creditors (as explained in the affidavit evidence provided to the court) and that the Updated Scheme Circular contained the necessary information as required by that section.

110. I was, therefore, satisfied on the basis of all of the evidence, that sufficient steps had been taken by and on behalf of the Scheme Company to identify and notify interested parties of the Amended Scheme and of the adjourned scheme meetings and to provide them with the information required under s. 452 of the 2014 Act.

(2) Compliance with Statutory Requirements and Court Directions

111. The statutory requirements which have to be fulfilled before a scheme of arrangement can become binding on the creditors of the company concerned (in the case of a scheme between a Company and its creditors) are set out in ss. 452 and 453 of the 2014 Act.

112. Section 452 contains the requirements as to the information which must be provided to the relevant creditors in relation to the proposed scheme of arrangement. I concluded that the Updated Scheme Circular provided to the Scheme Creditors in advance of the adjourned scheme meetings, in accordance with the directions made by the court, contained the information required under s. 452.

113. Section 453(1) provides that a scheme will become binding on the creditors of the company concerned if certain conditions are satisfied. Those conditions are set out in section 453(2). In summary, the conditions are as follows:-

(a) There must be a "*special majority*" of those voting at the scheme meeting in favour of a resolution agreeing to the scheme. A "*special majority*" is a majority in number representing at least three fourths in value of the creditors (s. 453(2)(a));

(b) Notice of the passing of the resolution at the scheme meeting, and that an application will be made to the court in relation to the scheme of arrangement, must be advertised in at least 2 daily newspapers circulating in the district where the registered office or principal place of business of the Company is situated (s. 453(2)(b)); and

(c) The scheme must be sanctioned by the court (s. 453(2)(c)).

114. As regards the statutory requirement contained in s. 453(2)(a), Mr. Overgaard's grounding affidavit and his report, as chairperson of the adjourned scheme meetings, demonstrated that the Scheme Company had more than met the requirement of having achieved the statutory *"special majority"* of those voting at the scheme meetings in favour of the Amended Scheme. All of the votes cast at the two scheme meetings were in favour of the Amended Scheme. With regard to the meeting of the Unsecured Scheme Creditors, 100% of those present and voting, representing 98% in value of the relevant unsecured debt, who voted, voted in favour of the Amended Scheme. As regards the meeting of Secured Scheme Creditors, 100% of those present and voting, representing 91% in value of the total relevant secured debt, voted in favour of it. Therefore, I was satisfied that this statutory requirement was complied with.

115. As regards the statutory requirement contained in s. 453(2)(b), I was satisfied on the basis of Mr. Murphy's affidavit that the relevant notices were published in the Irish Times, in the Financial Times (International Edition) and in Iris Oifiguil on 14th July, 2020. I was satisfied that the publication of these notices complied with the statutory requirement contained in s. 453(2)(b) and with the directions made by the court on 10th July, 2020.

116. As regards the statutory requirement contained in s. 453(2)(c), this requirement relates to the obtaining of the court's sanction for the proposed amended scheme, which was the subject of the Scheme Company's application and is the subject of this judgment. As I have indicated, I was satisfied that it was appropriate to sanction the amended scheme.

117. I was also satisfied on the evidence that the Scheme Company had complied with all of the orders and directions made by the court prior to the hearing of the Scheme Company's application on 21st July, 2020.

118. In those circumstances, I was satisfied that the second of the requirements or criteria which had to be fulfilled in order for the court to sanction the Amended Scheme were fulfilled, on the evidence before the court.

(3) Class of Members Properly Constituted.

119. The next requirement which had to be fulfilled by the Scheme Company was, that it had to demonstrate to the court that the classes of Scheme Creditors which voted at the adjourned scheme meetings on 9th July, 2020 were properly constituted.

120. In my order of 9th June, 2020, I gave a direction pursuant to s. 450(5) of the 2014 Act that the scheme meetings required to approve the proposed scheme should comprise two meetings: (a) a meeting of the Secured Scheme Creditors (as defined in the Scheme Circular) and (b) a meeting of the Unsecured Scheme Creditors (as also defined in that Circular). I was satisfied at that stage to give that direction on the *ex parte* application of the Company. Although no objection was taken by any person to the fact that the adjourned scheme meetings were conducted on the basis of these two classes of creditors, I had to be satisfied for the purposes of s. 450(3) of the 2014 Act that it was appropriate for the adjourned scheme meetings to proceed on the basis of these two classes of creditors.

121. It is well established that where no objection has been taken to the composition of the classes of creditors meeting at the relevant scheme meetings, the court should be slow to reach of different view as to the appropriateness of the meetings proceeding on the basis of those classes: see for example: *UBS, SCISYS, Allergan, Xtrackers* and *FundLogic*. I have previously endorsed the view expressed by Chadwick L.J. in the Court of Appeal of England and Wales in *Re Hawk Insurance Co. Ltd* [2001] 2 BCLC 480 ("*Hawk Insurance*"), that an applicant for sanction for a proposed scheme of arrangement would be *"entitled to feel aggrieved"* if the court, in the absence of any opposition and of its own motion, were to reach a different view as to the appropriateness of the class composition for the relevant scheme meetings to that reached at the earlier stage of the process (see, for example: *Allergan* at para. 28 and *FundLogic* at para. 48). However, as noted in the case law, as the court is not a rubberstamp, it was necessary for me to reconsider the position on this application, notwithstanding the absence of any objection to the appropriateness of the composition of the classes of creditors at the relevant scheme meetings and notwithstanding the unanimous support for the Amended Scheme on the part of those creditors who were present and voted at those meetings.

122. The legal principles applicable to class composition have been discussed in a number of the authorities. They were very recently considered by me in my judgments in *Allergan Xtrackers* and *FundLogic*. At para. 30 of my judgment in *Allergan*, I stated as follows:-

> *"As discussed by me in UBS and in SCISYS, the leading statement on the question of the class composition of meetings is that made by Bowen's LJ. in the English Court of Appeal in Sovereign Life Assurance Company v Dodd [1892] 1 QB 405, where he stated:*
>
> > *'It seems plain that we must give such meaning to the term 'class' as will prevent the section being so worked as to result in confiscation and injustice, and that it must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest.'"* (p. 583)

123. As noted in many of the cases, this test has been considered and applied in numerous subsequent cases. The relevant principles were very helpfully summarised by Lord Millett in the Court of Final Appeal of Hong Kong in *Re UDL Argos Engineering Ltd* [2001] HKCFA 54, by the English Court of Appeal in *Re BTR plc* [2000] 1 BCLC 740 and in *Hawk Insurance*, by Lloyd J. in the English High Court in *Re Equitable Life Assurance Society* [2002] EWHC 140 ("*Equitable Life*") and more recently by Hildyard J. in *Re Apcoa Parking (UK) Limited* [2014] 2 BCLC 285). In *Equitable Life*, Lloyd J. noted that it was necessary to balance the power of the majority and that of the minority and stated that:-

> "*…whereas unnecessary subdivision of a class may thwart a proper scheme altogether because of a veto thereby afforded to a small minority, on the other hand if*

it is said that there has been an unfairness or oppression on the part of the majority in a larger undivided class, the control mechanism is the court's scrutiny at the sanction stage: see Re Hawk insurance Co Ltd… and Nordic Bank plc v. International Harvester Australia Ltd…" (para. 46)

124. The test in *Sovereign Life Assurance* was approved in this jurisdiction by Laffoy J. in the High Court in *In Re Millstream Recycling Ltd* [2009] IEHC 571. It has also been approved and applied by me in several of the recent cases. In the case of a scheme of arrangement between a company and its creditors, the proper focus is on the legal rights possessed by the creditors of the company. If those rights are not so dissimilar as to make it impossible for the creditors to consult together with a view to their common interest, then it is appropriate to treat the creditors as a single class.

125. There is a useful summary of the test applied in England and Wales in one of the judgments on which the Scheme Company relied: *Re Stronghold Insurance Company Limited* [2018] EWHC 2909 (Ch) ("*Stronghold Insurance*"). In considering the class or classes of creditors (or members, as the case may be), the court applies a two-stage test. Hildyard J. described those stages as follows:-

"At the first stage, the focus is on rights: if there is no difference in their respective rights the fact that they may have opposing commercial or other interests is not relevant to class constitution (though it may become relevant at a subsequent stage). This requires consideration of (a) the rights of creditors in the absence of the scheme and (b) any new rights to which the creditors become entitled under the scheme. At the second stage of the test, if there is a difference in such rights, the question is whether, in the court's assessment and looking at the issue from the point of view of the two groups in the round (that is, not having regard to individual and special or separate commercial interests), the differences in their rights and their treatment

under the proposed scheme are such as to make it impossible for them to consult together with a view to their common interest…" (at para. 42)

126. The test as so described by Hildyard J. is very similar to that applied in this jurisdiction, as discussed in cases such as *UBS, Xtrackers* and *FundLogic*.

127. I agree with Hildyard J that the question of class composition is *"a matter of judgement on the facts of each particular case"* (para. 43). I also agree with him that the following points are relevant in the exercise of that judgement and I accept that they also reflect the law in this jurisdiction:-

"(1) Only those whose rights are sufficiently similar that they can properly consult together with a view to their common interest should be included in a single class; but equally, those with rights sufficiently similar to the rights of others that they can realistically be expected to consult together to that end should be required to do so, lest by ordering separate meetings the court gives a veto to a minority group (and see Warren J's emphasis on this in Re Sovereign Marine & General Insurance Co Ltd [2006] BCC 774; [2006] EWHC 1335 (Ch)).

(2) The test should not be applied in such a way that it becomes an instrument of oppression by a minority: Re Hawk at [33] (Chadwick LJ).

(3) In assessing class constitution, the court considers whether there is more that unites creditors than divides them (in considering the terms of the scheme at their proposed scheme meeting): Re Telewest Communications Plc (No 1), [40].

(4) A broad approach is to be taken, and the differences may be material, certainly more than de minimis, without leading to separate classes: Re

> *Telewest Communications Plc (No 1) [2004] EWHC 924 (Ch), [2005] 1 BCLC 752, [37].”* (per Hildyard J. at para. 43)

128. In the present case, the Scheme Company formed the view (for the reasons set out in detail in Mr. Overgaard's grounding affidavit) that it was appropriate to treat the Scheme Creditors as two classes, the Unsecured Scheme Creditors and the Secured Scheme Creditors. For that reason, two scheme meetings of the Scheme Creditors were summoned and took place.

129. In determining the appropriateness of the composition of the Scheme Creditors for the purposes of the scheme meetings, the court may also be required to consider the appropriate comparator when determining the similarity or dissimilarity of the rights of the relevant scheme creditors. Where a company is insolvent, the appropriate comparator will normally be the rights of the creditors in a winding up of the company. That was recognised by the Chadwick L.J. had in *Hawk Insurance* (at para. 42). In *Sovereign Marine and General Co. Ltd* [2007] 1 BCLC 228, Warren J. in the High Court of England and Wales considered what Chadwick L.J. said in *Hawk Insurance* and stated:-

> *“The fact that the alternative to a scheme was an insolvent winding up was of significance not only because it provided a direct comparator for financial outcome, but also because it enabled a common interest to be identified.”* (at para. 87)

130. In considering whether the classes of creditors have been properly determined, the *“starting point is to identify the appropriate comparator: that is, what would be the alternative if the scheme does not proceed”* (per Hildyard J. at para. 48 of *Stronghold Insurance*). Hildyard J. explained why that was so (at para. 49):-

> *“49. The reason is two-fold. First, a fair comparison between a policyholder's rights if there is no scheme and its rights under the proposed scheme depends on ascertaining the nature and quality of the right in the ‘non-scheme world’,*

and the latter depends on the appropriate comparator. Secondly, only by identifying the comparator can the likely practical effect of what is proposed be assessed and the likelihood of sensible discussion between the holders of rights so affected and between them and others with different rights to be weighed fairly.

50. Thus, for example, the likelihood of imminent liquidation may accentuate or diminish the importance of lender priority according to the effect of liquidation on the rights in question, and on whether the assets of the Company on liquidation would be sufficient to cover all or only some debts according to their different positions in the debt waterfall."

131. Where a company, the subject of a proposed scheme, is solvent, the rights of the creditors in a liquidation may not be an appropriate comparator: *Re British Aviation Insurance Co Limited* [2006] 1 BCLC 665; [2005] EWHC 1621 (Ch). However, as noted earlier, where the company is insolvent, the rights of the creditors in a winding up will normally be the appropriate comparator.

132. The Scheme Company's evidence was that if the Amended Scheme was not approved by the Scheme Creditors and sanctioned by the court, it might be necessary for the NAC Group of companies to make filings under Chapter 11 of the US Bankruptcy Code or there might have had to be an uncontrolled liquidation of the NAC Group. In those circumstances, the Scheme Company considered that the potential recovery for the Scheme Creditors in the event of a liquidation of the Scheme Company and other companies in the NAC Group was the appropriate comparator to the recovery they would achieve under the Amended Scheme. I agreed that, on the facts, this was the appropriate comparator. I also noted the conclusions contained in the EPA report prepared by EY, which demonstrated that recovery by the

Secured Scheme Creditors and the Unsecured Scheme Creditors would be significantly impaired in the case of a breakup of the NAC Group as at 31st March, 2020, assuming an entity by entity liquidation.

133. In all the circumstances, therefore, I accepted that the appropriate comparator was the estimated outcome for the Scheme Creditors in a winding up of the Scheme Company and other companies in the NAC Group. I also accepted that it was appropriate to have two classes of Scheme Creditors, the Secured Scheme Creditors and the Unsecured Scheme Creditors, as the Secured Scheme Creditors had security over the assets of the Scheme Company and other companies within the NAC Group, whereas the unsecured Scheme Creditors did not have the benefit of such security.

134. For those reasons, I was satisfied that the classes of Scheme Creditors were appropriate and that the third requirement of the test to be met was clearly fulfilled by the Scheme Company.

(4) Coercion

135. The court must also be satisfied that there has been no coercion of the creditors in respect of the approval of the scheme. As has been pointed out in a number of the cases mentioned (including *Ballantyne*, *UBS*, *SCISYS*, *Allergan*, *Xtrackers* and *FundLogic*), every scheme in a sense involves an element of coercion, where a dissenting creditor may be bound by the scheme, notwithstanding its opposition to it. However, as explained in *Ballantyne* (at para. 63), what this requirement is focused on is improper coercion or pressure by one group or section of creditors on another, similar perhaps to the oppression of a minority interest in a company. The Scheme Creditors voted unanimously in favour of the proposed scheme and there was clearly no question of coercion in the present case. Therefore, I held that this requirement had also been fulfilled by the Scheme Company.

(5) Approval by Intelligent and Honest Person

136. The fifth and final requirement which must be fulfilled is that, the court must be satisfied that the proposed scheme is such that an intelligent and honest person, being a member of the class concerned, acting in respect of his or her own interests, might reasonably approve of it. This requirement has been widely considered and discussed in several Irish, and other, cases, a number of which were discussed by me in *Ballantyne*. It is unnecessary to consider the cases in any detail in this judgment.

137. The test was most succinctly put by Kelly J. in *Depfa* in the terms summarised in the previous paragraph. In considering whether the test is satisfied, it is important to bear in mind, as stated by Kelly J. in *Colonia* and in *Depfa*, and by me in *Ballantyne, UBS, SCISYS*, *Allergan*, *Xtrackers* and *FundLogic*, that the court does not act as a rubber stamp in considering whether to sanction a scheme which has been approved by the relevant scheme creditors. That said, however, the court will be slow to reach a different view in respect of the scheme to that reached by experienced persons involved in the relevant market or industry relevant to the company who voted in favour of it.

138. As I mentioned in *Allergan*, *Xtrackers* and *FundLogic*, Parker J. in *Re Ocean Rig UDW Inc*. (18th September, 2017, Grand Court of the Cayman Islands, Parker J), stated in the case of a creditor scheme:-

> *"It is clear, therefore, that the court should be slow to differ from the vote, recognising that it is the creditors who are clearly the best judges of what is in their commercial interest. However, the court is not a rubber stamp in this regard even where the scheme has the support of an overwhelming majority of the creditors who are to be subject to it. The court can differ from the vote, but only if it is satisfied that an honest, intelligent and reasonable member of the class could not have voted for the*

> *scheme, and in that regard the court's own view as to whether the scheme is reasonable or even the best scheme is not relevant*." (para. 89)

139. That is the approach which I have adopted in considering the Scheme Company's fulfilment of this element of the test.

140. I was satisfied that this requirement was clearly complied with by the Scheme Company for several reasons. Among those reasons were: first, the Amended Scheme had the overwhelming support of the Scheme Creditors. The Scheme Creditors are clearly sophisticated participants in a highly specialised market and were undoubtedly the best judges of what was in their commercial interest. The court should be very slow to second-guess the exercise by them of their commercial judgement. Second, the Scheme Company had the benefit of expert financial and legal advice in formulating the scheme originally proposed and the Amended Scheme. The Scheme Company and the NAC Group and their advisors worked closely and constructively with the Scheme Creditors and their representatives at all stages of the process, including in the period between the date on which the scheme meetings were originally convened and the date of the ultimate hearing of the sanction application. Legal representatives of the various groups of Scheme Creditors appeared at all of the procedural hearings in the course of the proceedings. The commercial rationale for the Amended Scheme was obvious (to ensure the survival of the Scheme Company and other companies in the NAC Group) and that was clearly outlined to the Scheme Creditors. Third, the EPA report prepared by EY demonstrated that the Scheme Creditors would do considerably better under the Amended Scheme than in a winding up. While that does not necessarily mean that the Scheme Creditors might not have concluded that it was in their commercial interests to vote against the Amended Scheme, they did not do so. On any objective view, there was a sound commercial basis for the Amended Scheme.

141. I was satisfied on the evidence that, the Amended Scheme was fair and equitable and that it was one which an intelligent and honest person, being a member of the relevant class of creditors, acting in his or her own interests, might reasonably approve of. The fact that the Scheme Creditors unanimously voted in favour of the amended Scheme was powerful evidence of that.

142. I was, therefore, satisfied on the evidence that all of the five requirements of the test were fulfilled by the Scheme Company. However, before I could be satisfied to sanction the Amended Scheme, it was necessary for me to address two further issues. Those issues concerned the likelihood of the recognition and enforcement of the Amended Scheme in other jurisdictions and the potential application and implications of the Cape Town Convention. I address those two issues in the final two sections of this judgment.

Recognition and Enforcement: Jurisdictional Issues

143. Before considering the particular issues in relation to jurisdiction under the Brussels Recast Regulation which arose on this application, it is necessary to deal with the more general point in relation to the potential recognition of the Amended Scheme in other relevant jurisdictions.

144. In *Re Magyar Telecom BV* [2014] BCC 448 ("*Magyar Telecom*") and in *Lecta Paper,* it was observed that the court will not generally make an order which has no *"substantial effect"* and that *"before the court will sanction a scheme it will need to be satisfied that the scheme will achieve its purpose"* (per Trower J. in *Lecta Paper* at para. 39). I agree with those observations. A similar approach is taken in this jurisdiction.

145. The Scheme Company provided evidence that the Amended Scheme would be recognised in various relevant jurisdiction including England, New York and Germany. Mr. Overgaard exhibited to the grounding affidavit legal opinions from English, US and German counsel as evidence that the Amended Scheme would be recognised in those jurisdictions (bearing in mind that the Financing Arrangements are governed by English, New York and German law). In addition, Mr. Overgaard exhibited legal opinions from counsel in several other relevant jurisdictions where NAC Group company borrowers and Finance Lessors, whose debts were to be amended by the Amended Scheme, are incorporated. Opinions were provided from counsel in the Cayman Islands, Cyprus, Denmark, Japan, Malta and Singapore.

146. I considered those legal opinions and formed the view that they demonstrated that the Amended Scheme was likely to have substantial effect and was likely to be recognised in each of those jurisdictions. Indeed, I note that the Amended Scheme has since been recognised in the United States under Chapter 15 of the US Bankruptcy Code. The question of the potential recognition of the amended Scheme under the Brussels Recast Regulation was raised by the Scheme Company and was addressed in detail in the very helpful legal opinion provide by David Allison QC and in the comprehensive written submissions provided by the Scheme Company. I was satisfied that the Amended Scheme did fall within Article 1 of the Brussels Recast Regulation and that the proceedings seeking sanction for the Amended Scheme involved *"civil and commercial matters"* under that Article of the Regulation. I was also satisfied that the court had jurisdiction to sanction the Amended Scheme under various provisions of the Regulation, in circumstances where several of the Scheme Creditors were domiciled in other Member States of the European Union such that the scheme could be recognised in those jurisdictions. I set out briefly now my reasons for being so satisfied.

147. The first issue to address is whether the amended Scheme fell within Article 1 of the Brussels Recast Regulation. That issue has been considered in several English cases which were referred to in Mr. Allison's opinion and in the Scheme Company's written submissions.

148. Article 1 of the Regulation provides that it applies in *"civil and commercial matters"* and does not extend to certain types of cases (which are not relevant for present purposes). However, Article 1.2(b) provides that the Regulation does not apply to:-

> *"bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings;"*

149. An application to sanction a scheme of arrangement is not a *"bankruptcy"* or a *"proceeding relating to the winding-up of an insolvent company"*. However, it could potentially have fallen within the term *"judicial arrangements, compositions and analogous proceedings"* under Article 1.2(b). However, although that was the conclusion reached in two English cases under the precursor to the Brussels Recast Regulation (*Re DAP Holding NV* [2006] BCC 48 and *Re La Mutuelles du Mans Assurances IARD* [2006] BCC 11), that is not now the prevailing view of the English courts. That view is based on the fact that it was clear from the relevant *travaux preparatoires* of the original Brussels Convention (from which the Brussels Recast Regulation was ultimately derived) and the Draft Insolvency Convention that both instruments were designed to dovetail with each other. The two relevant instruments are now the Brussels Recast Regulation and the Recast Insolvency Regulation (Regulation (EU) 2015/848). Schemes of arrangement are not included in the list of insolvency proceedings in Annex A to the Recast Insolvency Regulation. In order to ensure that an application to sanction a scheme of arrangement does not fall within a gap between these two Regulations, they are considered to dovetail with each other. The existence of the dovetailing principle as between these regulations (or more correctly between their predecessors) was confirmed by the CJEU in *Nickel & Goeldner Spedition GmbH v. Kintra* UAB [2015] QB 96 (at para. 21) and *Comite d'entreprise de Nortel Networks SA v. Rogeau* [2015] BCC 490 (at para. 26). That principle has been applied in several of the recent English cases.

150. In *Re Rodenstock GmbH* [2012] BCC 459 ("*Rodenstock*"), Briggs J. held that proceedings seeking court sanction for a scheme in relation to a solvent company fell within the scope of the original Brussels Regulation. He held that they were clearly *"civil and commercial matters"* within Article 1.1 and that they were not excluded from the Regulation under Article 1.2(b). He held that it was no part of the purpose of that exclusion, construed by reference to the *travaux preparatoires*, to exclude any civil or commercial matter which did not fall within the scope of the Insolvency Regulation or which was not connected with bankruptcy or insolvency. While Briggs J. left open the question as to whether schemes of arrangement in relation to insolvent companies were within the scope of the original Brussels Regulation, even if they were not proposed as part of insolvency proceedings, that issue was determined by David Richards J. in *Magyar Telecom*. He stated:-

> *"As schemes of arrangements are not insolvency proceedings falling within the Insolvency Regulation and as it is generally accepted that the purpose of Article 1.2(b) is to enable the Judgments Regulation and the Insolvency Regulation to dovetail almost completely with each other…, it logically follows that the exclusion in Article 1.2(b) does not extend to a scheme of arrangement involving an insolvent Company, at least unless the Company is the subject of an insolvency proceeding falling within the Insolvency Regulation. In other words, an order sanctioning a scheme between an insolvent Company and creditors is subject to the Judgments Regulation, at least if the Company is not subject to insolvency proceedings to which the Insolvency Regulation applies…"* (para. 29)

151. Those cases were referred to by Snowden J. in *Re Van Gansewinkel Groep BV* [2015] EWHC 2151 (Ch) ("*Van Gansewinkel*"). In that case, Snowden J. made express reference to the dovetailing principle (at paras. 43 and 44) and noted that it had been endorsed (albeit not in the context of a scheme case) by the CJEU in the two judgments referred to earlier.

152. I was persuaded by the reasoning contained in *Rodenstock* and, in particular, in *Magyar Telecom* and agreed that an application for court sanction in respect of a scheme of arrangement in relation an insolvent company is a *"civil and commercial matter"* for the purposes of Article 1.1 of the Brussels Recast Regulation and is not excluded from that Regulation under Article 1.2(b). I was satisfied that an application for sanction in respect of a scheme in relation to an insolvent company is not an "*insolvency proceeding*" under the Recast Insolvency Regulation and that logically, therefore, on applications for court sanction in respect of a scheme of arrangement for an insolvent Company falls within the Brussels Recast Regulation.

153. Having reached that conclusion, it was then necessary to consider whether the court had jurisdiction to sanction the Amended Scheme under Chapter II of the Brussels Recast Regulation, in circumstances where some of the Scheme Creditors were domiciled in other Member States of the European Union.

154. I was persuaded that I should adopt the usual practice of the English Courts of assuming (without deciding) that Chapter II of the Brussels Recast Regulation applies and that the Scheme Creditors are *"defendants"* who are being *"sued"* by the Scheme Company for the purposes of Chapter II (although I believe that those assumptions are actually correct). The practice of the English Courts is to consider whether, on the basis of that assumption, jurisdiction can be found under Chapter II and, if it can, they take the view that there is no need to test whether that assumption is correct. In most, if not all, of the English cases, the court has concluded that it would have jurisdiction under Chapter II, often in reliance on Article 8, on the basis that one or more of the scheme creditors were domiciled in the UK: *Magyar Telecom*, *Van Gansewinkel*, *Re DTEK Finance PLC* [2017] BCC165 (Newey J.) and [2016] EWHC 3563 (Ch) (Norris J.) ("*DTEK*") and *Lecta Paper*. As that seemed to me to be a sensible approach, I was prepared to adopt it in the present case.

155. The Scheme Company relied on Article 4.1, Article 7(1)(a) and Article 8(1) of the Brussels Recast Regulation. I was satisfied that the court had jurisdiction under Article 4.1 and Article 8.1. In those circumstances, the Scheme Company agreed with my suggestion that it was unnecessary to consider whether the court had jurisdiction in respect of the Scheme Creditors under Article 7(1)(a).

156. Article 4.1 provides that:-

> *"Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State."*

157. On the evidence, at least one of the Scheme Creditors is domiciled in Ireland, Citibank Europe plc. That creditor was owed approximately US$100 million by NAC 29. That debt was guaranteed by the Scheme Company. That Scheme Creditor was entitled to appear to oppose the Scheme Company's application for sanction in respect of the Scheme and would be bound by the result of the application. On that basis, it could be regarded as a person being *"sued"* in the courts of its Member State for the purposes of Article 4.1 of the Brussels Recast Regulation.

158. As regards Scheme Creditors domiciled in other Member States of the EU, I was satisfied that Article 8(1) of the Brussels Recast Regulation applied. Under that provision, a person domiciled in a Member State may also be sued:-

> *"where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings;"*

159. On the basis that those Scheme Creditors can be regarded as *"defendants"* (on the basis that they too could have appeared and opposed the application and would be bound by the result), and having regard to the fact that at least one of the Scheme Creditors is domiciled in Ireland, I was satisfied that the court had jurisdiction in relation to the Scheme Creditors who were domiciled in other Member States, in accordance with the provisions of Article 8(1). A similar conclusion was reached in a number of the English cases including *DTEK* (at the convening hearing before Newey J. and at the sanction hearing before Norris J.), Re *Metinvest BV* [2016] EWHC 79 (Ch) and *Lecta Paper*.

160. While in *Van Gansewinkel*, Snowden J. considered the numbers and size of the scheme creditors domiciled in England and concluded that they were sufficiently large to satisfy the test of expediency in Article 8(1), other judges took the view that it was unnecessary to consider the numbers and size of the creditors domiciled in England for the purpose of determining whether Article 8(1) is engaged and that it was only necessary for one of the creditors to be domiciled in England for that purpose: *DTEK* (Newey J. and Norris J.) and *Lecta Paper*. I preferred the approach adopted in the latter cases which seemed to me to be more consistent with the express wording and objective of Article 8(1). I do not believe that it is necessary to establish that more than one Scheme Creditor is domiciled in Ireland or for the court to consider the size of the Scheme Creditor’s claim in order for Article 8(1) to be engaged. In any event, the one Scheme Creditor who is domiciled in Ireland could not, having regard to the size of its debt (US$100 million), be said to be immaterial. I was satisfied that, in those circumstances, it was expedient to hear and determine the application to sanction the Amended Scheme insofar as it applied to all EU domiciled Scheme Creditors under Article 8(1).

161. In those circumstances, I held that the court had jurisdiction to hear and determine the Scheme Company’s application for court sanction in respect of the Amended Scheme under Article 1(1), Article 4(1) and Article 8(1) of the Brussels Recast Regulation. On that basis, I concluded that the Scheme was likely to be recognised in other Member States of the European Union under the provisions of the Brussels Recast Regulation.

The Cape Town Convention

162. The Scheme Company quite properly drew to my attention the provisions of the Cape Town Convention and its accompanying Aircraft Protocol (both of which have force of law in Ireland pursuant to s. 4(1) of the International Interests in Mobile Equipment (Cape Town Convention) Act, 2005). In the event that the Cape Town Convention and the Aircraft Protocol applied to the Amended Scheme, fundamental difficulties might have arisen as regards court sanction for the scheme, having regard to the provisions of those legal instruments. The Scheme Company forcefully argued that the Cape Town Convention and the Aircraft Protocol did not apply and that schemes of arrangement, including the Amended Scheme, fell outside the definition of *"insolvency proceedings"* for the purposes of the Cape Town Convention and the definition of an "*insolvency related event*" under the Aircraft Protocol.

163. The Scheme Company provided expert evidence in support of its position in the form of an affidavit and expert report by Professor Jennifer Payne, Linklaters Professor of Corporate Finance Law at the University of Oxford. Professor Payne's conclusion was that the Amended Scheme did not fall within the definition of *"insolvency proceedings"* for the purposes of the Cape Town Convention and did not fall within the definition of an *"insolvency-related event"* for the purpose of the Aircraft Protocol. Detailed written submissions were also provided on behalf of the Scheme Company which argued for that conclusion, in the event that the court found it necessary to deal with this issue. The Scheme Company also provided evidence from Joe Fay, a solicitor in McCann Fitzgerald, as to the status and role of the Aviation Working Group and the Cape Town Convention Academic Project and, in particular, as to the status of certain annotations made in June, 2020 to the Official Commentary on the Cape Town Convention.

164. Ultimately, I took the view that it was unnecessary for the court to embark upon a consideration of the potential issues arising under the Cape Town Convention and the Aircraft Protocol and that, in circumstances where none of the Scheme Creditors and, most importantly, none of the Secured Scheme Creditors, were opposing the Amended Scheme or relying on the Convention or the Protocol, the court should not get into this area. I was satisfied that, while a strong case was made on behalf of the Scheme Company that the Cape Town Convention and the Aircraft Protocol did not apply, it was not necessary for me to decide that issue in this case, having regard to the overwhelming support for the Amended Scheme by the Scheme Creditors and most significantly, for present purposes, by the Secured Scheme Creditors. While a small number in percentage and value terms of the Secured Scheme Creditors did not vote at the meeting of Secured Scheme Creditors, those creditors were provided with extensive information concerning the Amended Scheme and had ample opportunity to participate at the relevant scheme meeting. Those Secured Scheme Creditors who did not participate at the relevant scheme meeting did not appear to oppose sanction in respect of the Amended Scheme. The group of Secured Scheme Creditors who did vote and who were represented at the sanction hearing did not rely on the Cape Town Convention and the Aircraft Protocol and did not oppose the application for sanction in respect of the Amended Scheme. In those circumstances, I felt that it was not necessary and, indeed, might be inappropriate for me to embark upon a consideration of the issues arising under the Cape Town Convention and the Aircraft Protocol. I decided that it would be appropriate to leave over to a future case a determination of the potentially controversial issues which could arise in terms of the potential application of the Cape Town Convention and the Aircraft Protocol to schemes of arrangement under the 2014 Act. For those reasons, I did not find it necessary or appropriate to decide those issues in this case.

Conclusions

165. In conclusion, I have set out in this judgment the reasons why I was satisfied to make an order sanctioning the amended scheme of arrangement between the Scheme Company and the Scheme Creditors pursuant to s. 453(2) of the 2014 Act at the conclusion of the hearing on 21st July, 2020. I was satisfied that the Amended Scheme was fair and equitable and have explained in this judgment why I felt that it was appropriate for the court to exercise its discretion to sanction the Amended Scheme.

166. I have also explained in this judgment why I was satisfied that the court had jurisdiction in relation to the Amended Scheme under the provisions of the Brussels Recast Regulation and why I felt that it was unnecessary for me to decide any issues in relation to the Cape Town Convention or the Aircraft Protocol.

THE UNCITRAL MODEL LAW ON CROSS BORDER INSOLVENCY: A CASE FOR ADOPTION IN IRELAND AND LESSONS FROM THE UNITED STATES BANKRUPTCY CODE

The Honorable Frank J. Bailey (ret) and Eoghan Veerasingam*

I. INTRODUCTION

"Modern States, however, cannot live in splendid isolation and do give effect to judgments given in other countries in certain circumstances."[1]

The Company Law Review Group ("CLRG") in its 2018 report on the *UNCITRAL Model Law on Cross-Border Insolvency* concluded that there is a "clear case as to why the Model Law should be adopted in Ireland".[2] The Model Law on Cross-Border Insolvency (Model Law) was adopted by the United Nations Commission on International Trade Law (UNCITRAL) on 30

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[1] *See* Alfonso Nocilla, *Canadian cross-border insolvency law and the triumph of "modified universalism": A retrospective*, INTERNATIONAL INSOLVENCY REVIEW, 401, Oct. 2024, *available at* https://www.researchgate.net/publication/384644132_Canadian_cross-border_insolvency_law_and_the_triumph_of_modified_universalism_A_retrospective .

[2] *See* Company Law Review Group, *UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY,* CO. L. REV. GRP. 1, at 5 (Nov. 2018), *available at* https://www.clrg.org/media/bonljhyr/2018-clrg-uncitral-model-law-on-cross-border-insolvency-recommendations.pdf.

May 1997.[3] The objective of this instrument is to provide rules governing the recognition and enforcement of foreign insolvency proceedings, the access of foreign representatives to the courts of states that adopt the Model Law, the entitlements of foreign creditors, the coordination of multiple insolvency proceedings, and the cooperation between courts, between representatives, and between courts and representatives.

The Model Law offers no substantive law in the realm of cross-border insolvency; rather, it provides a procedural structure within which member nations' laws can co-exist with an emphasis on recognition of foreign insolvency proceedings. The Model Law provides a mechanism for cooperation between stakeholders in affected jurisdictions and utilizes ancillary proceedings to assist foreign insolvency proceedings. The CLRG recommended that the Model Law be adopted in Ireland and concluded that it will "provide business with an increased level of certainty [and can] further improve conditions for continued foreign direct investment". This is of particular importance considering Brexit and Ireland's close trading relationship with the United Kingdom (a subscriber of the Model Law), along with the need to have a "cross-border insolvency procedure that is functional and adaptable."[4]

In that regard, this article seeks to illustrate the benefits of adopting the Model Law in Ireland, with a view of examining its core themes and importance in the context of trade with the United States (U.S.) - a country which implemented the Model Law into their legal system through Chapter 15 of the U.S. Bankruptcy Code.[5] In Part A, analysis is provided of the various theories underpinning cross-border insolvency law, along with an examination of the provisions

[3] *See generally* United Nations, General Assembly, *Report of United Nations Commission on International Trade Law*, A/52/17, 12-77, (12-30 May 1997) *available at* https://digitallibrary.un.org/record/243949?ln=en&v=pdf.
[4] *See* CO. L. REV. GRP., *supra* note 2, at 5.
[5] *See Chapter 15- Bankruptcy Basics*, *Ancillary and Other Cross-Border Cases,* United States Courts, *available at https://www.uscourts.gov/court-programs/bankruptcy/bankruptcy-basics/chapter-15-bankruptcy-basics.*

of the Model Law and the U.S. Bankruptcy Code. In Part B, regard is had to the Irish Companies Act 2014 and the framework at the E.U., which covers both corporate and personal insolvencies. The position at common law is also examined in this part, and it can be seen that the limits of the Irish High Court at common law is somewhat uncertain and is restrained in respect of enforcement of a foreign judgment.[6] In Part C, investigation is given to the scope and application of the Model Law in Ireland, as well as the significance of implementation from the U.S. perspective through analysis of recent jurisprudence from the U.S. Bankruptcy Court.

I. CROSS BORDER INSOLVENCY AND THE MODEL LAW

A. Competing Theories for the Recognition of Foreign Proceedings

Given that cross-border insolvency is concerned with proceedings where a debtor's assets and liabilities are dispersed across different jurisdictions, there are competing theories underlying the administration and recognition of foreign proceedings.[7] From the outset, key questions emerge concerning the 'weighing up' or cross-consideration of foreign laws and rules. These questions may range from procedural matters to more nuanced substantive issues concerning the rights of both debtors and creditors.

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[6] *See generally* Gearoid Carey and Gerard Kelly SC, *Enforcement of Foreign Public Policy,* Mason Hayes & Curran LLP (June 26, 2025), https://www.mhc.ie/latest/insights/enforcement-of-foreign-judgments-and-public-policy (explaining process of Ireland enforcing foreign judgment) When Ireland decides whether or not to enforce foreign judgment, the country it came from will determine what legal processes and rules apply. *Id.*

[7] *See* Lesley Salafia, *Cross-Border Insolvency Law in the United States and its Application to Multinational Corporate Groups,* 21 Conn. J. of Int'l L., 1 (2006) *available at* *https://www.shipmangoodwin.com/a/web/4HhreRVHWUdvZ1GTPgmXLy/Xbww5/cross-border_insolvency_law.pdf*; *See also Chapter 15 Bankruptcy Definition: Cross-Border Insolvency Guide,* Law Offices of Mark A. Bandy, *available at* https://markbandylaw.com/chapter-15-bankruptcy-definition-2/ (explaining cross border insolvency concerns); *See also* Ralf Michaels, *Recognition and Enforcement of Foreign Judgments*, Oxford Public Int'l Law 1, 2 (2009) https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2699&context=faculty_scholarship "A competing theory, especially influential in the common law, focuses less on the public relations of comity or duty between States and more on the private law relations between the parties.

For example, where insolvency proceedings involve creditors in multiple jurisdictions, a key question is whether there should be one or several proceedings commenced in those jurisdictions, and whether the decision of a court in one country ought to be recognized and enforced in others.[8] This leads to a further consideration: should the insolvency laws of one jurisdiction apply in another, and, if the priority rules under different laws conflict, which law should govern? It can also be asked, on a more substantive basis, whether insolvency laws allow for the modification or discharge of contractual rights under the law applicable to some, but not all contracts of jurisdictions, other than where the main insolvency proceedings are pending?[9]

Underlying cross-border insolvency law are three main theories: territorialism, universalism, and modified universalism.[10] Territorialism requires separate insolvency proceedings to take place in each jurisdiction in which the debtor's assets are located, and each country will have exclusive jurisdiction over the insolvency of a particular debtor in that jurisdiction.[11] No recognition is given to proceedings taking place in other jurisdictions, and distributions of assets are prioritized first to local creditors, often to the detriment of foreign creditors, giving rise to the so called "grab rule" where national interests are put ahead of international collaboration.[12] In the CLRG 2018 report, it highlighted that a "major disadvantage" of territorialism is proceedings that take

[8] *See* Scott Atkins, *The Model Law on Cross-Border Insolvency turns 25- A time for celebration and recalibration in pursuit of a global approach to recognition and judicial cooperation,* Norton Rose Fulbright (May 2022) https://www.nortonrosefulbright.com/en-419/knowledge/publications/87d4ce21/the-model-law-on-cross-border-insolvency-turns-25 (explaining how courts should recognize other court decisions). "[A] best practice insolvency regime has typically favoured the principle of 'modified universalism', under which a main proceeding opened in the debtor's home country is mutually recognised in other jurisdictions where the debtor has assets and creditors unless doing so would be manifestly contrary to the local laws and policies of those other jurisdictions." *Id.*
[9] *See* Martin Glenn, *The UNCITRAL Model Law and Chapter 15 of the US Bankruptcy Code*, INT'L INSOLVENCY L. SEMINAR COLUM. L. SCH.
[10] *See id.* at ¶¶ 3-5.
[11] *See* CO. L. REV. GRP., *supra* note 2, at 8.
[12] *See* Glenn, *supra* note 10, at ¶ 4; *see also* Gerard McCormack, *Conflicts in Insolvency Jurisdiction*, 19 J. PRIV. INT'L L. 186 (2023).

place in different countries where debtor's assets are located, creditors bear heavy costs, and the amount of time involved towards "numerous proceedings encourages inefficiencies and duplication of work".[13]

At the other end of the scale is the theory of universalism, which assumes that one insolvency proceeding will be universally recognized by the jurisdictions in which the debtor has its place of incorporation of has an establishment.[14] The multinational debtor's home country has "worldwide jurisdiction" over the debtor's assets, and the home country's court becomes, so to speak, the 'center piece' of the proceedings, which has the power to apply for assistance from foreign courts where the debtor's assets are located, with those courts also being obliged to enforce orders of the home country court.[15] According to Glenn, "one set of laws [applies] in determining *all* creditors' rights and distributions for a global enterprise", and that no country has so far signed up for a pure universalistic approach.[16]

Somewhere in the middle, and now the most popular model, is the modified universalism approach. Like universalism, this theory asserts that the debtor's assets should be collected and distributed on a worldwide basis in a single main insolvency proceeding, with the caveat that courts have discretion to enforce decisions of another jurisdiction where a main proceeding is pending so long as the treatment of domestic and foreign creditors is "fair".[17] In this way, modified universalism accepts the principle of a main insolvency proceeding (taking place where the debtor has its "centre of main interests") and the other courts in ancillary proceedings should defer to this main proceeding and support the centralized governance in accordance with the laws

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[13] *See* CO. L. REV. GRP., *supra* note 2, at 8.
[14] *See id*.
[15] Lynn M LoPucki, *The Case for Cooperative Territoriality in International Bankruptcy* MICH. L. REV. 2216, 2220-201 (2000).
[16] *See* Glenn, *supra* note 10, at ¶ 3.

[17] *See id*. at¶ 5.

of the main jurisdiction, but allows exceptions so that local courts can refuse to apply foreign insolvency law or may protect local creditors if necessary.[18]

Modified universalism takes a more balanced approach than pure universalism and territorialism insofar as it recognizes the importance of central insolvency proceedings, but at the same time, respects that the laws of other jurisdictions may mandate different treatment of some claims and distributions.[19] This principle also is in keeping with the doctrine of international comity, a dimension of private international law, where the courts of one state respect and defer to the laws of another state.[20] Modified universalism broadly underpins the Model law, the E.U. Insolvency Regulation,[21] and Chapter 15 of the U.S. Bankruptcy Code (which is based upon the Model Law).[22]

(b) UNCITRAL Model Law on Cross-Border Insolvency

The UNCITRAL Model Law on Cross-Border Insolvency is a piece of model law issued by the United Nations designed to assist states "to equip their insolvency laws with a modern, harmonized and fair framework to address more effectively instances of cross-border insolvency".[23] The Guide to the Enactment and Interpretation of the Model Law on Cross-Border Insolvency ("the Enactment Guide") makes clear that the purpose of the regime is to provide a model framework to encourage cooperation and coordination between states in relation

[18] *See generally* Jeffery Liesemer, *'Chapter 15 at 11: Bankruptcy Code's Cross-Border Insolvency Law Approaches 11th Anniversary'* (International Law Office, 2016) *available at* <https://www.lexology.com/library/detail.aspx?g=4f39fc79-ee39-44b0-9128-90edcca3c613#9>.
[19] *See* Glenn, *supra* note 10, at ¶ 5.
[20] *See id*.
[21] *See Regulation (EU) 2015/848 of The European Parliament and of The Council*, EUR-Lex (May 6, 2015) https://eur-lex.europa.eu/eli/reg/2015/848/oj/eng. This regulation updated the EC Regulation on Insolvency Proceedings (1346/2000). *Id*. The original EC Insolvency Regulation also had, as its underlying model, a modified universalism rationale. *See* CO. L. REV. GRP., *supra* note 2, at 41.
[22] *See* Glenn, *supra* note 10.
[23] *See* UNCITRAL, *supra* note 3, pt II ¶¶ 12–225 and Annex 1.

to insolvency proceedings for corporate or natural legal persons having assets or creditors in more than one state.[24] The Model Law came into force against a background of significant increases in cross-border insolvency cases in the 1990s where there was an absence of structured and mutually agreed upon international rules addressing cross-border insolvency.[25] Consequently, it became difficult to protect the residual value of assets spread over different jurisdictions and the "lack of predictability in the handling of cross-border insolvency cases impede[d] capital flow and [was] a disincentive to cross-border investment".[26]Although the Model Law is not a mandatory international convention, it is a legal text that can be adopted by states to help harmonize cross-border insolvency rules whilst also protecting their own interests.[27] In this way, the Model Law can be said to take a modified universalistic approach to cross-border insolvency and instead of mandating a single set of rules for all jurisdictions to adopt, the Model Law focuses on trying to:

(a) Identify the most appropriate jurisdiction which has the principal responsibility for managing the insolvency of the debtor in cross-border proceedings (called the "foreign main proceedings");[28]

(b) Ensure that insolvency officials from that jurisdiction are recognized in other states; and[29]

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[24] *See* U.N. Comm'n on Int'l Trade Law (UNCITRAL), UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation (1997) [Hereinafter: *The Enactment Guide*] at ¶¶ 1-4 *available at* https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency.

[25] *See id*. at ¶ 5.

[26] *See id*.

[27] *See* Ziyi Wang, *The Critical Discussion on Theories in Cross-Border Insolvency: Universalism, Territorialism, and Modified Universalism*, 5 Int'l J. Frontiers in Sociology 112, 113 (2023).

[28] *See* UNCITRAL Model Law on Cross-Border Insolvency (1997), at Ch. III. *See also The Enactment Guide*, supra note 25 at ¶¶ 31-32.

[29] *See id.* at Ch. III.

(c) Ensure that other states provide the necessary cooperation to facilitate the insolvency process in the principal jurisdiction.[30]

The Model Law uses the "centre of main interest" (COMI) concept to identify the jurisdiction where the main proceeding takes place.[31] The Enactment Guide explains that the main proceeding must take place where the debtor has its COMI at the date of commencement of the foreign proceeding.[32] Although COMI is not specifically defined in the Model Law, it is presumed that "the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the centre of the debtor's main interests."[33] This presumption can be rebutted and, quite usefully, the E.U. Insolvency Regulation makes use of the same concept and rebuttable presumption for the COMI of a debtor.[34] The Model Law also distinguishes main proceedings from non-main proceedings. A non-main proceeding is one taking place where the debtor has an "establishment", which is defined as "any place of operation where the debtor carries out non-transitory economic activity with human means and goods or services."[35]

[30] *See id.* at Ch. IV.
[31] *See The Enactment Guide, supra* note 25 at ¶¶ 157-160.
[32] *See id.*
[33] *See* UNCITRAL Model Law on Cross-Border Insolvency (1997), Art. 16(3).
[34] *See* Reg. (EU) No. 2015/848, Art. 3(1), 2015 O.J. (L 141) 1. While the presumption contained in art 16(3) corresponds to the presumption in the EU Regulation, it serves a different purpose. *The Enactment Guide* at ¶ 144 provides that "in the Model Law, the presumption is designed to facilitate the recognition of foreign insolvency proceedings and the provision of assistance to those proceedings. Under the EU Regulation, the presumption relates to the proper place for commencement of insolvency proceedings, thus determining the applicable law, and to the automatic recognition of those proceedings by other European Union Member States. Under the Regulation, the decision on COMI is made by the court receiving an application for commencement of insolvency proceedings at the time of consideration of that application. Under the Model Law, a request for recognition of a foreign proceeding may be made at any time after the commencement of that proceeding; in some cases it has been made several years later. Accordingly, the court considering an application for recognition under the Model Law must determine whether the foreign proceeding for which recognition is sought is taking place in a forum that was the debtor's COMI when the proceeding commenced …. Notwithstanding the different purpose of COMI under the two instruments, the jurisprudence with respect to interpretation of that concept in the E.U. Regulation may be relevant to its interpretation in the Model Law." *Id.*
[35] *See* UNCITRAL Model Law on Cross-Border Insolvency (1997), Art 2 sub-para *(f)*. *See also The Enactment Guide, supra* note 25 at ¶ 32.

Furthermore, the Model Law defines a foreign proceedings as "a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation."[36] The Enactment Guide explains that relief under Model Law can only apply to a collective proceeding because the Model Law itself is:

> *intended to provide a tool for achieving a coordinated, global solution for all stakeholders of an insolvency proceeding. It is not intended that the Model Law be used merely as a collection device for a particular creditor .... [and] a key consideration is whether substantially all of the assets and liabilities of the debtor are dealt with in the proceeding, subject to local priorities and statutory exceptions, and to local exclusions relating to the rights of secured creditors. A proceeding should not be considered to fail the test of collectivity purely because a class of creditors' rights is unaffected by it.*[37]

Additionally, the meaning of "foreign court" is also not confined to judicial bodies: it is operative to administrative bodies that are competent to handle a relevant foreign proceeding. Hence, and which has been the case in the U.S., it is possible for a state entity with a quasi-judicial function, like a state's central bank, to be designated as a foreign court in circumstances where it oversees a foreign proceeding in relation to cross-border insolvency, which includes corporate restructuring.[38]

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[36] *See* UNCITRAL Model Law on Cross-Border Insolvency (1997) Art. 2 sub-para (*a*). This definition likely includes examinership under Part 10 (§ 509) of the Companies Act 2014 (Ir). given that it is a judicial proceeding insofar as the Irish High Court appoints an examiner to oversee the affairs of the company which is, or is likely to be, unable to pay its debts as they fall due, but there is a reasonable prospect of the survival of the company and the whole or any part of its undertaking as a going concern. *Id.* The examiner must in turn present a scheme of arrangement as to the proposed plan for the company. *Id.*

[37] *See The Enactment Guide*, *supra* note 25 at ¶¶ 69-70.

[38] *See In re ENNIA Caribe Holding N.V.*, 594 B.R. 631 (Bankr. S.D.N.Y. 2018). Judge Glenn of the U.S. Bankruptcy Court for the Southern District concluded in a Chapter 15 case that the Curaçao-governed foreign insurance companies, operating under the supervision and control of the Central Bank of Curaçao and St. Martin, met the requirements for recognition as a foreign main proceeding. *Id.*

The ability for a national central bank to be subject to the Model Law depends on whether the enacting state decides to adopt the Model Law to extend its scope to cover banks and insurance undertakings.[39] On the other hand, the provisions of the E.U. Insolvency Regulation do not apply to insurance undertakings, credit institutions, investment firms, investment undertakings which provide services involving the holding of funds or securities for third parties, or collective investment undertakings given that they are subject to special insolvency rules.[40] If Ireland were to adopt the Model Law, it would, as recommended by the CLRG, exclude such entities which have their own special insolvency rules.[41] Should a scenario arise where there is a restructuring concerning a foreign credit institution, Ireland is entitled to rely on the excluding provision of the Model Law which allows for the refusal of recognition of a foreign judgment where recognition would be contrary to the public policy of the domestic state.[42]

Another concept that is tied to foreign proceedings under the Model Law is the title of "foreign representative".[43] This is defined as a "person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding."[44] Essentially, the foreign representative is the insolvency practitioner who is officially appointed in a foreign insolvency proceeding and must be in communication and cooperation with foreign courts.[45] A foreign representative appointed in a foreign insolvency proceeding, whether main or non-main, is given the right of direct access to a court of another state in respect of matters relating to the

[39] *See* UNCITRAL Model Law on Cross-Border Insolvency (1997), Art. 1(2).
[40] *See* Reg. (EU) No. 2015/848, Art. 1(2), 2015 O.J. (L 141) 1.
[41] *See* CO. L. REV. GRP., *supra* note 2, at 25.
[42] *See* UNCITRAL Model Law on Cross-Border Insolvency (1997), Art. 6.
[43] *See id.* at Art. 2 sub-para (*d*).
[44] *See id.*
[45] *See id.* at Art. 25.

foreign proceeding[46] – which includes applying to seek recognition of a foreign proceeding relating to the debtor and then to request relief for the debtor.

What is of great significance for the recognition of foreign proceedings under the Model Law is the ability to grant relief. Under Article 20 of the Model Law, upon recognition of a foreign main proceeding, relief such as a stay against enforcement, collection or transfer or encumbrance of assets of the debtor automatically follows recognition subject to the court's power to modify the scope of relief.[47] Significantly, such relief is not automatic upon recognition of a foreign non-main proceeding.[48] If the foreign representative wants similar relief in a foreign non-main proceeding, the representative must apply for it as discretionary relief under Article 21 of the Model Law.[49] An alternative discretionary relief can be granted under Article 19 of the Model Law, which applies on an interim basis pending the recognition of a foreign proceeding in circumstances where relief is "urgently needed to protect the assets of the debtor or the interests of the creditors".[50] Additionally, discretionary relief may only be granted where the court is satisfied that the interests of the creditors and other interested persons, including the debtor, are adequately protected.[51] Such relief may also be granted on conditions that the court thinks appropriate,[52] and may be modified or discharged by the court at the request of the foreign representative or a person affected (such as a local claimant) or on its own motion.[53]

[46] *See id.* at Art. 9. Direct access in practice means, in an Irish setting, an application to court using a barrister, instructed by a solicitor who in turn is instructed by the foreign representative. *Id.*
[47] *See id.* at Art. 20.
[48] *See generally* Hannah Buxbaum, *Maximum Comity: Recognition of Foreign Proceedings Under the Bankruptcy*, Transnational Litigation Blog (Sept. 25, 2025) *available at* https://tlblog.org/maximum-comity-recognition-of-foreign-proceedings-under-the-bankruptcy-code/.
[49] *See* UNCITRAL Model Law on Cross-Border Insolvency (1997), Art. 21.
[50]*See id* at Art. 19(1).. However, under Art. 19(4), the court may decline to grant such interim relief where to do so would interfere with the conduct of a foreign main proceeding. *Id.*
[51] *See id.* at Art. 22(1).
[52] *See id.* at Art. 22(2).
[53] *See id.* at Art. 22(3).

What is of note is that, while the relief provided by Articles 19 and 21 is discretionary in nature, the effects provided by Article 20 are not because they "flow directly from the recognition of the foreign main proceeding".[54] This distinction highlights the principality of a main proceeding and strengthens the notion that, for the purposes of a modified universalistic model, the main proceeding should be held in high regard with ancillary proceedings deferring to them, resulting in a more efficient and harmonious insolvency of a multinational debtor.[56] In that regard, the Model Law provides for a laudable and desirable framework for emulation, and the implementation of the Model Law can be seen at the level of the U.S. Bankruptcy Code.

1. The U.S. Bankruptcy Code and Interplay with the Model Law

Chapter 15 of the U.S. Bankruptcy Code was enacted in 2005 so as to adopt the Model Law into U.S. international insolvency practice.[57] Chapter 15 replaced Section 304 of the Code, which initially laid down the statutory guidelines for cases filed in the U.S. which are ancillary to insolvency proceedings initiated in foreign jurisdictions.[58] According to Glenn, the former Section 304 provided broad discretion to the U.S. Bankruptcy Court in granting remedies, and the "philosophies" underlying this provision were "deference to the foreign proceeding and the prevention of the piecemeal distribution of the debtor's estate."[59] The rationale behind Section 304 remains the same for Chapter 15. This is largely because the U.S. Bankruptcy Courts have

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[54] *See* CO. L. REV. GRP., *supra* note 2, at 8.
[56] *See* Liesemer, *supra* note 18, at 2.
[57] *See* Glenn, *supra* note 10 at ¶ 31.
[58] *See id.*
[59] *See id.*, (citing *Bank of New York v Treco (In re Treco)* 240 F.3d 148, 153–54 (2001).

long recognized the "particular need to extend comity to foreign bankruptcy proceedings"[60] given that:

> *"Comity takes into account the interests of the United States, the interests of the foreign state or states involved, and the mutual interests of the family of nations in just and efficiently functioning rules of international law."*[61]

Given that comity forms the basis for both the former Section 304 and the current Chapter 15, it has been noted by the American courts that while the criteria for recognizing a foreign proceeding turns on objective criteria, "relief [post-recognition] is largely discretionary and turns on subjective factors that embody principles of comity."[62] Where a case is recognized as a foreign main proceeding, Chapter 15 contemplates that the court will exercise its discretion in keeping with the principles of comity.[63] Exercising discretion in such a manner is important given that it is reflective of the ethos behind the Model Law, and the application of Chapter 15 is identical to how the Model Law operates in practice.[64] In this way, so as to invoke Chapter 15, foreign representatives in a foreign insolvency proceeding petitions to the U.S. Bankruptcy Court to give effect to that proceeding, particularly in circumstances where assets and creditors are located in the U.S.[65] When the U.S. Bankruptcy Court recognizes a foreign proceeding as either a main or non-main proceeding, certain forms of relief become available under the Bankruptcy Code. For example, recognition may trigger the automatic stay, which protects the debtor and

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[60] *See id.* at¶ 35.
[61] *See id.* at ¶ 36; *In re Artimm S.r.L.*, 335 B.R. 149, 161 (Bankr. C.D. Cal. 2005). (citing *Maxwell Commc'n Corp v Soc. Gen. (In re Maxwell Commc'n Corp)* 93 F.3d 1036, 1048 (1996)).
[62] *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund Ltd.*, 389 B.R. 325, 333 (S.D.N.Y. 2008) (citing §§1507, 1521, and 1525 of the Bankruptcy Code).
[63] *See* Glenn, *supra* note 5, at ¶ 45.
[64] *See The Enactment Guide, supra* note 25; *see also* Chapter 15- Bankruptcy Basics, *supra* note 6.
[65] *See* Liesemer, *supra* note 18, at 2.

assets located in the U.S. from collection and enforcement actions by creditors.[66] In addition, the court may grant discretionary relief, whether the proceeding is main or non-main, so long as doing so advances the purposes of Chapter 15, preserves the debtor's assets, and adequately protects creditors' interests.[67]

Chapter 15 has ultimately been said to "facilitate the distribution of the debtor's assets in an equitable, orderly, efficient, and systematic manner, rather than in a haphazard, erratic, or piecemeal fashion",[68] and is an insightful indication of the Model Law experience, serving as an example of how a large and significant nation can effectively adopt the Model Law into their national insolvency regimes.

Part II: Cross Border Insolvency Law in Ireland and the E.U.

(a) The Companies Act 2014

The operative source of law in which corporate insolvency law derives from in Ireland is the Companies Act 2014.[69] The 2014 Act gives the High Court jurisdiction to wind up any company formed and registered under Irish law[70] and any unregistered company,[71] which includes a company "incorporated outside the State which has been carrying on business in the State and ceases to carry on business in the State."[72]

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[66] *See* 11 U.S.C. § 1520.
[67] *See* 11 U.S.C. § 1521.
[68] *In re Artimm SrL* 335 B.R. 149, 161 (Bankr. C.D. Cal. 2005).
[69] Companies Act 2014 (Act No. 38/2014) (Ir.), https://www.irishstatutebook.ie/eli/2014/act/38/enacted/en/pdf.
[70]*See id*. at §564(1).
[71] *See id*. at§1326.
[72]*See id*. at §1328(6).

Section 1417 of the 2014 Act makes a provision for the recognition of foreign insolvency proceedings and states that orders "made for or in the course of winding up" of a company incorporated outside the State by the courts of a country recognized by an order of the Minister[73] under that Section, may be enforced by the High Court "in the same manner in all respects as if the order had been made by the High Court".[74] A Section 1417 order applies to any country that is not a Member State of the E.U., with the exception of Denmark given that it is the only E.U. country that did not subscribe to the E.U. Regulation.[75] When Ireland engages in corporate insolvency proceedings with E.U. Member States (save for Denmark), the E.U. Regulation is the operative provision and Section 1417 has no effect. It is also important to keep in mind that Section 1417 is limited to winding up orders and does take into account reorganizations of companies.

(b) E.U. Insolvency Law

As part of the need to create a proper functioning internal market where there is effective cooperation between the Member States, and in the absence of incentives for parties to transfer assets or judicial proceedings from one Member State to a more favorable one, the E.U. has a structured, binding, and directly applicable legal framework for cross-border insolvency proceedings within the E.U.[76] Regulation (EC) No 1346/2000 ("the E.C. Regulation") was adopted so as to create a framework, like the Model Law, for the opening of cross-border

[73] The Companies Act 2014 is administered by the Minister for Enterprise, Trade and Employment.
[74] *See id.* at § 1417(1).
[75] §1417 of the 2014 Act substantially re-enacts §250 of the Companies Act 1963 as amended by the European Communities (Corporate Insolvency) Regulations 2002 (S.I. No. 333/2002). Regulation 3(d) of the 2002 Regulations inserted a new subsection (4) into Section 250, providing that the section does not apply to an order made by a court of a Member State of the European Communities other than the State and Denmark.
[76] *See* CO. L. REV. GRP., *supra* note 2, at 12.

insolvency proceedings, and for the subsequent automatic recognition and co-operation between the different Member States, with the exception of Denmark.[77]

The E.C. Regulations were updated in 2015 by Regulation (EU) 2015/848 ("the Recast Regulation" or "the E.U. Insolvency Regulation"), which is applicable to insolvency proceedings opened after the 26 June 2017 by a MS of the E.U. (save for Denmark), with the E.C. Regulations applying to acts committed by debtors before that date. The E.C. Regulations were updated in 2015 by Regulation (EU) 2015/848 (the "Recast Regulation" or "E.U. Insolvency Regulation"), which applies to insolvency proceedings opened after 26 June 2017 by E.U. Member States, excluding Denmark; proceedings concerning acts committed by debtors before that date remain governed by the earlier EC Regulations.[78] Like the Model Law, the E.U. Regulation adopts the COMI concept for the determination of where main proceedings must be opened.[79] If the debtor does not have its COMI within the E.U., then the Regulations do not apply. Once again, like the Model Law, the COMI for companies is presumed to be the location of its registered office, or the habitual residence of an individual in terms of personal insolvency, although this presumption can be rebutted. [80]

[77] Denmark has an opt-out for from the E.U.'s Area of Freedom, Security and Justice; *See* Insol Europe, Joint Project on "How E.U. Member States Recognize Insolvency and Restructuring Proceedings of a Third Country" 61 (Lexis PSL, 2022).
[78] It should be noted that Irish insolvency proceedings from the perspective of the E.U. Insolvency Regulation refers to the following kinds of procedures in the Irish context: compulsory winding-up by the court, bankruptcy, the administration in bankruptcy of the estate of persons dying insolvent, winding-up in bankruptcy of partnerships, creditors' voluntary winding-up (with confirmation of a court), arrangements under the control of the court which involve the vesting of all or part of the property of the debtor in the Official Assignee for realization and distribution, examinership, Debt Relief Notice, Debt Settlement Arrangement, and Personal Insolvency Arrangement.
[79] *See* Reg. (EU) No. 2015/848, Art. 3(1), 2015 O.J. (L 141) 1.
[80]*See* UNCITRAL Model Law on Cross-Border Insolvency (1997), Art. 16(3).

The main insolvency proceedings, opened in the Member State where the debtor's COMI is located, have universal scope and are aimed at encompassing all of the debtor's assets.[81] The E.U. Regulation terms insolvency proceedings opened subsequently in another Member State as secondary proceedings.[82] Secondary proceedings may be opened in a Member State other than where COMI is located only if the debtor has an establishment within the territory of that Member State. In such cases, the effects of those proceedings are restricted to the assets of the debtor situated in that Member State's territory.[83]

Furthermore, not only does the E.U. Insolvency Regulation allocate jurisdiction vis-à-vis COMI and secondary proceedings, but it also establishes uniform choice of law rules to determine which country's insolvency law applies once jurisdiction is established.[84] The general rule, as grounded in the *lex fori concursus* rule, is that the law of the Member State where the insolvency proceedings are opened governs the entire insolvency proceeding.[85] This covers matters pertaining to who is subjected to the insolvency proceedings, the assets captured by the proceedings and their treatment, the respective powers of the debtor and liquidator, the effects of the proceedings on transactions, claims admissible and the manner of their proof.[86] However, the Regulation provides exemptions to the general rule, and these relate to, *inter alia*, matters such as rights *in rem* of third parties,[87] set-off claims by creditors,[88] rights based on reservation of title,[89]

[81] *See* Reg. (EU) No. 2015/848, Art. 1(2), 2015 O.J. (L 141) 1; see Recital 23.
[82] *See id.* at Recital 23.
[83] *See id.* at Art. 3(2).
[84] *See id.* at Arts. 4-15.
[85] The *lex fori concursus* principle provides that the law of the forum where insolvency proceedings are initiated governs the proceedings. *See id.* at Art. 7.
[86] *See id.*
[87] *See id.* at Art. 8.
[88] *See id.* at Art. 9.
[89] *See id.* at Art. 10.

contracts relating to immovable property,[90] employment contracts,[91] detrimental actions,[92] and matters containing ongoing litigation or arbitral proceedings.[93]

In respect of recognition and enforcement of judgments, the E.U. Regulation permits insolvency proceedings and related judgments to be automatically recognized and enforceable E.U.-wide.[94] Insofar as no secondary proceedings are opened in the other Member State and recognition is not contrary to the public policy of that Member State, the Regulation allows for such automatic and enforceable recognition without the need for additional procedures–which goes further than the Model Law and Chapter 15 which requires court applications for recognition.[95] The orders opening insolvency proceedings must be made by a court in the Member State where COMI is located, and orders made by that court during such proceedings must be recognized in all the other Member States from the time they come into effect.[96]

(c) The Position at Common Law

In circumstances where the E.U. Insolvency Regulation or Section 1417 of the Companies Act 2014 are not applicable to the recognition and assistance of foreign insolvency proceedings, the common law and rules of private international law apply. This would take effect against the recognition of foreign insolvency proceedings stemming from non-E.U. countries and Denmark (such as the U.S. and the U.K.).

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[90] *See id.* at Art. 11.
[91] *See id.* at Art. 13.
[92] *See id.* at Art. 16.
[93] *See id.* at Art. 18.
[94] *See id.* at Ch. II.
[95] *See* UNCITRAL Model Law on Cross-Border Insolvency (1997), at Ch. III.
[96] *See id.* at Art. 19.

The position of Irish common law on the recognition of foreign proceedings is not entirely clear. Different judicial statements have been made as to the *nature* of the common law impact on foreign recognition. In the High Court decision of *Fairfield Sentry Ltd (in liquidation) v. Citco Bank Nederland*, Finlay-Geoghegan J stated that:

> *"…pursuant to common law in Ireland, the court has an inherent jurisdiction to recognise orders of foreign courts (in the sense of non-E.U. courts) for the winding up of companies and the appointment of liquidators."*[97]

This seems to be slightly at odds with an earlier Supreme Court decision – that of in *Re Flightlease (Ireland) Ltd (In Voluntary Liquidation)*–where Finnegan J held that the recognition of a Swiss judgment mandating the payment of sums by the Irish entity to the liquidated Swiss company would not be granted.[98] The Supreme Court was not prepared to grant recognition in circumstances where the Irish entity was not present or carrying on business in Switzerland when the proceedings were instituted and had submitted to the jurisdiction of the Swiss courts, and added that it would be more desirable for mutually agreed upon rules to be formulated "by way of legislation rather than by judicial development having regard to the significant changes which would be wrought in the common law."[99]

However, the High Court in *Re Mount Capital Fund Limited (in liquidation)* clarified that the *ratio decidendi* in *Flightlease* was limited to the kind of case where "it is sought to enforce at common law a 'liability to pay a sum' on foot of a judgment made by a foreign court in

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[97] *See Fairfield Sentry Limited (in liquidation) v. Citco Bank Nederland* [2012] 1 IEHC 81, ¶ 23.
[98] *See Re Flightlease (Ireland) Limited (In Voluntary Liquidation)* [2012] 1 IR 722.
[99] *See id*. at ¶ 66.

liquidation proceedings," and it accordingly does "not preclude" the Irish courts from giving recognition more generally of orders from foreign jurisdictions.[100]

More recently, the Supreme Court in *Re Sean Dunne (a Bankrupt)*[101] accepted the various proclamations made by the High Court in different cases[102] where it had said to have inherent jurisdiction at common law, "deriving from the underlying principle of universality of insolvency proceedings", to recognise foreign insolvency proceedings.[103] However, the Supreme Court tailored the position by stating that, although the Irish courts have jurisdiction at common law to entertain foreign insolvency proceedings, its ability in respect of enforcement and assistance is constrained by pre-existing statutory authority. Here, the Supreme Court rejected the appellant's argument that the High Court lacked jurisdiction on the basis that dual-bankruptcy proceedings were impermissible.[104] Given that the appellant had filed for bankruptcy under Chapter 7 of the Bankruptcy Code in the U.S., he argued that the Irish bankruptcy proceedings which were opened against him were nugatory due to the principle of modified universalism, mandating the Irish courts to recognize the primacy of the U.S. proceeding.[105] The Court disregarded this argument on the basis that the relevant statue, the Bankruptcy Act 1988, says nothing that would prohibit dual bankruptcy proceedings and the Court also found that, by

[100] *See Re Mount Capital Fund Limited (in liquidation)* [2012] 2 IR 486, ¶ 34.
[101] *See Re Sean Dunne (a Bankrupt)* [2015] IESC 42.
[102] *See In Re Drumm (a bankrupt)* [2010] IEHC 546; *Fairfield Sentry Limited (in liquidation) v. Citco Bank Nederland* [2012] 1 IEHC 81; *In Re Mount Capital Fund Limited (in liquidation)* [2012] IEHC 97.
[103] *See Re Sean Dunne (a Bankrupt)* [2015] IESC 42, ¶ 63.
[104] *See id.* at ¶ 90.
[105] *See id.* at ¶ 28.

relying on English case law, the principle of modified universalism defers to pre-existing Irish statutory law.[106]

Hence, although *Re Sean Dunne* was highly fact specific and may not give rise to a definitive precedent, it indicates that Ireland may not have a freestanding common law practice of recognizing, assisting, and enforcing foreign insolvency orders from non-E.U. jurisdictions, and where recognition is to be granted to such jurisdictions, the proceedings must be in compliance with Irish statutory law and the Irish courts have discretion in regard of enforcement. In this case, the existence of the Model Law in Ireland may have allowed the High Court to accept the primacy of the U.S. proceedings (insofar as the appellant's COMI was located in the U.S.) and could have assisted the U.S. Bankruptcy Court in its collection and distribution of the bankrupt's assets. This would have prevented the need of opening fresh proceedings in Ireland, although the choice to open such proceedings in Ireland would still be possible where the foreign proceeding would be contrary to Irish public policy, which may include a lack of protection for the interests of Irish creditors.

Although the CLRG has noted that it is unclear what the "long-term effect of the *Sean Dunne* decision will be in the context of the development of the common law power of recognition and assistance", the current state of the Irish common law in respect of the assistance available to foreign liquidations serves to "underline the uncertainty and lack of predictability which reliance

[106] *See id.* at ¶ 55 (citing *Cambridge Gas v. Official Committee of Unsecured Creditors of Navigator Holdings plc* [2006] UKPC 26, *Singularis Holdings Ltd v. Price Watherhouse Coopers* [2014] UKPC 36, and *Rubin v. Eurofinance SA* [2012] UKSC 46).

on the common law for a solution" and highlights the prospective benefits of adopting the Model Law in Ireland.[107]

III. ADOPTION OF THE UNCITRAL MODEL LAW IN IRELAND AND SIGNIFICANCE FROM U.S. PERSPECTIVE

A. Scope and Application of the Model Law in Ireland

Enactment of the Model Law in Ireland would take place against a significant background. First, there is an increasing number of debtors with their assets held in different jurisdictions due to the modern international nature of trade and commerce. The International Monetary Fund (IMF) has noted that the challenges presented by the diversity of national rules in respect of international insolvency procedures "creates considerable uncertainty and undermines the effective application of national insolvency laws in an environment where cross-border activities are becoming a major component of the business of large enterprises."[108] With that in mind, adoption of the Model Law would have tangible benefits to Ireland's internationalized corporate environment.

Secondly, the onset of Brexit makes adoption of the Model Law in Ireland even more prominent. Given that companies in the U.K. may no longer be subject to the E.U. Insolvency Regulation and coupled with Ireland's "significant trading relationship" with its "immediate neighbour", there is a need for a "system of cross-border insolvency administration which is usable,

[107] *See* CO. L. REV. GRP., *supra* note 2, at 19.
[108] *See* INT'L MONETARY FUND, ORDERLY & EFFECTIVE INSOLVENCY PROCEDURES (1999), https://www.imf.org/external/pubs/ft/orderly/.

functional and adaptable."[109] The Model Law (to which the U.K. is ascribed) would provide welcomed clarity to Ireland and would be preferable, from the perspective of clearer rules, than reliance on the common law position and conflict of law rules. This clarity would also be significant for other countries which are not subject to the E.U. Insolvency Regulation but are subscribers to the Model Law- namely the U.S., to which corporate Ireland is closely connected and integrated with.

For the purposes of the CLRG's Report, given that the remit of the body is restricted to matters of Company Law, it noted that adoption of the Model Law in Ireland may be limited to corporate insolvencies only and may not include personal insolvencies.[110] However, it is possible for the scope and application of the Model Law to cover cases of natural legal persons. The Model Law itself, as well as Chapter 15 of the U.S. Bankruptcy Code and the E.U. Insolvency Regulation, makes provision for both corporate entities and natural persons who are in financial distress.[111] It would be, as is submitted, too restrictive of a position to only adopt the Model Law in Ireland in respect of only corporate entities. When considering implementing the Model Law in Australia in respect of both corporate and natural legal persons, the government noted that:
It is arguable that failure to include personal bankruptcy within the scope of the provisions is undesirable because, as Australia has experienced, there are individuals that enter personal bankruptcy in the aftermath of corporate failures and the facilities provided by the Model Law to

[109] *See* CO. L. REV. GRP., *supra* note 2, at 5-6.
[110] *See id.* at 11
[111] *See* UNCITRAL Model Law on Cross-Border Insolvency (1997), *supra* note 3. *See also* Glenn, *supra* note 9. *See also* Reg. (EU) No. 2015/848, 2015 O.J. (L 141) 1, *supra* note 17. *See also* CO. L. REV. GRP., *supra* note 2, at 11 n.14. The jurisdictions which have implemented the Model Law to both corporate and personal insolvency include: Australia, the British Virgin Islands, Canada, the Cayman Islands, Colombia, Great Britain, Greece, Japan, Mauritius, Mexico, New Zealand, Poland, Romania, Serbia, South Africa, South Korea, the United States of America. *Id.*

trace assets across jurisdictions would be very useful in those circumstances.[112] The Model Law creates no special rules for personal insolvencies.[113] The procedure for filing for relief under the Model Law would apply in the same manner as for a corporate entity: a foreign proceeding commences where the natural person has assets in another jurisdiction, a foreign representative is appointed to seek recognition of the proceeding, and subsequently ancillary relief is sought.[114] Having such a scheme in place would make cross-border proceedings, like a *Re Sean Dunne* scenario, clearer and more streamlined and would be in line with the uniform approach taken by the E.U. Insolvency Regulation to corporate and personal insolvencies.

As part of the CLRG's Report, various key recommendations were made in respect of enacting the Model Law in Ireland.[115] First, the Group recommended that Article 3 of the Model Law, relating to the international obligations of a state, should be modified such that if there is a clash between the Model Law and another international treaty (the E.U. Insolvency Regulation), the requirements of the E.U. Insolvency Regulation prevails.[116] Secondly, the CLRG recommended that paragraph 2 of Article 20 be adopted and insert a phrase as would be relevant to Irish law.[117] Article 20, as previously discussed, provides for mandatory relief where there is recognition of a foreign main proceeding and would be worded as such if adopted:

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[112] Australian Government Corporate Law Economic Reform Program Proposals for Reform, *Cross-Border Insolvency: Promoting international Co-operation and Coordination* (2002, Paper No 8) 25. This highlights government concern that excluding personal bankruptcies from the Model Law's reach could hinder efforts to recover assets international when company directors or owners shift wealth offshore before or after corporate collapse. *Id.*

[113] *See* UNCITRAL Model Law on Cross-Border Insolvency (1997).

[114] *See id*. at Chps. II and III.

[115] *See* CO. L. REV. GRP., *supra* note 2, at Chp 4.

[116] *See* CO. L. REV. GRP., *supra* note 2, at 27. The CLRG recommends the following re-wording of Article 3: "To the extent that this Law conflicts with the *European Insolvency Regulation* or an obligation of this State arising out of any treaty or other form of agreement to which it is a party with one or more other States, the requirements of the *European Insolvency Regulation,* treaty or agreement prevail." *Id. See also* UNCITRAL Model Law on Cross-Border Insolvency (1997).

[117] *See* CO. L. REV. GRP., *supra* note 2, at 39.

> *The scope, and the modification or termination, of the stay and suspension referred to in paragraph one of this article is subject to the Court, on application of the foreign representative or any affected party, modifying or terminating such stay and suspension on such terms as the Court thinks fit.* [118]

The effect of adding the phrase 'subject to such terms as the court deems fit' takes into account the modifications and limitations that may be imposed to an order of mortarium, and is a key phrase used in the Irish legislation for the granting of relief in insolvency proceedings. Such changes can be made through the provisions of the Companies Act 2014[119] and the E.U. Insolvency Regulation.[120] Further, the recently transposed E.U. Preventative Restructuring and Second Chance Directive, which proposes a level of harmonization for preventative restructuring for Member States, has elements which are similar to the Irish examinership procedure and the rescue plan of Chapter 11 of the U.S. Bankruptcy Code.[121] The stay under this Directive is akin to the stay that is given upon the granting of examinership under the 2014 Act, and hence having the phrase 'as the Court thinks fit' would be in keeping with the Irish formulation.

Additionally, the Group recommended that the discretionary relief under Article 21 specifically mention protection to preferential creditors in paragraph 2 of the article provision.[122] Preferential creditors in Irish law include the Revenue Commissioners and employees of an insolvent companies, and the Group made the same recommendation (to include specific reference to

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[118] Article 20(2) in its ordinary form in the Model Law provides: "The scope, and the modification or termination, of the stay and suspension referred to in paragraph 1 of this article are subject to *[refer to any provisions of law of the enacting State relating to insolvency that apply to exceptions, limitations, modifications or termination in respect of the stay and suspension referred to in paragraph 1 of this article].*"
[119] *See*, §§520, 606, 606(4), and 678 of the Companies Act 2014.
[120] *See*, Articles 8, 9, 20, and 46 of Reg. (EU) No. 2015/848, 2015 O.J. (L 141) 1.
[121] Directive (EU) No. 2019/1023, 2019 O.J. (L 172) 18, as transposed by European Union (Preventive Restructuring) Regulations 2022 (S.I. No. 380/2022) (Ir.), amending Companies Act 2014 (Ir.).
[122] *See* CO. L. REV. GRP., *supra* note 2, at 41.

protection of preferential creditors) in paragraph 1 of Article 22.[123] By making specific reference to preferential creditors, concerns can be calmed surrounding Ireland ceding control to another state in cross-border proceedings, where there may be less favorable treatment of domestic preferential creditors.[124]

Upon adoption of the Model Law, Ireland would derive tangible benefits. The most immediate advantage is the clarity and certainty that the Model Law provides through mutual co-operation of different jurisdictions. Although not fully harmonized, this framework for co-operation aims at minimizing risks for international insolvency actions, such as the uncertainty surrounding the ability to enforce legal rights and costs, and unfamiliarity with foreign legal processes. Ireland is in a particular focal point due to Brexit and is a popular corporate destination for multinationals, largely due to its favorable corporate tax rate.[125] Ireland's prospective use of the Model Law for countries outside the E.U., who have to rely on common law rules which have not yet been authoritatively elaborated on by the Irish courts, would bring welcomed clarity and be of a benefit to the State's significant reliance on foreign direct investment.

A. Significance from the U.S. Perspective – Supreme Court decision in *Purdue Pharma* and Third-Party Non-Debtor Releases

[123] *See id*.
[124] *See id*. at 51.
[125] Ireland has a low corporate tax rate of 12.5%. According to the 2025 International Tax Competitiveness Index Rankings, Ireland is ranked 5th as amongst the OECD (Organization for Economic Co-Operation and Development) contracting states in terms of the competitiveness of its corporate tax rate (*see also* the Finance Act 1999 for regulation of corporation tax in Ireland). However, among the 38 OECD contracting states, Ireland ranked 31st in terms of its overall tax competitiveness, which is primarily due to Ireland's high personal income tax rate. *See* Alex Mengden and Andrea Nieder, *International Tax Competitiveness Index 2025* (Tax Foundation, 2025) *available at*https://taxfoundation.org/research/all/global/2025-international-tax-competitiveness-index/.

The adoption of the Model Law in Ireland will bear legal significance in respect of U.S. restructurings. It is important to note that the insolvency frameworks in both Ireland and the U.S. have common aspects. In the first instance, both countries have provisions for the winding up of companies,[126] but what is relevant for this present discussion are the legal instruments for rescuing and restructuring a company under Irish and U.S. law. Under the Companies Act 2014, provision is made for the "examinership" of a company which is, or is likely to be, unable to pay its debts as they fall due, but has a reasonable prospect of survival.[127]Additionally, the 2014 Act makes provision for a "scheme of arrangement", which is a court-supervised flexible mechanism that can allow a restructuring.[128] These restructuring provisions are similar to Chapter 11 of the U.S. Bankruptcy Code, which allows for the rescue plan of a company. A restructuring of a company under the 2014 Act can berecognized and enforced in the U.S. via Chapter 15 of the Bankruptcy Code.

A feature that may be contained in a rescue plan is a third-party non-debtor release.[129] Such a release involves the discharge of creditor claims against third-party non-debtors (such as officers, directors, shareholders, or affiliated entities) pursuant to a restructuring plan.[130] These releases aim to protect parties who provide assistance to the reorganization plan (by providing funding or facilitating settlements). In Ireland, there appears to be a pro-release approach to release of third-

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[126] *See* Companies Act 2014, pt. 11 (Ir). and 11 U.S.C. §§ 701–784 (2024).
[127]*See* Companies Act 2014, pt. 10 § 509 (Ir).
[128] See *id* at pt. 9.
[129] *See* Glenn, *supra* note 10, at 37-43; In the US setting, third-party non-debtor releases are a common feature of Chapter 11 plans, and as part of the plan, there will be an "opt-out" mechanism whereby a creditor must withdraw their consent (via expressly opting-out) from the clause that release the claims against the third parties. *See also Re Arctic Aviation Assets* [2021] IEHC 272, ¶ 158 (in the Irish setting, third-party non-debtor releases primarily occur vis a scheme of arrangement, and Quinn J noted that "third-party releases are unusual in the context of examinership"). *See also Re Ballantyne* [2019] IEHC 407(it should also be noted that it is possible for there to be a release of claims against the debtor itself where the creditor agrees to do so, and that is made via a scheme of arrangement to be approved by the Irish High Court, as had occurred in this case).
[130] *See* Adam J. Levitin, *The Constitutional Problem of Nondebtor Releases in Bankruptcy*, 91 FORDHAM L. REV. 429, 429 (2022).

parties. This was made clear by Barniville J., as he then was, in *Re Ballantyne* where a scheme of arrangement was approved which released claims against the debtor company which proposed the scheme and the guarantor of its most significant liabilities.[131] For a release to be validly incorporated into a scheme, there must be a "sufficient nexus" between a release and the relationship between the releasing creditor and the scheme company.[132]

The U.S. approach to third party releases, however, has recently been subject to judicial scrutiny. In June 2024, the U.S. Supreme Court ruled in *Harrington v. Purdue Pharma* that the U.S. Bankruptcy Code does not permit a Chapter 11 plan to grant a release that discharges creditors' claims against third parties without the consent of affected claimants.[133] This is to say that *Purdue Pharma* prohibits Chapter 11 rescue plans from containing nonconsensual third-party release clauses, even though such releases had become a regular feature of Chapter 11 cases in recent years.[134] In a 5–4 decision, the Court held that:

> *"The bankruptcy code does not authorize a release and injunction that, as part of a plan of reorganization under Chapter 11, effectively seeks to discharge claims against a nondebtor without the consent of affected claimants."*[135]

However, the decision of *Purdue Pharma* raises a question relevant for this present discussion: are the standards applicable to recognition in Chapter 15 of a foreign plan confirmation order

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131 *See Re Ballantyne* [2019] IEHC 407 where Barniville J cited with approval the approach taken by the Federal Court of Australia to third-party releases according to in *Re Opes Prime Stockbroking Ltd* [2009] FCA 813. The position taken in *Re Ballantyne* was adopted and confirmed again by Barniville J in *Re Nordic Aviation Capital Dac* [2020] IEHC 445.
132 *See Re Ballantyne* [2019] IEHC 407, ¶ 120.
133 *See Harrington v. Purdue Pharma,* 603 U.S. 204 (2024).
134 *See* Jason Blanchard, *Opt-in or Opt-out? The Ongoing Debate over Consensual Third-Party Releases in Chapter 11 Cases* (Norton Rose Fullbright, 2025) *available at* https://www.nortonrosefulbright.com/en/knowledge/publications/dc525032/01-opt-in-or-opt-out.
135 *See Harrington v. Purdue Pharma* 603 U.S. 204 (2024) (Gorsuch J, delivering the majority opinion of the Court) at 19.

different from the standards applicable to plan confirmation under Chapter 11? Stated differently, might the U.S. Bankruptcy Court authorize and enforce a non-debtor, third-party release that is present in a foreign court's order, even though that very same release might be barred in a Chapter 11 plan by virtue of the *Purdue Pharma* decision?

In the first instance, some background of the case is in order. Purdue Pharma was a manufacturer of the semi-synthetic opioid, OxyContin, and was owned and controlled by the Sackler family.[136] OxyContin, which became an extraordinarily prescribed narcotic, had a highly addictive effect, despite representations to the contrary by the manufacturer.[137] The widespread impact of the drug contributed to the opioid epidemic in the U.S., resulting in a mass number of deaths and illnesses, and Purdue Pharma became a defendant in thousands of lawsuits claiming injuries resulting from deceptive marking practices.[139] Among the plaintiffs were states and countries that had shouldered large expenses addressing opioid injuries and deaths. During this time of outsized profits, the Sackler family received distributions from the company of approximately $11 billion.[140]

Faced with mounting liabilities related to litigation claims, Purdue filed for relief under Chapter 11 of the U.S. Bankruptcy Code. Purdue proposed a restructuring plan that included payment by the Sackler family in the amount of $4.325 billion in return for a release of all claims of the

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[136] *See* Gregory Germain, *What's Next for the Sackler Family and for Creditors in Other Cases after Supreme Court Eliminates Third Party Releases in Bankruptcy Cases?*, SYRACUSE UNIV. COLL. LAW (June 27, 2024), https://law.syracuse.edu/news/professor-gregory-germain-writes-whats-next-for-the-sackler-family-and-for-creditors-in-other-cases-after-supreme-court-eliminates-third-party-releases-in-bankruptcy-cases/.
[137]*See* Art Van Zee, *The Promotion and Marketing of OxyContin: Commercial Triumph, Public Health Tragedy,* 99 AM. J. PUB. HEALTH 221, 221-225 (2009).
[139] *See Uncovering the Opioid Epidemic* 1-6 (2019) (From 1999–2019, nearly 500,000 people died from an overdose involving prescription and illicit opioids).
[140]*See Harrington v. Purdue Pharma,* 603 U.S. 204 (2024) at 3.

debtors and from third parties.[141] The proposed plan was to provide recoveries for victims harmed by the company's products ranging from $3,500 to $48,000, depending upon the severity of the injuries.[142] The U.S. Government objected to the plan, arguing that such releases were not permitted by the Bankruptcy Code. The Bankruptcy Court in the Southern District of New York overruled these objections and confirmed the plan.[143]

On appeal, the U.S. District Court in the Southern District of New York vacated confirmation. It held that the Bankruptcy Code did not allow the release of third-party claims without consent of the claimants.[144] Undeterred, the plan proponents appealed the decision to the Second Circuit Court of Appeals and increased the proposed Sackler contribution to the plan fund in exchange for the withdrawal of certain objections.[145] While the additional payment was sufficient to cause certain parties to withdraw their objections, the U.S. Government, certain Canadian parties, and other individual creditors continued to oppose to the plan as unauthorized under the Bankruptcy Code.[146] A divided panel of the Second Circuit reversed the district court and approved the plan as modified by the additional proposed payment.[147]

The Supreme Court agreed to hear the case and, in a split opinion, reversed the Circuit Court and denied plan confirmation. The Court focused on Section 1123(b) of the Bankruptcy Code, which sets forth the permissible components of a Chapter 11 plan.[148] Among the provisions of Section

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[141] *See id.*
[142] *See id.* at 4.
[143] *See id.* at 5.
[144] *See In re Purdue Pharma, L.P.*, 635 B.R. 26 (S.D.N.Y. 2021) (holding that Bankruptcy Code disallows releasing third-party claims absent claimant consent).
[145] *See generally Purdue Pharma, L.P. v. City of Grande Prairie*, 69 F.4th 45 (2d Cir. 2023).
[146] *See* Leonard Gumport, *Purdue Pharma, L.P. v. City of Grande Prairie (In re Pharma L.P.), 69 F.4th 45 (2nd Cir. 2023)*, California Lawyer's Association, https://calawyers.org/business-law/purdue-pharma-l-p-v-city-of-grande-prairie-in-re-pharma-l-p-69-f-4th-45-2nd-cir-2023/ (listing creditors withdrawing claims).
[147] *See Purdue Pharma, L.P. v. City of Grande Prairie*, 69 F.4th 45 (2d Cir. 2023) (reversing lower court's ruling).
[148] *See Harrington v. Purdue Pharma L.P.*, 603 U.S. 204, 215-16 (2024) at 8 (outlining Section 1123(b)).

1123(b) - the one that arguably allowed for nonconsensual third-party releases - was the so-called "catch-all" contained in Section 1123(b)(6), which authorizes a plan to "include any other appropriate provision not inconsistent with the applicable provisions of this title."[149] The Court first rejected the argument that paragraph 1123 (b)(6) authorizes any provision not expressly prohibited if the judge deems it appropriate.[150] Rather, the Court interpreted Section 1123(b)(6) in light of its surrounding statutory context so as to "embrace only objects similar in nature to the specific examples preceding it."[151] Finding that all the preceding provisions concern the debtor and its relationship with creditors, the Court concluded that paragraph (b)(6) "cannot be fairly read to endow a bankruptcy court with the 'radically different' power to discharge the debts of a non-debtor without the consent of affected non-debtor claimants."[152] The Court also rejected the argument that, because the purpose of Chapter 11 is to resolve collective-action problems, the Bankruptcy Court is empowered to extinguish claims against non-debtors in the absence of the affected creditors' consent.[153] The Court also found that nothing in the history of bankruptcy law supported the notion that claims against non-debtors could be discharged absent consent.

Perhaps the most critical aspect of *Purdue*, for the present purposes, is that the Court declined to address the policy underlying the notion of a non-debtor release absent consent and the ramifications of unwinding the plan, including the possibility that the opioid victims in this case may have no meaningful path to recovery. Critically, the Court found no deep-seated policy in federal bankruptcy jurisprudence that would bar such releases. The Court's opinion therefore

[149] *See id.* at 9 (outlining Section 1123(b)(6) catch-all provision).
[150] *See id.* at 10 (rejecting argument that Section 1123 (b)(6) authorizes provision not expressly prohibited if judge deems appropriate).
[151] *See id.* (interpreting Section 1123(b)(6) in light of its surrounding statutory context).
[152] *See id.* (holding that 1123(b)(6) does not empower Court to discharge debts of non-debtor without non-debtor claimant consent).
[153] *See id*. at 13 (rejecting Bankruptcy Court's power to extinguish claims against non-debtors absent affected creditor consent).

rested exclusively on its reading of the Bankruptcy Code, concluding that it is up to Congress to determine whether to grant Bankruptcy Courts the power and authority to grant such releases.[154]

(c) Implications of *Purdue Pharma* on Proceedings under Chapter 15

Chapter 15 of the Bankruptcy Code governs recognition of foreign insolvency cases by the U.S. Bankruptcy Court. Among other things, Chapter 15 authorizes bankruptcy courts to recognize foreign proceedings, enter orders, and provide ancillary support in connection with foreign proceedings. For the purpose of this discussion, there will be an examination of the implications of *Purdue Pharma* on Chapter 15 proceedings and whether the U.S. Bankruptcy Court can recognize a foreign court's confirmation of a plan that includes a non-debtor, third-party release, absent creditors' consent.

Two prominent bankruptcy judges have held that, under Chapter 15, a court in the U.S. can recognize a plan or order in a foreign proceeding that includes a release that, in light of *Purdue Pharma*, would not be permitted under Chapter 11. In *Re Crédito Real*, Horan J of the Delaware Bankruptcy Court, found that notwithstanding *Purdue Pharma*, a bankruptcy court may enforce a nonconsensual third-party release contained in a plan approved in a foreign proceeding.[156] While *Purdue* held that nonconsensual third-party releases were impermissible in a Chapter 11 plan based on a textual reading of the Bankruptcy Code, Horan J found them enforceable through Chapter 15 because "Chapter 11 and Chapter 15 are very different animals."[157]

[154] *See id*. at 19.
[156]*See Re Crédito*, S.A.B. de C.V., SOFOM, E.N.R., 670 B.R. 150 (Bankr. D. Del. 2025).
[157] *See id*.

Shortly after *Re Credito Real*, Glenn J, Chief Bankruptcy Judge for the Southern District of New York, reached a similar result in *Re Odebrech* and extended the ruling in *Re Credito Real*.[158] Glenn J held that a bankruptcy court's recognition order under Chapter 15 could authorize such a release even if that relief was not expressly set forth in a plan or order entered in the foreign proceeding.[159]

Crédito Real experienced severe liquidity constraints beginning in 2021, and in October 2023, it filed a voluntary liquidation proceeding in Mexico City under Mexican bankruptcy law.[160] In the Mexican restructuring proceeding, Crédito Real presented a plan that, *inter alia*, released certain third parties for acts or omissions during the restructuring process and at any time prior to the execution of the plan.[161] The release extended to certain creditors, the debtor's officers, directors, managers, and a bond holder's trustee. The plan was ultimately approved by a sufficient number of unsecured claim holders.[162] In August 2024, the Mexican court issued an order finding that the restructuring plan satisfied all requirements of Mexican bankruptcy law and was consistent with public policy.[163]

In February 2025, Crédito Real's foreign representative commenced a Chapter 15 case in the District of Delaware seeking recognition of the Mexican proceeding and enforcement of the confirmed plan and the Mexican court's confirmation order.[164] In the Chapter 15 case, the United States International Development Finance Corporation (DFC), a creditor, objected to recognition of the Mexican plan, arguing that, under *Purdue Pharma*, the plan was contrary to

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[158] *See In re Odebrecht Engenharia e Construção SA*, 669 B.R. 457 (Bankr. SDNY 2025).
[159] *See id*. at 23.
[160] *See Re Crédito*, S.A.B. de C.V., SOFOM, E.N.R., 670 B.R. 150, 156-57 (Bankr. D. Del. 2025).
[161] *See id*. at 158.
[162] *See id.* at 156-157.
[163] *See id*. at 157.
[164] *See id*. at 159.

U.S. public policy and that the Bankruptcy Court lacked authority to recognize it under several sections of Chapter 15.[165] DFC argued that Bankruptcy Code Sections 1507 and 1521(a), which respectively permit a court to grant a debtor's foreign representative "additional assistance" and "any appropriate relief" in a Chapter 15 case, do not encompass approval of nonconsensual third-party releases and that, in light of *Purdue Pharma*, such releases are "manifestly contrary to the public policy of the United States" and therefore impermissible under Section 1506's public policy exception.[166] The Delaware Court rejected DFC's objections, noting that Section 1501 encourages bankruptcy courts to be "guided by the main policy goals of Chapter 15 — cooperation and comity with foreign courts and deference to those courts within the confines established by Chapter 15."[167]

Furthermore, the Court analyzed Sections 1521(a) and 1507 and concluded that they are sufficiently broad to support recognition of a nonconsensual third-party release granted in a foreign proceeding.[168] With respect to Section 1521(a), the Court cited pre-*Purdue Pharma* cases to the effect that the relief enumerated in Section 1521(a) is "not a complete and exclusive list" and that enforcement of the Mexican court's release was appropriate.[169] The Court also found that the release was permissible "additional assistance" under Section 1507, based both on considerations of comity to the Mexican court and because the Mexican proceeding provided the procedural protections identified in Section 1507(b).[170] Perhaps most importantly, the Court rejected DFC's public policy argument.[171] According to the Court, public policy exceptions

[165] *See id*. at 159-160.
[166] *See id.*
[167] *See id*. at 161.
[168] *See id.* at 165-169.
[169] *See id.* at 166.
[170] *See id.* at 168-170.
[171] *See id.* at 171-174.

under Section 1506 must be narrowly construed and third-party releases are not manifestly contrary to U.S. public policy; indeed, such releases are specifically authorized under the U.S. Bankruptcy Code in the context of Chapter 11 plans in specific contexts, such as in cases dealing with asbestos-related liabilities.[172]

In *In re Odebrecht*, the debtor, a Brazilian construction company, commenced a proceeding to facilitate a comprehensive restructuring plan under the law of Brazil in June 2024, which was approved by its creditors and a Brazilian court.[173] In March 2025, the debtor filed a Chapter 15 petition in the Southern District of New York seeking recognition and enforcement of the confirmed plan.[174] The Office of the U.S. Trustee objected to the foreign representative's proposed form of order granting U.S. recognition because, *inter alia*, the plan included a third-party release that was prohibited by *Purdue Pharma*.[175] The debtor's foreign representative disputed the U.S. Trustee's claim that the proposed order contained a third-party release and argued that, even if such a release were present, *Purdue Pharma* does not apply to Chapter 15 cases.[176] Chief Judge Glenn subsequently overruled the U.S. Trustee's objection, agreeing with the debtor's foreign representative and found that *Purdue Pharma* does not apply to Chapter 15 proceedings.[177]

[172] *See id.* at 173-174.
[173] *See In re Odebrecht Engenharia e Construção SA*, 669 B.R. 457, 462-63 (Bankr. SDNY 2025) (providing background).
[174] *See id.* at 463 (detailing procedural history).
[175] *See id.* at 463-64 (enumerating objections of Trustee).
[176] *See id.* at 464-465 (summarizing reply of debtor's foreign representative to United States Trustee objection).
[177] *See id.* at 476-77 (enumerating holdings and supplying ruling).

Critically, the Court in *In re Odebrecht* determined that, under Section 1521(a), a court may grant relief beyond that afforded by the foreign court in the foreign proceeding.[178] Chief Judge Glenn followed the reasoning of *Crédito Real* with respect to the interpretation of Sections 1506, 1507, and 1521(a), and noted that creditors that deal with a foreign corporation subject themselves to the laws of such corporation's government, and a party may lose rights in a foreign proceeding that it would have had under U.S. law.[179] Chief Judge Glenn found that the discretion to grant "appropriate relief" under Section 1521(a) is "exceedingly broad", and noted that the public policy exception in Section 1506 is narrowly construed by bankruptcy courts.[180]

The Court went on to affirm the well settled principle that exculpations may protect estate fiduciaries and that those who are not estate fiduciaries may be exculpated if they were actively involved in all aspects of the Chapter 11 case and made "significant contributions."[181] In Chapter 15 cases, Chief Judge Glenn concluded that "Courts in this district have long enforced foreign restructuring plans in Chapter 15 cases which include nonconsensual third-party releases, most doing so pursuant to sections 1507 and 1521 of the Code" and added that "[e]xculpations have been granted by courts in this district in Chapter 15 cases, including the protection of non-fiduciaries."[182]

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[178] *See id.* at 469-470 (asserting text of Chapter 15 does not limit relief to that granted by foreign court).
[179] *See id.* at 473-475 (summarizing reasoning of *Crédito Real* and ramifications of its holding). *See also Crédito Real*, 670 B.R. at 164-69 (interpreting Sections 1507 and 1521(a) of Bankruptcy Code in wake of *Purdue*).
[180] *See id.* at 465-466 (detailing legal standard for relief pursuant to Chapter 15 proceedings). *See also In re Atlas Shipping A/S*, 404 B.R. 726, 739 (Bankr. S.D.N.Y. 2009) (outlining exercise of discretion by federal courts under 1521(a)); *See also In re Ocean Rig UDW Inc.*, 570 B.R. 687, 707 (Bankr. S.D.N.Y. 2017); *In re Toft*, 453 B.R. 186, 195 (Bankr. S.D.N.Y. 2011) (asserting that "[t]hose courts that have considered the public policy exception codified in [Section] 1506 have uniformly read it narrowly and applied it sparingly").
[181] *See In re Odebrecht*, 669 B.R. at 466-67 (supplying legal standard for exculpation in Chapter 11 cases).
[182] *See id.* at 466-69 (providing exculpation procedure and legal standard for foreign restructuring plans in Chapter 15 cases).

Having regard to the combined effect of *Re Credito Real* and *Re Odebrech*, the message in respect of releases under a Chapter 15 is clear: a rescue plan confirmed under the law of Ireland (via a scheme of arrangement) that includes a non-debtor, third-party release will very likely be enforceable in the U.S.by application of Chapter 15 of the Bankruptcy Code, even in the absence of the consent of creditors. Thus, a company seeking the assistance of such releases in its restructuring process might seek relief first in Ireland and, after confirmation of its plan in Ireland, seek recognition and implementation of that plan in the US under Chapter 15. This scenario presents a powerful incentive for companies to consider pursuing financial and restructuring relief first in Ireland. Irish adoption of the Model Law would greatly facilitate the effectiveness of this strategy.

IV. CONCLUSION

When the CLRG conducted its report on Ireland's adoption of the Model Law in 2018, it did so with the intention of clearly displaying the numerous merits that would be derived from the predictability of outcome and certainty in procedure that the Model Law offers, along with the tangential benefits that adoption would have on Ireland's economy, being that it is a state which heavily depends upon foreign direct investment.[183] Seven years have now passed since the CLRG made its recommendations, and no movement has been made by the Oireachtas to enact legislation giving effect to the Model Law.

[183] *See generally* CO. L. REV. GRP., *supra* note 2.

Throughout the course of this paper, it is hoped that light has been shed on the operations of the Model Law and the advantages it can offer Ireland, drawing on experiences from the U.S. Bankruptcy Court and the use of Chapter 15 in cross-border proceedings. This paper has analyzed the theories that beset cross-border insolvency law, identifying modified universalism as the basis for the recognition and enforcement of foreign proceedings for the Model Law and the E.U. Insolvency Regulation. Analysis has been made of both legal instruments, as well as Irish statutory law and the common law position, which has not been developed to a detailed level in respect of enforcement of foreign judgments and orders.

This paper also examined some of the CLRG's specific recommendations and has looked at a recent matter that is pertinent to U.S. and Irish relations–that being the decision in *Purdue Pharma*. Through chartering post-*Purdue Pharma* cases, it becomes clear that a key feature of certain rescue plans—third-party releases—is likely to remain permissible under Chapter 15 of the U.S. Bankruptcy Code. This point, as is contended, bears significance for the selection of Ireland as a jurisdiction in which to restructure a company incorporated and governed by Irish law, with the expectation of recognition in the U.S. The adoption of the Model Law would substantially facilitate such restructurings, as well as a host of other insolvency proceedings, thereby strengthening Ireland's capacity to engage effectively with major trading partners, particularly the U.S. and the U.K.

On the basis of the foregoing, implementation of the Model Law in Ireland would yield noticeable benefits, both of a legal and economical nature. It would foster greater clarity and coherence in insolvency proceedings while advancing the principles of international comity. Collectively, these developments would serve to bolster Ireland's stature within the global legal order and strengthen its capacity to function as an effective and credible jurisdiction in cross-border insolvency matters.