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Case No: CR-2016-002355

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
COMPANIES COURT
IN THE MATTER OF
GLOBAL GARDEN PRODUCTS ITALY S.p.A.

Royal Courts of Justice
Strand, London, WC2A 2LL
Monday, 27 June 2016

B e f o r e :

MR JUSTICE SNOWDEN

IN THE MATTER OF
GLOBAL GARDEN PRODUCTS ITALY S.p.A.

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(Official Shorthand Writers to the Court)

MR. ROBIN DICKER QC (instructed by Linklaters LLP) appeared on behalf of the Applicant

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HTML VERSION OF JUDGMENT (AS APPROVED)

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MR JUSTICE SNOWDEN:

1. This is an application by Global Garden Products Italy S.p.A. ("the Company") for an order sanctioning a scheme of arrangement under Part 26 of the HYPERLINK "https://www.iclr.co.uk/legislation/view/ukpga/2006/46/contents/data.xml" \t "_blank". The Company is a limited liability company incorporated and domiciled in Italy with its headquarters and registered office in Castelfranco, Veneto, Italy. The Company is a wholly owned subsidiary of a Luxembourg company, Global Garden Products C S.á.r.l. ("the Parent"). Both companies are part of a group which is one of the European leaders in the manufacture and sale of lawnmowers, machines for garden maintenance and related equipment. The group employs approximately 1500 people worldwide and operates in 17 jurisdictions.

<u>The Financial Background</u>

2. The Company is the borrower in respect of term facilities made available pursuant to a credit agreement with Intesa Sanpaolo S.p.A. as the existing lender ("the Facilities Agreement"). That

agreement is governed by English law and contains a jurisdiction clause in favour of the English courts in the following terms:

> "37.1 Jurisdiction:
>
> (a) Unless otherwise set out in any other finance documents, the English courts have exclusive jurisdiction to settle any dispute in connection with any finance document.
>
> (b) The English courts are the most appropriate and convenient courts to settle any such dispute in connection with any finance document. Each Obligor agrees not to argue to the contrary and waives objection to those courts on the grounds of inconvenient forum or otherwise in relation to proceedings in connection with any finance document.
>
> (c) This clause is for the benefit of the Finance parties only. To the extent allowed by law a finance party may take (i) proceedings in any other court; and (ii) concurrent proceedings in any number of jurisdictions.
>
> (d) References in this clause to a dispute in connection with a Finance Document include any dispute as to the existence, validity or termination of that finance document."

3. Under the Facilities Agreement the existing lender acts in large part as a fronting bank for a group of international financial institutions together with other investors who have acquired their interests in the secondary market. This structure was designed to facilitate the international syndication of the Facilities Agreement having regard to Italian tax rules and regulatory restrictions limiting the type of financial institutions that are eligible to be direct lenders to Italian companies.

4. To give effect to this structure, the existing lender has entered into arrangements with the other lending institutions pursuant to a Credit Support Agreement, which is governed by English law and contains a jurisdiction clause in favour of the English courts in the following terms:

> "30.1 Jurisdiction:
>
> (a) Each party irrevocably agrees that the English courts have exclusive jurisdiction to settle any dispute in connection with disagreement.
>
> (b) The English courts are the most appropriate and convenient courts to settle any such dispute in connection with this agreement. Each party agrees not to argue to the contrary and waives objection to those courts on the grounds of inconvenient forum or otherwise in relation to proceedings in connection with this agreement.
>
> (c) References in this clause 30 to a dispute in connection with this agreement include any dispute as to the existence, validity or termination of this agreement."

5. Under the Credit Support Agreement, the other institutions who are referred to as "the credit support providers" have, in effect, provided a commitment to fund a proportion of the facilities made available to the Company. The mechanism employed is that each credit support provider has provided a guarantee to the existing lender for a proportion of the Company's liabilities to the existing lender under the term facilities, and has deposited an amount with the existing lender equal to such credit support commitment. In the event that a credit support provider satisfies any of its guarantee obligations, including if the existing lender utilises only part of the sums deposited, the credit support provider will have an immediate and automatic right of subrogation to the rights of the existing lender against the Company under the Facilities Agreement and related security and guarantees. The overall commercial effect of this structure is that the lenders to the Company are the existing lender and the credit support providers and, in commercial terms, the Company has always regarded its creditors as being that group of institutions, rather than just the existing lender.

6. For the purposes of the scheme jurisdiction under Part 26 of the Companies Act, I am satisfied that the credit support providers can be regarded as "creditors" of the Company because they are contingent creditors pursuant to their rights of subrogation and indemnity under the Credit Support Agreement and

the Facilities Agreement. That approach follows a number of cases, including Re Castle Holdco [2009] EWHC 3919 and Re PrivatBank [2015] EWHC 3186 at paragraphs 9 to 16.

7. That appears also to have been the view taken by Henry Carr J at the convening stage in this case, because he ordered that the existing lender and the credit support providers were together to constitute a single class of scheme creditors for the purposes of the scheme meeting. In addition, to the extent that the rights of the existing lender and the credit support providers overlap, the convening order was made on the basis of an assurance from the existing lender that it would only vote for its uncovered commitment, which would avoid double-counting.

8. The existing lender and the credit support providers are also shareholders in the ultimate holding company of the group, which I shall refer to as "Topco", having acquired their shares pursuant to a restructuring in 2010. There is a high, although not exact, correlation between the credit support providers' respective credit support commitments and each parties' or affiliates' holding of shares.

9. As at 30 April 2016, the principal indebtedness of the Company under the Facilities Agreement amounted to about €224 million. This comprised two tranches: the first of about €99 million (due on 31 August 2016); and the second of €125 million (due on 31 August 2017). The scheme has become necessary because the board of the Company has concluded, following various unsuccessful initiatives in 2015 that it will not be possible to refinance these borrowings on commercially acceptable or affordable terms prior to the maturity of the first tranche of the existing loan on 31 August 2016.

The Scheme in outline

10. In outline, the scheme is intended, amongst other things, to extend the final maturity date of both tranches of the existing term facilities to 31 December 2020. It is hoped that this will place the group on a secure footing in the short term and facilitate a refinancing on more favourable economic terms in the medium term. The board of the Company considers that a failure to conclude the scheme prior to the maturity of the first tranche on 31 August 2016 will cause considerable damage and uncertainty for the Company and its creditors.

11. The scheme also forms part of a wider restructuring, which is referred to in the documents as the "A&E Transaction". The terms of the scheme contemplate that the A&E Transaction will be brought into effect by the execution by a nominee, pursuant to powers of attorney granted under the scheme by the scheme creditors, of an "Amendment and Restatement Agreement" relating to the existing Facilities Agreement, together with the execution of a number of other "A&E Transaction Documents". Under those documents, in essence, the existing two tranches of the loan will be consolidated and split into two new tranches: Tranche A, being a debt of the Parent; and Tranche B, being a debt of the Company. Both tranches will have a maturity date of 31 December 2020, and the restructured debts will be owed directly to the scheme creditors rather than through the existing lender and credit support arrangements. The reason for the split debt is to enable creditors who cannot lend directly to the Company, which is Italian, to lend instead to the Luxembourg Parent. Both tranches are, however, designed to offer precisely the same commercial terms and benefits to the lenders

12. In addition, the financial and information covenants of the borrowers will be re-set. There will be scope for the Company to enter into new receivables financing arrangements and factoring arrangements, a new revolving credit facility and new interest rate hedging and foreign exchange currency hedging arrangements. Further, and pursuant to various resolutions passed outside the scheme by the relevant companies, various steps will be taken to amend the equity arrangements, corporate governance and constitutional documents of Topco, the Parent and the Company.

The Coordinators and the transaction fees

13. The terms of the A&E Transaction were the result of negotiations which commenced in about September 2015, and which were initially conducted between the Company and two of the credit support providers, together holding about 25 per cent of the credit support commitments. These were Alcentra Limited and Halcyon Structured Asset Management European CLO 2006-II BV. I shall refer to these entities as "the Coordinators". The existing lender also participated in negotiations.

14. On 19 February 2016 a "lock-up agreement" was entered into between Topco, the Parent, the Company and the two Coordinators under which the two Coordinators agreed to support and vote in favour of the scheme and the A&E Transaction on the terms recorded in an agreed term sheet.

15. The lock-up agreement was subsequently circulated to other scheme creditors and they were invited to execute it. An incentive to do so was provided by a term under which if they agreed to lock-up by a specified date (eventually extended to 25 May 2016) the creditors agreeing to support and vote in favour of the scheme would be entitled, if it was sanctioned, to payment of a fee of 0.5 per cent of their "locked-up credit support commitment". That fee was defined in the documentation as a "work fee" and was said in the evidence before me to be designed to recognise the resource commitment required on the part of the creditor to consider and assess the A&E Transaction. I should observe, however, that there was no requirement on any creditor to demonstrate that any work had actually been done to qualify for payment of the fee; that the work fee would not be payable to any creditor who carried out work to consider and assess the A&E Transaction but formed the view that they would not support the scheme; and nor would any work fee be paid to creditors who carried out the work and agreed to support the scheme, but where the scheme was subsequently not approved or not sanctioned.

16. In addition, the evidence and the explanatory statement disclosed that on signature of the lock-up agreement, the two Coordinators would become entitled to payment of what was described as a "Coordination Fee" from the Parent. Other than it being asserted in the evidence that this fee was agreed to compensate the Coordinators for work done by them after September 2015, the precise basis of computation of that fee and the amount of it were not set out in the lock-up agreement, or in the evidence initially filed in support of the scheme, or in the explanatory statement sent to other creditors. I shall return to that issue later in this judgment.

Procedural matters

17. In accordance with the Practice Statement (Companies: Schemes of Arrangement) [2002] 1 WLR 1345, a letter was sent to scheme creditors on 26 April 2016 summarising the background to and the objectives and purposes of the scheme, the key terms and conditions of the scheme, the proposed class of creditors and the intention to have a hearing seeking an order convening a scheme meeting. By an order dated 25 May 2016 Henry Carr J ordered the company to convene a single meeting of scheme creditors to be held on 17 June 2016 and gave directions in that respect. No scheme creditor appeared on that application or asked the Company to draw any issue to the attention of the court.

18. The meeting of scheme creditors was duly held on 17 June 2016 in accordance with Henry Carr J's order. At that meeting, 28 of the 33 scheme creditors of the Company were present and voted on the scheme either in person or by proxy. The scheme was approved by all those creditors who attended and voted. That vote represented 76.34 per cent by value of all scheme creditors entitled to vote.

Schemes for overseas companies

19. Before turning to consider questions of jurisdiction and whether to sanction the scheme in my discretion, I should by way of background reiterate some observations which I made concerning schemes of arrangement in respect of overseas companies in Re Van Gansewinkel Groep BV [2015] EWHC 2151 at paragraphs 4 to 6:

> "4.In recent years schemes of arrangement have been increasingly used to restructure the financial obligations of overseas companies that do not have their COMI or an establishment or any significant assets in England. In such cases, the English court has been satisfied that neither the EC Insolvency Regulation (EC 1346/2000) nor the EC Judgments Regulation (EC 44/2001) (now recast and replaced by Regulation EU 1215/2012 with effect from 10 January 2015) has prevented the court from having jurisdiction; and a sufficient connection with England to justify the exercise of the scheme jurisdiction of the English court has been found to exist as a result of the fact that the debt obligations which are to be restructured under the scheme are governed by English law. The legal issues arising in such cases were first considered in depth by Briggs J in Re Rodenstock GmbH [2011] EWHC 1104 (Ch), [2011] Bus LR 1245, [2012] BCC 459 ("Rodenstock") and were most recently tested before Hildyard J in Re Apcoa

> GmbH [2014] EWHC 3849 (Ch), [2015] Bus LR 374, [2015] BCC 142 ("Apcoa") (a case in which permission to appeal to the Court of Appeal was granted, but the appeal was subsequently compromised).
>
> 5.The use of schemes of arrangement in this way has been prompted by an understandable desire to save the companies in question from formal insolvency proceedings which would be destructive of value for creditors and lead to substantial loss of jobs. The inherent flexibility of a scheme of arrangement has proved particularly valuable in such cases where the existing financing agreements do not contain provisions permitting voluntary modification of their terms by an achievable majority of creditors, or in cases of pan-European groups of companies where co-ordination of rescue procedures or formal insolvency proceedings across more than one country would prove impossible or very difficult to achieve without substantial difficulty, delay and expense.
>
> 6.In circumstances such as these, there is a considerable commercial imperative, and indeed pressure, upon the court to approve a scheme of arrangement. It should be emphasised, however, that even where the scheme in question has the support of an overwhelming majority of the creditors who are to be subject to it, the court does not act as a rubber stamp. Whether or not the scheme is opposed, the court requires those presenting the scheme to bring to its attention all matters relevant to jurisdiction and the exercise of its discretion. The court will then consider carefully the terms and effect of what is proposed, whether it has jurisdiction, and whether it is appropriate to exercise such jurisdiction. That is particularly the case when the court is considering a scheme for an overseas company which does not have its COMI or an establishment in England, where jurisdictional issues necessarily arise, and where recognition of the scheme in other countries will be important."

20. Having regard to my observations in paragraph 6 of that judgment, I should record that I have had the benefit of a very full skeleton argument from Mr Robin Dicker QC, who appeared for the Company and who has also dealt concisely and thoroughly with my questions concerning various aspects of the scheme and the wider A&E Transaction.

Jurisdiction

21. The first issue that I should consider is whether I have jurisdiction to sanction this scheme in relation to a company that does not have either its centre of main interests, an establishment or any material assets in the United Kingdom. Although the question of jurisdiction was raised in the skeleton argument provided to Henry Carr J and he obviously found counsel's submission on the question of jurisdiction sufficiently persuasive to justify convening the scheme meeting, he did not decide the jurisdictional issues at that stage.

22. Under section 895(2) of the HYPERLINK "https://www.iclr.co.uk/legislation/view/ukpga/2006/46/contents/data.xml" \t "_blank", the court has jurisdiction to sanction a scheme in relation to a "company" which is defined as "any company liable to be wound up under the HYPERLINK "https://www.iclr.co.uk/legislation/view/ukpga/1986/45/contents/data.xml" \t "_blank"". It is now established by a series of first instance decisions, including Re Drax Holdings Ltd [2004] 1 WLR 1049 at paragraphs 22 to 27; Re Rodenstock [2011] EWHC 1104 at paragraphs 21 to 23 and Re Van Gansewinkel Groep at paragraphs 35 to 36 that this jurisdiction will extend to a foreign company. Accordingly, there is jurisdiction in the strict sense to sanction a scheme in relation to the Company in this case.

23. A number of the cases have also raised the question of whether it is necessary, in order to found jurisdiction, for the English court to be satisfied that it has jurisdiction to sanction a scheme of arrangement under the relevant European Regulations. The existing authorities have concluded that the jurisdiction of the English court to sanction a scheme of arrangement is not affected by the EC Insolvency Regulation (No. 1346/2000). There is, however, an as yet unresolved question of whether the provisions of Chapter II of the recast EU Judgments Regulation (No. 1215/2012) apply to schemes of arrangement, so that the English court could only accept jurisdiction in accordance with that

Chapter. In order to avoid having to decide this latter issue, in a number of cases the court has adopted the practice of considering whether jurisdiction to sanction the scheme would exist on the assumption that the recast Judgment Regulation applies.

24. In this regard, Mr Dicker submitted that on the assumption that the recast Judgment Regulation applies, I would have jurisdiction to entertain proceedings for sanction of the scheme by reason of Article 8 of the Regulation. That article provides, as an exception to the general rule that a person domiciled in a Member State must be sued in a court of the Member State in which he is domiciled, that where a person domiciled in a Member State is one of a number of defendants, he may also be sued in the courts of a jurisdiction where any one of the defendants is domiciled, provided that the claims against them are so closely connected that it is expedient to hear and determine the claims together to avoid the risk of irreconcilable judgments resulting from separate proceedings.

25. In a number of cases, the courts have expressed the view that on the assumption that the recast Judgments Regulation applies to schemes, and treating the company as a claimant which is suing the scheme creditors, provided that at least one such creditor is domiciled in the United Kingdom, Article 8 is potentially engaged. The question will then be whether it would be expedient to hear and determine the application for sanction of the scheme as regards the other creditors to avoid inconsistent judgments from separate proceedings. On one view, this question will necessarily be answered in the affirmative because of the desirability of binding all scheme creditors to the same restructuring: see Re Metinvest BV [2016] EWHC 79 at paragraph 33. Alternatively, the answer may depend upon a consideration of the number and value of the creditors domiciled in the United Kingdom: see Re Van Gansewinkel Groep at paragraphs 41 to 45.

26. In this respect, the evidence on behalf of the Company that was initially filed by Mr Joseph Sinyor simply stated:

> "I understand that scheme creditors holding at least 28.37 per cent of the scheme claims by value and at least five by number are domiciled in the UK as at the date of this witness statement, which the company considers to be a significant number of scheme creditors holding a significant amount of the credit support commitments."

No further details were given of the source of Mr Sinyor's understanding, nor as to the identity of the creditors in question, nor as to the basis for the conclusion that they were domiciled in the United Kingdom.

27. That unsubstantiated evidence was, in my view, inadequate and required further evidence to be adduced at the hearing dealing with the point. The further evidence disclosed that three of the five creditors referred to were well-known major financial institutions incorporated in the United Kingdom and holding between them just over 24 per cent of the scheme claims. I accept that those entities are obviously domiciled in the United Kingdom. The other two creditors were entities incorporated abroad, which held a total of just over four per cent of the scheme claims. The evidence was that those two creditors were funds managed by Alcentra Ltd and Halcyon Loan Advisers Ltd, both of which are companies incorporated in United Kingdom. The assessment of the solicitors acting for those creditors was that, by reason of that management, the central administration of the two creditors within the meaning of that concept in the definition of "domicile" under Article 63 of the recast Judgments Regulation was in the United Kingdom. Mr. Dicker also provided some further helpful submissions by way of explanation to that evidence as to the precise management functions that are performed by the two management companies that I have referred to. He told me that all discretionary decisions (and certainly those in relation to the question of whether to vote in favour of the scheme) are taken on behalf of those two scheme creditors by their investment or collateral managers in the United Kingdom.

28. On the basis of that evidence and those submissions, I am persuaded that if the recast Judgments Regulation was applicable, jurisdiction could be established under Article 8 on the basis that sufficient creditors by number and value are domiciled in the United Kingdom and that it is expedient to determine whether the scheme should bind the other scheme creditors in these proceedings in England.

29. That conclusion makes it unnecessary for me to consider the central question of whether the recast Judgments Regulation does apply to schemes of arrangement at all, or to consider whether, if it did, jurisdiction could be established under any of the other articles of that Regulation.

30. I would, however, indicate that my provisional view was that the alternative source of jurisdiction suggested by Mr Dicker, namely Article 25 of the recast Judgments Regulation, would not have given jurisdiction. That article provides:

> "If the parties regardless of their domicile have agreed that the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship."

31. In this case, however, the jurisdiction clause in the Facilities Agreement that I have referred to in paragraph 2 above was expressed to be for the benefit of the finance parties only and, hence, could not be relied upon by the Company against those finance parties: see (for a similar point) Re Van Gansewinkel Groep at paragraphs 46 to 49. I further observe that this clause in the Facilities Agreement can, in this respect, be contrasted with the broader jurisdiction clause in the Credit Support Agreement to which I have referred in paragraph 4 above.

32. Moreover, although the lock-up agreement did contain a clause by which scheme creditors executing that document submitted to the jurisdiction of the English courts in relation to the scheme, not all of the parties to the litigation (i.e. all of the scheme creditors) have signed the lock-up agreement. It seems to me to be a requirement of the opening words of Article 25 of the recast Judgments Regulation that all of the parties to the litigation have contractually submitted.

33. As I said, however, on the basis that I am satisfied that I would have jurisdiction under Article 8 of the recast Judgments Regulation if it were applicable, I do not need to finally decide those additional points and I do not do so.

Discretion to sanction a scheme for an overseas company

34. In addition to determining that the court has jurisdiction in the strict sense to entertain an application to sanction a scheme of arrangement, a court must also consider whether it is appropriate to exercise that discretion. In relation to overseas companies it is established that the court will not exercise its jurisdiction to sanction a scheme unless a "sufficient connection" to the jurisdiction is established. In addition, in order to justify the court exercising its jurisdiction to sanction a scheme in respect of an overseas company, the court will need to be satisfied that there is a sufficient prospect of the scheme being recognised in other jurisdictions in which the company operates, owns assets or in which dissenting creditors might take action, such that the scheme will have some substantial effect and that the court will not be acting in vain. One view taken by David Richards J in Re Magyar Telecom [2013] EWHC 3800 at paragraphs 21 to 22 was that these issues of sufficient connection and recognition in other relevant jurisdictions are not wholly separate questions, but are closely related.

35. On the question of sufficient connection, the authorities have established that it will generally be sufficient in order to justify the exercise of the English scheme jurisdiction that that the relevant obligations to be restructured under the scheme are, and from the outset have been, governed by English law. That connection may be strengthened if there is a relevant jurisdiction clause in favour of England, even if it is not one that would confer jurisdiction under the recast Judgments Regulation (if applicable). For the reasons I have already given, these requirements are plainly met on the facts of this case.

36. So far as recognition is concerned, I have had the benefit of an opinion from Professor Romano Vaccarella who was a Justice of the Constitutional Court of Italy between 2002 and 2007 and has, since that date, held chairs of civil procedure at two universities in Rome. Professor Vaccarella is of the opinion that, although Italian law does not contain a procedure equivalent to an English scheme of arrangement, an Italian court would recognise an order of the English court sanctioning a scheme of arrangement under Chapter III of the recast Judgments Regulation because it is a "judgment" as defined by Article 2(a) of that Regulation.

37. In that regard, it is notable that Professor Vaccarella is of the opinion that an Italian court would not share the view of the German Oberlandesgericht (OLG) in the Equitable Life case of 8 September 2008, which characterised the role of the court in relation to an English scheme of arrangement as essentially supervisory rather than decision making. Professor Vaccarella observed in his opinion at paragraphs 2.1.2 and 2.1.3 as follows:

> "2.1.2In my view, the decision and reasoning of the OLG in Germany would not be shared by an Italian judge who is also a civil law judge. If in conformity with Article 111 of the Italian Constitution the order sanctioning a scheme arises from a *'court trial operating with adversary proceedings where the parties are entitled to equal treatment before an impartial judge in a third party position'* if the judge has to illustrate the rationale which convinced him to endorse or reject the arguments submitted by the parties in favour or against the sanction of the scheme. The Italian judge has no choice but to conclude - using Lewison J's words in a judgment rendered on 21 July 2005 in Re British Aviation Insurance Co Ltd (paragraph 69) - that 'the court is not a rubber stamp'.
>
> 2.1.3 Indeed the main point for an Italian judge is how this operates in the English court, namely the fact that the English High Court has and exercises the widest powers on the one hand not to allow a minority of creditors to frustrate the wishes of the majority and on the other hand to prevent the majority from unreasonably prejudicing the rights of creditors opposing the arrangement. This is a very sensitive task that the English court performs with the benefit of adversarial proceedings, which also requires parties to be treated equally before an impartial judge, i.e. the disclosure of the scheme to the creditors, the accuracy of the information provided, its understandability as regard the types of creditors (large and sophisticated corporations or normal consumers) and if the creditors were properly placed in their classes."

38. As will be apparent from the passage from my judgment in Van Gansewinkel Groep, which I have already set out in paragraph 19 above, that is a view of the role and functions of the English court in relation to schemes of arrangement with which I concur. Moreover, Professor Vaccarella's opinion emphasises the importance of this court not being regarded as a rubber stamp in relation to schemes of arrangement.

39. In addition, Professor Vaccarella expresses the view that the Italian court would not seek to review the assumption of jurisdiction by the English court because Article 45 of the recast Judgments Regulation prevents the recognising court from reviewing the jurisdiction of the court of the Member State of origin of the judgment, except on grounds of public policy. Professor Vaccarella opines that an Italian court would not regard a scheme of arrangement as manifestly contrary to Italian public policy because, at least since 2006, the Italian legal system has no longer taken the view that the rights of creditors can only be modified without their consent within the framework of formal insolvency proceedings. He calls attention to a number of procedures under Italian company and insolvency law that do provide for the modification of discharge of claims by creditors outside formal insolvency proceedings.

40. On the basis of Professor Vaccarella's very clear and persuasive opinion, I am entirely satisfied that there is a realistic prospect that my order sanctioning this scheme of arrangement would be recognised in Italy, where the Company is based. Accordingly, subject to satisfaction of the ordinary requirements that are applicable in every case before this court can sanction a scheme, I take the view that it would be appropriate to exercise this court's jurisdiction over the scheme by the overseas company in this case.

General principles applicable at the sanction stage

41. I therefore turn to the general question of whether it is appropriate to exercise my jurisdiction to sanction the scheme in this case. The general principles that are applied by the court at this stage of proceedings were summarised by David Richards J in Re Telewest Communication plc (No 2) [2005] 1 BCLC 772 at paragraphs 20 to 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 by reference to a passage in *Buckley on the Companies Acts*, 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, 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."
>
> 21. This formulation in particular recognises and balances two important factors. First, in deciding to sanction a scheme under s.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".

42. So far as the first requirement is concerned, I am satisfied on the evidence that the order of Henry Carr J was complied with and that the statutory majorities were obtained at the meeting of scheme creditors that he ordered.

43. As regards the correct constitution of classes, I accept the point made by Mr Dicker that if a judge has heard full argument at the convening hearing and has decided on the appropriate constitution of classes, it is not ordinarily appropriate for a different judge at the sanction hearing to take a different view of his own motion in the absence of any creditor appearing to contend that the classes were not correctly constituted. That was the view expressed by the Court of Appeal in Re Hawk Insurance Company Limited [2001] EWCA Civ 241 at paragraph 21 and was reinforced by the terms of the subsequent Practice Statement to which I have referred.

44. In this case, however, as I shall explain, in at least one respect Henry Carr J's attention was not drawn to a potentially relevant class issue. As such, and in the absence of a judgment being given on the point at the convening hearing, I believe it is appropriate that I should review, albeit briefly, the question of whether the classes were correctly constituted.

45. The test for correct constitution of classes is well-known and was considered in Re Hawk and in Re UDL Holdings Ltd [2002] 1 HKC 172 at pages 104 to 105. In summary, the question is whether the rights of the relevant creditors against the scheme company are not so dissimilar as to make it impossible for them to consult together with a view to their common interests. This test requires consideration both of the rights of the creditors against the company in the absence of the scheme and any new rights to which the creditors will become entitled under the scheme. The authorities emphasise that the class test is concerned with rights, not with interests.

46. I would also observe that when applying the test set out in the authorities in a case such as the present, where the scheme forms part of a larger restructuring and envisages and authorises the execution of a number of restructuring documents, it seems to me that it will be necessary when considering the rights to be granted to creditors not merely to focus narrowly on the provisions of the scheme itself, but to take into account rights that may be granted to creditors under the terms of the wider restructuring contemplated by the scheme. I made a similar point in Re Stemcor [2015] EWHC 2662 (Ch) at paragraph 18.

47. I would also endorse a suggestion made by Nugee J in Re Codere Finance UK Ltd [2015] EWHC 3206 (Ch) at paragraph 4:

> "I do think in a case like this where it appears that there are a number of investors or creditors who play more than one role (I instance in this case a scheme creditor called Silverpoint Finance LLC, which is both part of the ad hoc committee and will have the largest director nomination rights and has acted as the global coordinator under which it receives two per cent of the post-restructuring equity and is likely to be one of the excess backstop providers) I do think it would be helpful in a case of that type for the evidence instead of dealing with each of these matters one by one to provide a statement of what cumulatively any particular creditor would get out of the scheme that was different from that available to the general body of creditors."

48. With one minor modification suggested by Mr Dicker, I respectfully and readily endorse the good sense of that observation. The minor modification suggested by Mr Dicker is that the evidence to which Nugee J referred should be provided as a supplement to, rather than a replacement for, the conventional topic-by-topic treatment of class issues in the materials to be placed before the court either at the convening stage or the sanction stage as appropriate.

49. Turning to the specific class issues to which Mr Dicker referred, the first such issue was the fact that the company's existing liabilities in respect of the two tranches of the term loan, which mature on 31 August 2016 and 31 August 2017, are to be replaced by new facilities in two different tranches that both mature on the same date of 31 December 2020. However, as Mr Dicker submitted, given that each scheme creditors' current funding commitments are in respect of both existing loans and are in the same relative proportions, I accept that no material differences exist, and hence no class issue arises based upon the different existing maturity dates in the way that they are dealt with under the scheme.

50. Secondly, under the scheme, as I have indicated, the existing Facilities Agreement will be amended and restated in the form of a new agreement, pursuant to which the current fronting structure will be collapsed and the credit support providers will become direct lenders to either the Company or the Parent. I have explained the reasons for that new structure, and have also indicated that in commercial terms those two new tranches of loans are intended to provide precisely the same commercial effect. In addition, under the scheme each creditor will be given the same opportunity to participate in whichever tranche is convenient to them. In those circumstances, it seems to me that the rights of the scheme creditors are essentially treated equally under the scheme and no class issue arises.

51. The third issue raised by Mr Dicker relates to the issue of whether the fees granted in consideration of a creditor entering into the lock-up agreement give rise to a class question. This type of issue has been the subject of a number of authorities in recent years as such lock-up agreements have become more prevalent. The issues that arise were conveniently summarised by David Richards J in the case of Re Seat Pagine Gialle SpA [2012] EWHC 3686 (Ch) at paragraphs 16 to 21:

> "16.In re Primacom Holding GmbH and in re DX Holdings Ltd, Hildyard J and Floyd J considered whether lock-up agreements of this sort resulted in the relevant creditors constituting a separate class from those creditors who had not signed such agreements. In both cases they concluded that they did not do so. Floyd J in paragraph 7 of his judgment said:
>
> > "In the present case I was not satisfied that the existence of the benefits meant that those who had accepted them formed a separate class. Firstly, there is no doubt that the benefits were available to all creditors if they entered into the

> Agreement: they were all made aware of the offer in March 2010. Secondly, the evidence shows it to be most unlikely that a creditor who considered any substantive aspect of the scheme to be against its interest would be persuaded to vote in favour by the existence of the fees. That is not only the view of Mr Pain, a director of the Scheme Companies, but is supported by a witness statement made by the solicitor acting on behalf of the consenting creditors. The view he expresses is that his clients are in favour of the scheme because the alternative of insolvent administration would result in their suffering very significant losses compared to the proposed rights under the scheme. Alongside that, he says, the fees are not a material factor. He says that a deadline for signing up, coupled with a small incentive, gives focus to negotiations which could otherwise be protracted. Thirdly, the amount of the fees is small in relation to common interests of the creditors in relation to the restructuring. The fee which is payable immediately is 0.5% of the outstanding loan. A further fee of 2% is of less weight as it is payable much further in the future and is conditional upon certain loan extensions occurring."

Floyd J further commented that class questions such as these are "highly fact specific".

17.It was essentially similar considerations which led Hildyard J to conclude in re Primacom Holding GmbH that the lock-up agreements in that case did not constitute the consenting creditors a separate class.

18.The only factor which is different in the present case is the recent re-opening of the offer so close to the meeting. This is not a case in which the motivation or part of the motivation for the lock-up is to enable difficult negotiations to proceed. As I see it, on the whole the negotiations have already occurred and a proposal is to be put before creditors.

19.On the other hand, it is an offer which is to be made available to all scheme creditors and it remains the case that it is a relatively small amount of money. Looked at objectively, I doubt whether a creditor with substantial objections on commercial grounds to the proposals would be swayed in their view by a consent fee at the proposed level. There is certainly no evidence before me to suggest that this would be the case.

20.If it could be shown that the lock-up agreement did have a serious impact on the way in which creditors voted, that is a matter which plainly could be raised at the sanction hearing and the court could consider whether either it meant that the classes had been wrongly constituted or, perhaps more probably, whether the discretion should be exercised against sanctioning the scheme.

21.In this context in re Telewest Communications plc [2004] BCC 356, I had to consider a similar question in relation to commitments given by bond holders to vote in favour of a scheme, but in circumstances where no consideration was being provided to them. I concluded, and I am not sure the point had previously been the subject of decision, that such commitments did not constitute those creditors giving the commitments a separate class and that it was an issue which was relevant to the court's discretion at the sanction stage. I did, however, say at paragraph 54:

> "A serious issue would arise if, in consideration of its agreement to vote in favour of the scheme, or collaterally to it, the bondholder received benefits not available to the other bondholders. In effect, the result would be unequal treatment under the scheme and the bondholder could not, I think, be included in the class. As I was informed, that is not the case with the voting agreement in this case...""

52. In the instant case, as I have described, scheme creditors who acceded to the lock-up agreement before 25 May 2016 will be entitled to receive a "work fee" payable in the event that the scheme is sanctioned, amounting to 0.5 per cent of their locked-up credit support commitment. I have also

indicated that it is said (at least in the evidence) that the amount of that "work fee" is to reflect the resource commitment required by them to consider and assess the restructuring. The fee was available to all creditors who chose to accede to the lock-up agreement.

53. Having regard to the points that I have made in paragraph 15 above, I am not persuaded that the description given in the evidence as to the justification for that lock-up agreement is necessarily one that would sustain close examination. Nonetheless, on the basis that the work fee was available to all, and given its relatively low value by reference to the total amount of the debts held, it does seem to me that the point made in the evidence that such a fee would be very unlikely to have a material effect on the decision of a creditor to support the scheme is one that I am entitled to accept. I therefore do not think that the work fee as described in the lock-up agreement gives rise to a class issue.

54. It seems to me that similar considerations, at least potentially, apply to the so-called Coordination Fee payable to the Coordinators, to which I referred to earlier in the judgment. As I have indicated, however, although the existence of the Coordination Fee was referred to in the Practice Statement letter and the explanatory statement, no further information was given as to its amount or the justification for it.

55. The additional evidence that has been filed at this hearing at my request indicates that the Coordination Fee was actually agreed in the amount of €450,000 in about March 2016. It represents, therefore, about one per cent of the total face value of the scheme claims of the two Coordinators, and it will be payable to them on condition that the restructuring is approved and the scheme sanctioned.

56. In my judgment, the details and the amount of the Coordination Fee should have been disclosed in the explanatory statement and in the evidence, and it should have been drawn to the attention of the court at the convening stage as a potential class issue.

57. That said, the evidence that has now been filed at this sanction hearing does deal comprehensively with the reasons with the payment of the Coordination Fee. Mr Sinyor has provided an explanation to the effect that under the terms of the agreement of March 2016, the costs of the Coordinators' legal advisers are to be paid for by the Parent; and there is to be no reimbursement of the costs of the financial advisers of the Coordinators because the Coordinators did not appoint or use separate financial advisers.

58. Mr Sinyor also makes the point that the Coordinators have engaged in discussions with the Company since September 2015 and, during that period, there have been intensive periods of negotiation and engagement, both with the Company and with the original group of lenders on a monthly basis. Mr Sinyor points out that the Coordination Fee equates to approximately €22,500 per month each. He further explains that that rate of payment is in accordance with "market practice" in London in recent similar transactions. Mr Sinyor reiterates an assertion made earlier in the evidence that the Coordination Fee was not offered by the Parent to the Coordinators as an inducement to support the transaction or vote in favour of the scheme. He suggests that the Coordination Fee was intended to remunerate the Coordinators for their time, effort and work done both with the Company and in discussions with other scheme creditors to progress the A&E Transaction and the scheme proposals and he also indicates the view that the Company considers that the Coordinators played a crucial role in that process.

59. A further issue which arises in relation to payment of fees of this type to persons, such as the Coordinators, who have acquired their shares in the secondary market, was identified in Re PrivatBank [2015] EWHC 3299 at paragraph 26 where David Richards J said:

> "One test for considering the relevance of this type of agreement is whether the fee is sufficiently small as to be very unlikely to have a material effect on the decision of a creditor to support the scheme. While Mr Smith QC, appearing for the Bank, pointed to the fact that the fee was only 2% of the principal amount outstanding on the notes held by a Noteholder entering into such agreement, he readily accepted that materiality might more appropriately be judged by reference to the price at which notes had been acquired by a Noteholder. If, for example, notes were acquired at a price of 25 cents per US $1 nominal of Notes, a fee of 2% of the nominal value might well be considered material.

> However, I need not explore this further in the circumstances of the present case, given the factors to which I have already referred."

In this case the evidence filed by Mr Sinyor at the hearing discloses that the prevailing market price when the Coordinators acquired their debt was about 90 cents in the euro.

60. On the basis of the explanations and evidence to which I have referred above, I accept that the Coordination Fee is not likely to have affected the Coordinators' decision to support the scheme. Moreover, in the absence of any evidence that other creditors (who are sophisticated institutions) queried or questioned the amount of the Coordination Fee when they saw the explanatory statement, I am prepared to waive the deficiency in the explanatory statement of the amount of the fee not being disclosed. Practitioners should not, however, assume that a similar view would necessarily be taken in a similar case in the future.

61. The fourth issue referred to by Mr Dicker relates to the position of scheme creditors who are also hedging banks. Mr Sinyor's evidence indicates that although the existing hedging arrangements are to be either terminated or rolled over into the restructured financing arrangements, no early termination or close-out fees are contemplated under the scheme and no fees, payments, inducements or other financial benefits are being made or given to the institutions other than any amount payable in accordance with the terms of the existing hedging agreements which are on standard market terms. On that basis again I am satisfied that any payments made to scheme creditors who are also hedging banks are not such that should require them to be put into a separate class.

62. The final class point relates to the Topco shareholder arrangements. As I have already described, they seem to me to be a simplification of corporate governance and constitutional amendments of a number of the companies, including Topco. I accept that it is arguable that they are not really referable to the rights of creditors against the scheme company at all but, even if taken into account as collateral rights, they apply equally to all. In my judgment, therefore, they do not give rise to a class issue.

63. Having dealt with the class questions, the second consideration referred to by David Richards J in the Re Telewest case was whether the statutory majorities were representative of the class which they purported to represent or whether the majorities were motivated by some form of ulterior interest which was adverse to the interest of the class. Having already considered the amounts and circumstances giving rise to the payment of the work fee and the Coordination Fee in relation to the class question (above), those payments do not cause me to take the view that the majorities were motivated by any interest adverse to the class that they purported to represent, and there is no basis for any other argument to that effect that I am aware of. There was, moreover, a high turnout at the scheme meeting and all those voting at the scheme meetings voted in favour.

64. The third requirement is that the scheme is one that an intelligent man, a member of the class in acting in respect of his own interests, might reasonably approve. As David Richards J indicated in Re Telewest, the court will generally recognise that scheme creditors are the best judges of their own commercial interest, provided that they have been furnished with all relevant information upon which to base their decision and are not acting for ulterior purposes. In this case, given the high turnout and unanimous vote at the scheme meeting and in the absence of any creditor appearing to oppose the scheme, it seems to me that I should accept that the sophisticated institutions who form the creditor base in this case are indeed the best commercial judges of their own interest.