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Case No: CR-2018-008453

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMPANIES COURT (ChD)

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

Date: Friday 2 November 2018

Before:

MR JUSTICE SNOWDEN

- -

IN THE MATTER OF NOBLE GROUP LIMITED

AND IN THE MATTER OF THE COMPANIES ACT 2006

- -

William Trower QC, Henry Phillips and Lottie Pyper
(instructed by **Kirkland & Ellis International LLP**) for the Company

David Allison QC and **Stephen Robins**
(instructed by **Akin Gump LLP**)
for the members of the "Ad Hoc Group" of Scheme Creditors

Hearing dates: 12, 15 and 16 October 2018

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Judgment Approved

MR JUSTICE SNOWDEN :

1. These are my reasons for acceding on 16 October 2018 to an application by Noble Group Ltd (the "Company") for an order pursuant to section 896 of the Companies Act 2006 (the "2006 Act") convening meetings of its Scheme Creditors (as defined below) for the purposes of considering and, if thought fit, approving a proposed scheme of arrangement between the Company and the Scheme Creditors (the "Scheme").

2. The Company is incorporated and has its registered office in Bermuda, and is listed on the mainboard of the Singapore Exchange ("SGX"). It is the ultimate holding company of a group of companies (the "Group") which are a major global commodities trader. In recent years the Group has encountered financial difficulties caused, among other things, by the industry-wide decline in commodity prices between 2014 and 2016.

3. As I will explain, the Company has defaulted on its main financial obligations. A liquidation analysis conducted by KPMG with an assumed liquidation date of 31 March 2018 estimates that returns to the Company's unsecured creditors would range between 19.5 and 30.3 cents in the US dollar. The Company's financial position has not changed materially since 31 March 2018, although by 30 June 2018 its balance sheet position had further deteriorated from US$(902) million to US$(1,030) million.

<u>The Restructuring and the Scheme in outline</u>

4. The Scheme is part of a broader and highly complicated restructuring of the Group (the "Restructuring"). The key feature of the Restructuring for present purposes is that on the "Restructuring Effective Date" (or "RED"), all of the Company's business and assets will be transferred to two subsidiaries (a "New Trading Co" and a "New Asset Co") of a newly incorporated company, Noble Group Holdings Limited ("New Noble").

5. New Noble will be majority (70%) owned by a special purpose vehicle (the "Senior Creditor SPV") for the unsecured Scheme Creditors whose claims might amount to between about US$3.5 billion and US$4.2 billion and who would be entitled to a return in a liquidation of the Company. The remaining 30% of the equity in New Noble will be allocated to the existing shareholders of the Company (who will be entitled to 20% of the equity) and a special purpose vehicle for the existing management of the Company (which will hold 10% of the equity). At the RED, the listing status of the Company will be transferred to New Noble such that New Noble will be listed on the SGX and the Company will no longer be listed.

6. The Scheme Creditors comprise substantially all of the Company's creditors. The majority of Scheme Creditors are finance creditors holding existing debt instruments issued by the Company (the "Finance Creditors"). However, they also include a limited number of other persons who have made or asserted claims against the Company in contract or tort (the "Other Scheme Creditors").

7. The Scheme does not extend to the holders of a class of subordinated debt instruments issued by the Company which are known as "Perpetual Capital Securities" and upon which about US$436 million in principal and interest is due. It is said that these instruments would be "under water" and would not receive a return in a liquidation of the Group. Pursuant to the wider Restructuring, the holders of these instruments are,

however, to be offered the opportunity to exchange their existing debt instruments for US$25 million of new subordinated debt instruments to be issued by New Noble. The Scheme also excludes certain other claims and does not extend to one major financial creditor of the Company, ING Bank NV ("ING"). ING supports the Restructuring and has agreed to enter into bilateral arrangements with the Company. It is generally for a scheme company to decide with whom it wishes to propose a compromise or arrangement (see SEA Assets v PT Garuda [2011] EWCA Civ 1696 and Re SABMiller plc [2016] EWHC 2153 (Ch)) and no objections have been taken to these aspects of the Scheme.

8. Under the Scheme, the Scheme Creditors will be required to submit their claims and supporting documents before a "Bar Date" two months after the Scheme has become effective. The claims will then be subjected to a claims determination process that has been modelled on the manner in which such claims would be determined against the Company in a liquidation in England. In the first instance, the claims will be assessed by the Scheme Administrators, who are accountants at KPMG, and who will apply the same approach as if they were determining whether the claims should be admitted to prove in a winding up.

9. Where claims are rejected in whole or in part, the Scheme Administrators will notify the claimant and give reasons. There will then be a 21-day period during which the Scheme Administrators and the claimant can seek to reach agreement, failing which the Scheme Creditor will have three business days in which to refer their Scheme Claim to an independent Adjudicator, who will either be a retired Court of Appeal judge (Sir Bernard Rix) or a QC (Nicholas Vineall QC) or some other individual or individuals of comparable qualification who are impartial and independent of the Company. The Adjudicators are given broad powers to manage the claims determination process, will consider the disputed claim *de novo*, and may (but are not obliged to) give reasons for their decisions, which will be final and binding insofar as is permitted by law.

10. Scheme Creditors whose claims are accepted will receive a combination of new debt instruments to be issued by subsidiaries of New Noble. They will also receive shares in the Senior Creditor SPV which, as indicated above, will hold 70% of the equity in New Noble. If the Restructuring is successfully implemented, the proponents of the Scheme anticipate that New Noble and its subsidiaries will be able to service all of the new debt instruments in full in accordance with their respective terms. The Scheme Creditors will also have the potential, if all goes well, to recover value through the equity interest in New Noble which will be held on their behalves by the Senior Creditor SPV.

11. A key feature of the consideration to be provided to Scheme Creditors by way of new debt instruments is that it takes three forms. All Scheme Creditors will be entitled to a proportion of US$290 million of bonds to be issued by an intermediate holding company of the New Trading Co (the "Basic Creditor Scheme Consideration"). Because they are issued by an intermediate holding company, those bonds will, however, be structurally subordinated to about US$1.2795 billion of new bonds which will be issued by the New Trading Co itself and by the New Asset Co (the "Priority Debt"). The amount of a Scheme Creditor's entitlement to Priority Debt will reduce the amount of the Basic Creditor Scheme Consideration to which it is entitled.

12. Crucially, however, the Priority Debt will only be issued to Scheme Creditors who elect to "risk participate" by agreeing to guarantee US$700 million of new trade finance and hedging facilities (the "New Money Debt") which are required by the New Noble group (the "Participating Creditors"). Under the Scheme there are two routes through which Participating Creditors can risk participate: through entering into an agreement with an Intermediary Bank or by subscribing cash for shares in a special purpose company formed for the purpose (the "Cash SPV"). Those who elect to participate through the Cash SPV will be required to provide cash upfront to the amount of their risk participation. For a Scheme Creditor electing to risk participate via an agreement with an Intermediary Bank, the extent to which that Scheme Creditor will have to provide cash upfront to fund its risk participation will be a matter to be agreed bilaterally between that Scheme Creditor and its Intermediary Bank.

13. The financial effect of this structure upon potential returns to Scheme Creditors is very significant. According to the Explanatory Statement, depending upon the assumptions that are made as to the level of the Other Scheme Creditors that are accepted, Moelis has calculated that a non-Participating Creditor can expect to receive between 24.7% and 33.8% of its accepted Scheme Claim, whereas a Participating Creditor who elects to risk participate will receive between 47.4% and 58.4% of its accepted Scheme Claim for a risk participation of between 14.7% and 18.2% of its accepted Scheme Claim.

14. In addition to the Basic Creditor Scheme Consideration and the Priority Debt, one Scheme Creditor, Deutsche Bank AG ("Deutsche Bank"), will be issued with superior notes which rank ahead of the New Money Debt in respect of the first US$58 million of its Scheme Claim. The remainder of its claim will be treated in the same manner as other Scheme Claims.

The Issues

15. The main issues for decision at this convening stage related to the appropriate composition of the classes of Scheme Creditors for the purpose of the meeting or meetings to consider and approve the Scheme (the "Scheme Meeting(s)"), and as to the appropriate timetable for the convening and holding of that meeting or meetings.

16. In particular, in relation to classes, I had to decide whether it is appropriate for all Scheme Creditors (other than Deutsche Bank which it is accepted should be given its own meeting) to be placed into a single class.

17. In relation to the timetable, I was asked to impose a timetable for the dispatch of the extremely lengthy Explanatory Statement and the holding of the Scheme Meeting(s), which the Company accepted is very tight, but which it contends is appropriate in light of the prior publicity given to the Restructuring proposals over many months. That timetable is also said to be necessary to comply with a deadline for completion of the Restructuring by 27 November 2018 which results from a condition imposed by the Securities Industry Council (the "SIC"), which is the regulatory body for takeovers in Singapore, in relation to a waiver granted to the Senior Creditor SPV of a requirement to make a mandatory takeover bid for New Noble.

18. In order to facilitate the international effectiveness of the compromises brought about as part of the Restructuring, the Company is also promulgating an inter-conditional scheme of arrangement in Bermuda where the Company is incorporated (the "Bermudan Scheme"). However, consistently with its contention that it has moved its centre of main interests ("COMI") to London earlier this year, the Company has indicated that it regards the Scheme in England as the "lead" scheme. The Company then intends to seek recognition of the English Scheme in the US under Chapter 15 of the US Bankruptcy Code.

The Company, its assets and liabilities

19. The Company was incorporated on 31 March 1994 under the laws of Bermuda and has been listed on the SGX since 1997. The Company's registered office is Clarendon House, Church Street, Hamilton HM 11, Bermuda.

20. The Group is one of the world's biggest commodity traders by volume, with corporate hubs in London, Hong Kong and Singapore. The Group manages a portfolio of global supply chains, which involves marketing, processing, financing and transporting key commodities across the globe.

21. The Company's assets comprise of shares in its direct subsidiaries, principally Noble Resources Group Limited ("NRGL"), which in turn is the holding company for almost all the companies in the Noble Group. It also owns certain intercompany balances owed to it by subsidiaries, and certain intellectual property rights relating to the Group's business and cash deposits. The Company's principal roles are to direct strategy for the Group, issue debt and perform treasury functions in respect of the use of cash throughout the Group.

22. The Company's liabilities are all unsecured. The Finance Creditors' claims total about US$3.449 billion and arise from the fact that the Company is the borrower under an English-law governed US$1.143 billion revolving credit facility (the "RCF") and is the issuer of three series of unsecured notes with total principal outstanding of US$2.306 billion (comprising two series of "English law Notes" and one series of "New York law Notes"). The amount of "Other Scheme Claims" is uncertain, but for the purposes of its analysis of the outcomes of the Scheme, Moelis assumed that the other Scheme Creditors' claims might amount to US$100 million, US$200 million or US$800 million. The latter two figures are described as "unlikely" and "highly unlikely" respectively.

The English law Notes

23. The Company is the issuer of US$379 million in principal amount of 3.625% senior unsecured notes due in 2018 (the "2018 Notes") constituted by a trust deed dated 17 August 2011, between the Company and DB Trustees (Hong Kong) Limited as trustee. All of the principal under the 2018 Notes is outstanding.

24. The Company is also the issuer of US$750 million in aggregate principal amount of 8.75% senior unsecured notes due in 2022 (the "2022 Notes") constituted by a trust deed dated 9 March 2017, between the Company and HSBC as trustee. All of the principal under the 2022 Notes is outstanding.

25. The 2018 and 2022 Notes are governed by English law and have English jurisdiction clauses. The 2018 Notes became due and payable on 20 March 2018, but remain unpaid. Interest payment defaults occurred on 8 April 2018 and 9 October 2018 in respect of the 2022 Notes.

The New York law Notes

26. The Company is the issuer of approximately US$1.177 billion in aggregate principal amount of 6.75% unsecured senior notes due in 2020 (the "2020 Notes") constituted by an indenture dated 29 October 2009, between the Company and Deutsche Bank Trust Company Americas as trustee. The 2020 Notes are governed by New York law. All of the principal under the 2022 Notes is outstanding. An interest payment default occurred on 29 August 2018 in respect of the 2020 Notes and the Company is now in default on the 2020 Notes.

The RCF

27. The Company has approximately US$1.143 billion in principal outstanding under the RCF, pursuant to a facility agreement dated 18 May 2015 between the Company and the "RCF Creditors", with Madison Pacific Trust Limited as the current agent. The RCF bears interest at the aggregate of 1.95% plus LIBOR and a utilisation fee of 0.30% per annum. The RCF is governed by English law.

28. On 29 March 2018 the Company missed interest payments due under the RCF. In addition, the amounts outstanding under the RCF were due to be repaid, but were not repaid, at the end of May 2018.

The Other Scheme Claims

29. The Other Scheme Claims include (i) various contingent and unliquidated claims which have been intimated or made, some of which are the subject of legal proceedings; (ii) contingent claims arising out of certain parent company guarantees and indemnities granted by the Company in relation to the commercial activities undertaken by the Group; and (iii) claims of unknown creditors which have not yet been identified. In summary, the potential Other Scheme Claims in category (i) above are as follows.

30. <u>Ricardo Leiman</u> Mr. Leiman is an ex-senior executive of the Company who has brought a claim in Singapore for about US$35 million relating to his previous employment by the Group, claiming that the Company and his employing entity breached their contracts, conspired against him and committed various other economic torts in relation to the forfeiture of certain share options, dividend payments and bonus payments. On 26 July 2018, the High Court of Singapore rejected Mr. Leiman's claim. Mr. Leiman has filed an appeal, but this has not been served.

31. <u>PT Atlas</u> PT Atlas Resources Tbk ("Atlas") has threatened to bring a claim in Indonesia for around US$260 million against 17 defendants including the Company and one of its directors. The claim is said to relate to coal mining interests in Indonesia. Atlas threatened its claim in response to arbitration proceedings commenced by a Noble Group subsidiary in Singapore, but after seven and a half months the Company has yet to be served with any proceedings.

32. Vitol The Vitol group is a global energy and commodities trading company with revenue of US$152 billion in 2016. It is a potential creditor of the Company under an indemnity given to it when it purchased Noble Americas Corp from the Group in January 2018. Vitol has not made any claims under the indemnity, but were it to do so it is expected that they would be satisfied from a sum of about US$105 million which is being held in an escrow account for the purpose.

33. COFCO The Company has been engaged in a confidential LCIA arbitration with COFCO Agri Limited and other associated companies (together, "COFCO") in connection with the Group's disposal of its stake in Noble Agri Limited in 2014. On 11 October 2018 the Company signed a settlement agreement of the arbitration proceedings with COFCO. Under the settlement agreement, COFCO Agri Limited shall have a claim against the Company for US$102,671,645.18 plus applicable interest which will be dealt with in accordance with the terms of the Scheme, and COFCO has undertaken to support the Restructuring.

34. Iceberg The Company has brought proceedings in Hong Kong against Arnaud Vagner and Enlighten Ace Limited, two parties associated with a blog site called “Iceberg Research” (together, “Iceberg”), in respect of which it has a potential adverse costs exposure of HK$3 million, which is just under US$400,000 and in respect of which Iceberg is seeking an order that the Company provide security for costs. On 12 October 2018 Hong Kong solicitors for Iceberg wrote to the Company indicating that Iceberg did not consider itself bound by the Scheme and did not intend to submit to the jurisdiction in England, from which it can be assumed that Iceberg will not seek to be involved in the Scheme process.

35. Yancoal A subsidiary of the Company (“NRIPL”) has commenced proceedings in the Supreme Court of New South Wales against two subsidiaries of Yancoal Australia Ltd ("Yancoal") seeking damages estimated at US$127 million for breaches of contractual obligations under a marketing services agreement entered into in 2011. Yancoal has served a defence and a cross claim to which the Company is a party. I am told that the cross-claim is unquantified and would serve only to reduce NRIPL's claim for damages against Yancoal. There is also a separate (but related) arbitration claim from Yancoal against NRIPL for US$40 million, but the Company is not a party to that claim and it will not on any view be affected by the Scheme.

36. Shortly before the hearing, Australian solicitors for Yancoal (Ashurst LLP) wrote to the Company’s solicitors raising objections to the Scheme which included the following,

> “… it appears that our clients’ claims, if admitted, would only entitle our clients to risk participate in the New Money Debt by entering into a risk participation agreement with an Intermediary Bank or participate in New Money Debt by subscribing for Cash SPV Bonds. In the event our clients do not elect to risk participate, our clients will have no entitlement to Priority Debt. Noble’s decision to seek to effectively force trade creditors to participate in new money raising for New Noble along with the financial creditors in order to achieve the same return is a matter of great concern to our clients, including as to how the classes have been formulated by Noble for the purposes of convening

> meetings to consider the proposed Schemes. As must be apparent to you, finance creditors are used to providing financial accommodation to third party borrowers as part of their core business. To penalise trade creditors who do not elect to risk participate (and for whom financial accommodation is not part of their core business) is manifestly unfair. It is impossible to see the trade creditors and finance creditors being able to consult at a scheme meeting with a view to their common interests given the unequal treatment.
>
> Our clients are concerned that Noble has formulated the Classes so that the interests of Other Scheme Creditors will be swamped by the votes of the financial creditors with different interests. This risks the Schemes being approved to the detriment of the interests of Other Scheme Creditors. For these reasons, our clients do not consider that it is appropriate for Other Scheme Creditors to … vote in the same class meeting as Existing Notes Scheme Creditors and the Existing RCF Scheme Creditors…."

Ashurst also indicated an intention to appear at the convening hearing by counsel.

37. The Company's solicitors responded pointing out that the Scheme was limited to the liabilities of the Company and that NRIPL was a solvent subsidiary of the Company which would be transferred to become one of the key operating entities of the New Noble group and would have the same ability to meet its obligations as before. In the result, Yancoal did not appear at the hearing before me.

38. Importantly for part of the class analysis to which I refer below, it is readily apparent that the claims of the holders of the English law Notes and the New York law Notes and the RCF Creditors are, by their nature, very unlikely to be disputed. The same may also be true of the Other Scheme Claims arising from parent guarantees. However, both the existence and value of the remaining Other Scheme Claims (except for COFCO) are likely to be subject to considerable dispute.

Background to the Restructuring

39. As a result of an industry-wide decline in commodity prices between 2014 and 2016, the Group fell into financial difficulties, resulting in downgrades from credit rating agencies and consequential increased cost of financing. In 2015 the Company's problems were further exacerbated by the release on the blog site called "Iceberg Research" of three so-called "Iceberg Reports", which made allegations regarding the Company's financial reporting and conduct. Despite attempts to improve its finances, the Company reported a $129.3 million loss in the first quarter of 2017.

40. In July 2017 the Company initiated a strategic review with a view to obtaining restructuring advice, and throughout the remainder of 2017 it negotiated covenant waivers and extensions under the RCF and other creditor facilities.

41. The Restructuring proposal is essentially the result of extensive negotiations between the Company and a group of its senior creditors which comprises certain Noteholders and RCF Creditors who are advised by Akin Gump LLP and Houlihan Lokey EMEA LLP (the "Ad Hoc Group"). The composition of that Ad Hoc Group has changed over time, but it now comprises 36 funds established and/or represented by 10 financial institutions who are primarily international hedge funds based in the UK, US, Hong Kong and Singapore. In aggregate, the Ad Hoc Group now hold about US$1.893 billion amounting to about 54.6% of the total claims in respect of the Notes and the RCF.

42. The negotiations with certain of the RCF Creditors began in mid-2017 and with a group of Noteholders in about October 2017. The Ad Hoc Group was formed from these two groups in about December 2017 and thereafter it has led the restructuring negotiations with the Company and the other interested parties such as Deutsche Bank, ING, the Company's shareholders and management.

43. An "in principle" agreement between the Company and the Ad Hoc Group of a restructuring proposal was reached and announced on 29 January 2018. On 19 February 2018 the Company announced that it had reached a further "in principle" agreement with the Ad Hoc Group and ING for the provision of a three-year committed $700 million trade finance facility to be made available to New Noble in the event that the restructuring was successfully implemented.

44. On 14 March 2018 the Company announced that it had entered into a restructuring support agreement (the "RSA") with the members of the Ad Hoc Group and Deutsche Bank in its capacity as an existing senior creditor and provider of future finance. The RSA set out the terms of the then proposed restructuring and provided for a moratorium on all enforcement actions by acceding creditors against the Company, who agreed to support the Restructuring and the Scheme. The RSA also envisaged an alternative restructuring, which would have involved putting the Company into administration in England in circumstances where shareholder consent to the proposed restructuring could not be obtained. A copy of the RSA was placed on the Company's website.

45. Concurrently with the publication of the RSA, the Company publicly announced that it was in the process of moving its COMI from Hong Kong to the UK, subject to appropriate tax and other due diligence. This proposed COMI shift was clearly aimed at persuading the English Court that it would be appropriate to exercise its jurisdiction to sanction a scheme of arrangement in respect of the Company or to make an administration order if the alternative restructuring proposal was to be pursued.

46. The publication of the RSA led almost immediately to litigation in Singapore instituted against the Company and certain of its directors and certain members of the Ad Hoc Group or their affiliates by an entity called Goldilocks Investment Company Limited ("Goldilocks"), which claimed to hold just over 8% of the Company's shares. Goldilocks contended, among other things, that some of the existing directors of the Company had acted in breach of duty to the Company and were seeking unfairly to enrich themselves via the proposed restructuring. It sought an injunction from the Singapore court to restrain the restructuring from proceeding. The Company then brought a claim in Bermuda against Goldilocks and Goldilocks sought an anti-suit injunction against the Company in Singapore.

47. The claims between Goldilocks, the Company and the various other parties to litigation were compromised in June 2018 pursuant to a settlement agreement that included the Ad Hoc Group. The settlement included various provisions under which the Group agreed to enter into a strategic partnership for the Middle East with an affiliate of the parent entity of Goldilocks' fund manager. It also resulted in a material change to the proposed split of the equity in New Noble under which the existing shareholders of the Company would receive an increased 20% of the equity (up from 15%) and the existing management a reduced 10% (down from 15%).

48. Because the Restructuring envisaged a transfer of substantially all of the Company's assets to New Noble it required a resolution of the Company's existing shareholders approving such transfer. In addition, because the Senior Creditor SPV will hold 70% of the shares in New Noble, which will be a listed company, the Senior Creditor SPV would be required by the Singapore Code on Take-Overs and Mergers to make a mandatory general offer for New Noble, unless a waiver was obtained of that obligation from the SIC. On 2 July 2018 the SIC granted a conditional waiver of the requirement that the Senior Creditor SPV make such a mandatory general offer. One of the conditions was that the majority of independent shareholders of the Company should agree to waive their rights to receive a mandatory offer by passing a so-called "whitewash waiver" resolution at a special general meeting of the Company. A second condition imposed by the SIC was that the Restructuring (including the issue of shares in New Noble) should be completed within three months of the passing of that whitewash waiver resolution.

49. Accordingly, on 10 August 2018 the Company published a circular to shareholders calling a special general meeting of its shareholders (the "SGM") for the purposes of passing a resolution approving the Restructuring and the whitewash waiver resolution. The SGM was held on 27 August 2018. Votes were cast in respect of just over half of the total number of issued shares, and each of the resolutions in favour of the Restructuring and the whitewash waiver was approved by a majority of about 99.6% (the "Shareholder Resolutions"). The condition imposed by the SIC means that, unless the three-month period is extended, the Restructuring must be completed by 27 November 2018.

50. Following the SGM, on 30 August 2018 the Company issued an announcement that it was to proceed to promulgate parallel schemes in England and Bermuda, and highlighted various features of the proposed schemes. These included the fact that the schemes would apply to Other Scheme Creditors (who were invited to make themselves known to the Company) and that there was an intention to impose a Bar Date for submission of claims. The announcement also referred to the opportunity for all Scheme Creditors (including the Other Scheme Creditors) to receive Priority Debt by electing by a date shortly before the date of the Scheme meetings to risk participate in the New Money Debt to be made available to the New Trading Co.

The Practice Statement letter

51. Arrangements were made with the Companies Court on 14 September 2018 to reserve a court date on Friday 12 October 2018 for the convening hearing. A detailed letter written in accordance with the Practice Statement (Companies: Schemes of Arrangement) [2002] 1 WLR 1345 (the "Practice Statement") was then issued by the Company on 21 September 2018 (the "PSL"). The PSL was sent to all known Scheme

Creditors by the Company via the announcement systems of Euroclear, Clearstream, DTC and SGX, and via the Existing RCF Agents. Delivery was also attempted to any potential Other Scheme Creditors known to the Company.

52. The PSL ran to some 43 pages including a lengthy annex of definitions. It summarised the terms of the Restructuring and the Schemes and highlighted the opportunity for Scheme Creditors to elect to risk participate in the New Money Debt, indicating that full details of the requirements would be set out in the Explanatory Statement. The PSL also set out the Company's arguments on the questions of class composition and the jurisdiction of the English Court to sanction the Scheme.

53. The PSL also disclosed that Scheme Creditors accounting for approximately 87% by value of the claims under the Notes and the RCF had entered into or acceded to the RSA and had agreed to support the Restructuring.

The Scheme timetable

54. The Part 8 Claim Form for an order convening the Scheme Meetings was issued on 8 October 2018 and the convening hearing was fixed for Friday 12 October 2018. The Company also booked a hearing in Bermuda for Monday 15 October 2018, and indicated that it intended to make the Explanatory Statement available electronically to Scheme Creditors on Tuesday 16 October 2018.

55. The suggested date for the Scheme Meetings was Thursday 8 November 2018, with the "Voting Instruction Deadline" for submission of claims for voting purposes and for the election to receive the Priority Debt under the Scheme being 5 pm on Monday 5 November 2018. Scheme Creditors would however, be able to obtain a few more days if they attended at the Scheme Meeting in person to vote and make their election.

56. The Company has also booked a hearing to sanction the Scheme in England on Tuesday 13 November 2018, and a hearing to sanction the Bermuda scheme the following day, Wednesday 14 November 2018. Its intention is to make the Scheme effective that same day.

57. The date for the determination and notification by the Scheme Administrators of their determination of claims submitted prior to the Voting Instruction Deadline was set for Friday 16 November 2018, with the calculation of the apportionment of the Scheme consideration taking place over the weekend and by Monday 19 November 2018. According to the Company's timetable, the Restructuring Effective Date would then occur on Monday 26 November 2018, one day before the expiry of the SIC's three-month limit based upon the Shareholder Resolutions passed at the SGM on 27 August 2018.

Notice of the convening hearing

58. The dispatch of the PSL to Scheme Creditors on 21 September 2018 followed a number of earlier announcements of the progress of the Restructuring process more generally. In Indah Kiat International Finance Co BV [2016] BCC 418 ("Indah Kiat") at [28]-[30] I observed that the purposes of the Practice Statement would only be served if the notice to creditors of the convening meeting was adequate, and that what was adequate would depend on all the circumstances, including the complexity of the scheme and any

consultation that had taken place with creditors as a whole before the scheme was launched.

59. In this case, I am satisfied that the notice of the convening hearing given in the PSL was adequate. Although the Scheme and associated Restructuring is of the utmost complexity, the Company has made regular announcements throughout 2018 indicating the progress of the Restructuring in general terms, and though lengthy, the PSL itself identifies the issues that the Company intended to raise at the convening hearing and is as clear a document as the complexity of the matter permits.

The approach to a convening hearing

60. Section 896(1) CA 2006 provides:

> "The court may, on an application under this section, order a meeting of the creditors or class of creditors, or of the members of the company or class of members (as the case may be), to be summoned in such manner as the court directs."

61. It has often been stressed that the function of the court at the convening stage is "emphatically not" to consider the merits or fairness of the proposed scheme: see e.g. Re Telewest Communications plc [2004] BCC 342 at [14] (David Richards J). Those issues will arise for consideration at the future sanction hearing if the scheme is approved by the statutory majority of creditors.

62. The primary function of the convening hearing is to consider the question of the proper formulation of classes for the scheme meeting(s) that the court is being asked to order be convened. That is apparent from the Practice Statement. It is not, however, limited to that issue: other jurisdictional or quasi-jurisdictional issues may be raised. The reasons for this practice were explained by David Richards J in Re T&N Ltd (No. 4) [2007] Bus LR 1411 ("T&N") at [19]-[20],

> "19. [The purpose of the Practice Statement] is to avoid the waste of costs and court time which results if it is not until the sanction hearing that it is determined that the classes were wrongly constituted. If the classes have been wrongly constituted, the court has no jurisdiction to sanction the scheme. The purpose underlying this revised practice shows that if there are known to be other issues which would go to the jurisdiction of the court to sanction the scheme, they too are best raised at the stage of the application to convene the meetings: see In re Savoy Hotel Ltd [1981] Ch 351 and In re MyTravel Group plc [2005] 2 BCLC 123. The same is also true of issues which, although not strictly going to jurisdiction, are such that they would unquestionably lead the court to refuse to sanction the scheme. Examples in this category of issue on the present application are the questions arising under the Employers' Liability (Compulsory Insurance) Act 1969.
>
> 20. On a preliminary application, the administrators drew the court's attention to the existence of a number of essentially

> jurisdictional issues which arose in relation to the proposed schemes. For the reasons given above, I considered it right that those issues should be dealt with at this stage. Further issues were subsequently raised and argued. Just as the Practice Statement makes clear that determination of a creditor issue at this stage cannot altogether preclude the issue being raised at the sanction hearing, so the same applies to the other jurisdictional issues which have been raised."

63. A similar approach was taken by Hildyard J in his judgment at the convening stage of the first APCOA scheme in Re APCOA Parking (UK) Ltd [2014] Bus LR 1358 ("APCOA No.1") at [12]-[16],

> "12. … my role today is a limited one. This is not the occasion for determining the fairness or otherwise of the scheme. The only purposes of today's hearing are first, to determine whether the classes selected for consideration of the scheme are appropriate and second, whether there are presently apparent jurisdictional impediments to the scheme such as to demonstrate even at this preliminary stage that it is unlikely that the scheme could properly and effectively be sanctioned by the court at the end of the day, whatever might be the decision in the class meetings which are convened.
>
> 13 Jurisdiction in that context, as usual, covers two rather different concepts. The first is whether the court has jurisdiction to exercise power. The second is whether there is some obvious and inescapable reason why it should not exercise its discretion pursuant to that power. An example of the latter would be where its exercise of power in sanctioning a scheme, although effective domestically, would not be recognised and enforced in other jurisdictions in which it is necessary that the scheme should have effect.
>
> ….
>
> 15. … [at the convening hearing] the court offers the company and its creditors an opportunity to ventilate any concerns as regards the proposed classes and for the court itself to raise concerns in that regard or in regard to its jurisdiction.
>
> 16. In doing so the court does not and could not bind itself as regards the sanctions hearing, even on issues relating to class constitution or its jurisdiction. Nothing I say today can resolve ultimately the question of whether the classes and class meetings are properly constituted and whether the court has jurisdiction. The function today is [to consider] whether there are factors which make it plain that the proposed class meetings are not appropriate and/or that it has no jurisdiction (in both the narrow and broader sense)."

64. T&N concerned the questions of whether a scheme which included a compromise of claims by employees against the scheme company's insurers fell within the scope of section 425 of the Companies Act 1985, together with questions of whether the scheme infringed the Employers' Liability (Compulsory Insurance) Act 1969. Those were purely legal questions which were not dependent upon any factual evidence or discretionary considerations and permitted a "yes/no" answer. It therefore made good sense for the Court to hear extended argument on the points at the convening stage and to give a reasoned decision on them.

65. In relation to schemes involving overseas companies, the issues that arise in relation to jurisdiction are often less clear cut. Such international jurisdictional issues stem from the provision in section 895 of the 2006 Act that Part 26 applies to a compromise or arrangement proposed between a "company" and its creditors, and that according to section 895(2)(b) a "company" means a company "liable to be wound up under the Insolvency Act 1986".

66. In Re Drax Holdings [2004] 1 WLR 1049 (Ch) ("Drax"), Lawrence Collins J concluded that before a foreign company could be wound up in England, three core requirements had to be fulfilled: (1) there must be a sufficient connection with England 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; and (3) one or more persons interested in the distribution of assets of the company must be persons over whom the court can exercise jurisdiction. He also noted that in Re Paramount Airways Ltd [1993] Ch 223, Sir Donald Nicholls V-C had expressed the view (obiter) that these requirements were not preconditions for the existence of the statutory jurisdiction of the court, but were principles to be observed in considering the discretion to exercise the jurisdiction.

67. Lawrence Collins J then continued as follows, (I substitute references to the 2006 Act for the references in his judgment to the equivalent sections of the Companies Act 1985),

> "24. In most cases the distinction will not matter. The English court will not wind up a foreign company where it has no legitimate interest to do so, for that would be to exercise an exorbitant jurisdiction contrary to international comity, and for that purpose it does not matter whether the preconditions are couched in terms of the existence of jurisdiction or the exercise of jurisdiction.
>
> 25. But in the present case it may make a difference, because the question is one of the jurisdiction to approve a scheme of arrangement, and the second and third conditions may not be relevant because they were formulated in the context of winding up. If they go to the *jurisdiction* to order a winding up, the words "any company liable to be wound up" in [section 895(2)(b) of the 2006 Act] may require those conditions to be fulfilled even in the case of schemes of arrangement. If they go to the *discretion* to wind up, then they do not have to be fulfilled in the case of a scheme of arrangement, although the first condition would plainly be relevant in any event.

> 26. The question therefore is whether (as was assumed in the present matter by the companies) the combined effect of [section 895(2)(b) of the 2006 Act] and of section 221(1) of the Insolvency Act 1986, and the cases on the winding up of foreign companies, is that the three conditions must be satisfied before the court can exercise its powers under [Part 26 of the 2006 Act]. In my judgment the three conditions go to the discretion of the court, and not to the existence of its jurisdiction. If that it is right, then the conditions do not have to be satisfied for the purposes of [section 895(2)(b) of the 2006 Act], because they do not go to the question whether a company is "liable" to be wound up under the Insolvency Act 1986. So also it is not necessary for the purposes of [section 895(2)(b) of the 2006 Act] that the grounds for winding up in section 221(5) [of the Insolvency Act 1986] exist."

68. Lawrence Collins J's decision thus made it quite clear that the only "hard" jurisdictional question is a very simple one, namely whether the company is liable to be wound up under the Insolvency Act. In Re Rodenstock GmbH [2011] Bus LR 1245 ("Rodenstock") at [56], Briggs J confirmed that this test is intended simply to identify the types of companies and associations to which the scheme jurisdiction applies. Briggs J then went on to consider the questions (i) whether there was a "sufficient connection" with England and (ii) whether the scheme would be "effective" in practice as part of his exercise of discretion whether or not to sanction the scheme.

69. The view that the questions of "sufficient connection" and "effectiveness" are relevant to the discretionary exercise of the Court's jurisdiction rather than its existence, is also consistent with the observations of David Richards J in Re Magyar Telecom BV [2014] BCC 448 ("Magyar") at [21]-[23],

> "21. I am inclined to the view that the requirement to show a connection with England and the need to show that the scheme, if approved, will have a substantial effect are not wholly separate questions but, if not aspects of the same question, at least closely related. In applying the requirement for a sufficient connection with England to the exercise of the court's jurisdiction to sanction a scheme, Lawrence Collins J. in Re Drax Holdings Ltd (above) was applying the requirement that, before the court would make a winding-up order, there must be a sufficient connection with England. This may, but does not necessarily have to, consist of assets within the jurisdiction. The reason for such connection in the context of winding up is not the product of abstract theory but the need for the winding-up order to have a practical effect: see, for example, Re Compania Merabello San Nicholas SA [1973] Ch 75 at 86G–H per Megarry J. Although in theory a winding-up order against a foreign company has as a matter of English law worldwide effect, the courts have always recognised that in practice its effect will be confined to the United Kingdom. (I leave aside here the effect of the Insolvency Regulation and the UNCITRAL Model Law.) The presence of

> assets within the jurisdiction is but the most obvious example of a connection which will give practical effect to a winding-up order.
>
> 22. Likewise, the presence in England of substantial assets belonging to a company proposing a scheme with its creditors could in an appropriate case provide the requisite connection, because the scheme if sanctioned would have the practical effect of preventing execution by the relevant creditors against those assets, save in accordance with the terms of the scheme. The presence of a sufficient number of creditors in England subject to the personal jurisdiction of the court might also supply the necessary connection, as those creditors would be bound to act in accordance with the scheme, both within and outside the jurisdiction. The importance of the connection provided in cases where the rights of creditors are governed by English law lies in the effect which foreign courts may be expected to give to an alteration of those rights in accordance with English law."

70. The position which I have outlined is further complicated by the potential impact of the Recast EU Insolvency Regulation (2015/848) (the "Insolvency Regulation") and the Recast EU Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (1215/2012) (the "Judgments Regulation").

71. The general view is that the provisions in the Insolvency Regulation which limit the English court's jurisdiction to wind up companies to those which have their COMI in England do not apply to schemes of arrangement. They would not in any event apply in a case (such as the present) where the Company is not incorporated in, and does not on any view have its COMI in, another EU member state.

72. The question of the potential application of the Judgments Regulation is more difficult and has been discussed in a number of cases, commencing with Rodenstock, without any firm conclusion. I summarised the various arguments and issues that have arisen in this respect in Re Van Gansewinkel Groep [2015] Bus LR 1046 ("Van Gansewinkel") at [41]-[52] and in Re Global Garden Products Italy SPA [2017] BCC 637 ("Global Garden Products") at [23]-[25]. In summary, rather than decide the difficult question of whether the Judgments Regulation applies, the Court has usually been content to adopt the pragmatic approach of asking whether, on the assumption that the Judgments Regulation applies, the Court would in any event have jurisdiction to sanction the scheme.

73. Against this complicated background, the tendency has developed for applicant companies in international cases to invite the Court at the convening hearing to consider a wide range of issues relating to international jurisdiction. So, for example, in Re Vietnam Shipbuilding Industry Group [2014] 1 BCLC 400 at [6]-[16] David Richards J was invited to give, and did give a judgment at the convening hearing to the effect that the English court would have jurisdiction to sanction the scheme between a Vietnamese company and its finance creditors under an English law governed facility, and that there was a sufficient connection between the scheme and England so that there was a "reasonable prospect" that the court would (all other tests being met) exercise its discretion to sanction the scheme. A similar approach was taken by Hildyard J in

relation to a German-based group of companies in APCOA (No.1) when he gave "preliminary indications" as to the questions of international jurisdiction which arose.

74. I accept that the practice outlined by David Richards J in T&N and by Hildyard J in APCOA (No.1) is a valuable and flexible means by which scheme companies can raise important jurisdictional and quasi-jurisdictional issues at the convening stage. However, I do not think that the intention behind the Practice Statement was that the convening hearing should become the primary focus of the scheme process rather than the sanction hearing, and I do not think that it will always be appropriate for the Court to agree to decide such issues at the convening stage. That is especially so where they involve consideration of factual evidence and/or the exercise of discretion as to whether it would be appropriate for the Court to exercise its jurisdiction in international cases. The more appropriate time for such issues to be determined will often be at sanction.

75. Attempting to determine factual or discretionary issues at the convening stage can also lead to procedural pitfalls if, for example, the factual situation changes prior to the sanction hearing, or if different judges conduct the two hearings. The problems that might arise in the latter situation are illustrated by the Van Gansewinkel in which I was told at the sanction hearing that the jurisdictional questions had been resolved by the Judge at the convening stage, but it turned out that no reasoned judgment had been given and I was thus unable to satisfy myself of the position: see paragraphs [32]-[34]. In passing I should make it clear that my comments at paragraphs [55]-[56] of that case as to the correct procedure to be followed if the court was asked to address jurisdictional questions at the convening stage, were not intended as an indication that it would necessarily be appropriate for the court to agree to do so in all or even a significant proportion of cases.

76. What I do think that a scheme company can legitimately ask at the convening stage is for the Court to indicate whether it is obvious that it has no jurisdiction to sanction the scheme, or whether there are other factors which would unquestionably lead the Court to refuse to exercise its discretion to sanction the scheme. This is often described as the question of whether there is a "roadblock" in the way of the Company. That was, I think, the real thrust of the points being made by David Richards J in T&N and by Hildyard J in APCOA (No.1).

International jurisdiction

77. In the instant case, Mr. Trower QC sought a decision from me on three questions relating to international jurisdiction: (i) whether the Company has a sufficient connection to England; (ii) whether the Scheme will achieve a substantial effect; and (iii) whether the English Court's jurisdiction to sanction the Scheme is limited by the Insolvency Regulation or the Judgments Regulation.

78. It seems to me that the first and second of these questions, which Briggs J treated as going to the exercise of the Court's discretion in Rodenstock, and which David Richards J thought were connected in Magyar, do not allow a simple yes/no answer. Instead they involve an evaluation of a number of factors, some of which may not be reliably known or be capable of being assessed until the sanction hearing. It will, for example, only be at that stage when it is known how many overseas creditors with what value of claims participated in the Scheme process so as arguably to submit to the jurisdiction of the English court, and how many overseas creditors might, as Iceberg

has in the instant case, protest the jurisdiction and indicate that they regard themselves as not being bound by the Scheme in respect of claims which they contend are governed by a foreign law.

79. Accordingly, for reasons that I have just explained I do not think that now would be the appropriate time at which to purport to decide questions of this type. When I put that point to Mr. Trower at the hearing, he was content to accept that I should not decide the issues, but he did ask me to indicate, in accordance with the practice which I have outlined, whether I consider there to be any "roadblock" in the way of the Company in these respects.

80. In that regard I have had the opportunity to consider the evidence filed by the Company to support its assertion that it has shifted its COMI from Hong Kong to London, together with other factors which it contends amount to a sufficient connection with England. I have also seen a report prepared by The Hon. James M. Peck, a distinguished former US Bankruptcy Judge for the Southern District of New York, expressing the opinion that if the Scheme was sanctioned by this Court, a US Bankruptcy Court would be likely to recognise the Scheme as a foreign main proceeding under Chapter 15 of the US Bankruptcy Code. Suffice to say for present purposes that I see no features of that evidence that would obviously lead the Court at the sanction hearing to conclude that it lacked jurisdiction to sanction the Scheme, or which would unquestionably lead it to refuse to exercise its discretion to sanction the Scheme.

81. The third issue of whether the Insolvency Regulation or the Judgments Regulation impose any limitation or restriction upon this Court's jurisdiction to sanction the Scheme is a yes/no question that could appropriately be determined at the convening stage. It is, however, a difficult legal question which I consider should await a final decision in a case in which it makes a difference and in which, ideally, there can be contrary argument addressed. For present purposes I can, however, simply say that for the same reasons that I explained in Global Garden Products at [25], if it were necessary to establish jurisdiction under the Judgments Regulation, then I think that the evidence that around 20% of the Scheme Creditors by value are domiciled in the UK provides a reasonable basis for concluding that article 8 of the Judgments Regulation would be engaged.

Class composition

Introduction

82. The Practice Statement provides,

> "It is the responsibility of the applicant to determine whether more than one meeting of creditors is required by a scheme and if so to ensure that those meetings are properly constituted by a class of creditor so that each meeting consists of creditors whose rights against the company are not so dissimilar as to make it impossible for them to consult together with a view to their common interest."

That formulation reflects the well-known dicta of Bowen LJ in Sovereign Life Assurance Co v Dodd [1892] 2 QB 573 at 583 ("Sovereign Life").

83. In addition to endorsing the Sovereign Life test, an alternative approach to the class question was suggested by Chadwick LJ in Re Hawk Insurance Co Ltd [2001] 2 BCLC 480 (CA) ("Hawk") at [23]: are the rights of those who are to be affected by the proposed scheme such that the scheme can be seen as a single arrangement with all creditors, or two or more linked arrangements? In Re UDL Holding Ltd [2002] 1 HKC 172 (HKCFA) ("UDL") at page 179B, Lord Millett NPJ did not dissent from that approach, but suggested that it provided a rationale for summoning one or more meetings rather than a test by which the question could be answered.

84. Whichever approach is adopted, it is clear from authorities such as Hawk and UDL that the focus when defining the classes at the convening stage is on a comparison of the existing *rights* of the creditors which are to be altered or extinguished by the scheme, and the new *rights* to which creditors will become entitled under the scheme. The authorities have made it clear that although the court will have regard to the private interests and motivations of creditors when considering whether to give effect to the majority vote at the sanction stage, the individual interests of creditors which are not shared by other members of the class are not to be taken into account at the convening stage.

85. The rationale for this concentration on rights rather than interests at the convening stage was explained by Lord Millett in UDL at pages 183H-184D,

> "Why, it may be asked, should persons with divergent interests be allowed to vote as members of the same class for the purpose of ascertaining whether the Scheme has been approved by the necessary 75% majority, if their votes are only to be discounted or disregarded by the Court when considering whether to sanction it? There seem to be three reasons. The first is the impracticality in many cases of constituting classes based on similarity of interest as distinct from similarity of rights. Re Alabama, New Orleans, Texas and Pacific Junction Railway Co. is an example of this; Re BTR plc is another. A second is that the risk of empowering the majority to oppress the minority to which Bowen LJ referred in Sovereign Life Assurance Company v. Dodd is not the only danger. It must be balanced against the opposite risk of enabling a small minority to thwart the wishes of the majority. Fragmenting creditors into different classes gives each class the power to veto the Scheme and would deprive a beneficent procedure of much of its value. The former danger is averted by requiring those whose rights are so dissimilar that they cannot consult together with a view to their common interest to have their own separate meetings; the latter by requiring those whose rights are sufficiently similar that they can properly consult together to do so. The third reason is that this is mandated by the rationale which underlies the calling of separate meetings. A company can be regarded as entering into separate but linked arrangements with groups whose members have different rights or who are to receive different treatment. It cannot sensibly be regarded as entering into a separate

> arrangement with every person or group of persons with his or their own private motives or extraneous interests to consider."

86. Consistently with Lord Millett's comments regarding the need to balance oppression of the minority with the dangers of giving a small minority an unjustifiable right of veto, the cases have also indicated that not every difference between the rights or treatment of different group of creditors will necessarily lead to a need for separate classes. Whether such differences do so will depend on a judgment by the court as to whether the differences make it impossible for the groups to consult together with a view to their common interest.

87. Different judges have sought to explain how to make this judgment in various ways, but the modern trend has certainly been to resist any tendency to increase the number of classes. So, for example, in Re Anglo American Insurance Limited [2001] 1 BCLC 755 at 764, Neuberger J observed in the context of an insurance company scheme that practical considerations were not irrelevant, and that the court should not get "too picky" about potential different classes, or "one could end up with virtually as many classes as there are members of a particular group". In Equitable Life Assurance Society [2002] BCC 319, policyholders with a wide variety of mis-selling claims were placed into a single class. And in Telewest Communications plc (No.1) [2004] BCC 342 at [40] David Richards J held that it was appropriate to place into the same class two groups of sterling and dollar bondholders who were treated differently by the use of a particular currency conversion date under the scheme than if there had been a winding-up, remarking that "there is a great deal more which unites the bondholders than divides them".

88. In making that judgment, as those cases make clear, it is also important to bear in mind that the safeguard against minority oppression is that the court is not bound by the decision of the class meeting, but retains a discretion to refuse to sanction the scheme: see e.g. Hawk at [33] (Chadwick LJ) and [59] (Pill LJ).

89. In the context of restructuring it has been established that where a scheme is proposed as an alternative to the winding up of an insolvent company, the relevant existing rights are those which creditors would have in a winding-up: see Hawk at [42]-[43]. In particular, as in Hawk, that means that in relation to any proposals under a scheme for determination and adjudication of creditor claims against an insolvent company, the correct comparison is with the rights that creditors would have under the statutory process for proof of debts in a liquidation.

90. It does not follow, however, that simply because a scheme company is insolvent and seeking to restructure to avoid liquidation, that all creditors should simply be placed into a single class on the basis of an argument that the scheme proposed is the only alternative to the financial Armageddon of a liquidation, and it offers all creditors a return which will at least exceed the dividend that they would be likely to receive in a winding-up. That would be to confuse the class question, which focusses on how the scheme seeks to divide up a limited pie between creditor groups, with the test applied at the sanction stage, when it is axiomatic that to have any prospect of being sanctioned at all, a scheme must offer all creditors a prospect of receiving a larger or faster return on their debts than they would receive in a winding-up: see Re T&N Limited [2005] 2 BCLC 488 at [82] (David Richards J). As Hildyard J pithily remarked in the second

APCOA case, Re APCOA Parking Holdings GmbH (No.2) [2015] Bus LR 374 ("APCOA (No.2)") at [117],

> "the risk of imminent insolvency is not to be used as a solvent for all class differences."

91. Against that background I turn to consider the class issues in this case.

Deutsche Bank

92. The Company has proposed that Deutsche Bank should be in a separate class of its own for voting purposes. The reason is the different treatment that Deutsche Bank receives under the Scheme from other Scheme Creditors. Under the Scheme, Deutsche Bank's claims against the Company are divided into two: a "DB Excluded Claim" and a "DB Surplus Claim". The DB Excluded Claim is for US$58 million and will be released in return for the issue of "New Tranche A2 Asset Co Bonds" which will be issued to Deutsche Bank alone and which will rank senior in all respects to the rest of the Priority Debt. The DB Surplus Claim is for the balance of Deutsche Bank's claims in respect of the Notes and the RCF. This claim will be treated in the same manner as all other common Scheme Claims. In addition, Deutsche Bank is to receive a fee of US$3.75 million for committing US$75 million for New Money Debt: this is an amount equivalent to the Backstop Fees payable to some of the other Financial Creditors that I will consider below.

93. Given the favourable and different rights conferred upon Deutsche Bank under the Scheme in respect of part of its claim against the Company (the DB Excluded Claim), it is obvious that there are two linked arrangements under the Scheme: one between the Company and Deutsche Bank, and the other between the Company and the remainder of the Scheme Creditors. It would plainly not be possible for Deutsche Bank to have a discussion as to their common interest with the remaining Scheme Creditors about the proposal from the Company that they should receive the senior New Tranche A2 Asset Co Bonds for part of their claims, because no such senior notes will be issued to anyone apart from Deutsche Bank.

94. I thus agree that it is appropriate for Deutsche Bank to be placed into a separate class for voting purposes. It is possible to have a class meeting of one creditor where that is the sum total of members of the class (see Altitude Scaffolding Ltd [2007] 1 BCLC 199), albeit that it is more normal for the creditor concerned simply to undertake to the Court to be bound by the terms of the scheme.

The Other Scheme Creditors

95. A more contentious class issue relates to whether the Other Scheme Creditors should form a separate class from the remaining Scheme Creditors and Deutsche Bank. The two issues, one of which was also picked up in the letter from Ashurst on behalf of Yancoal to which I have referred, relate to (i) the proposals for a Bar Date and for the determination and adjudication of creditor claims under the Scheme and (ii) the requirement that a Scheme Creditor should "risk participate" in order to receive the Priority Debt.

96. The first issue arises because of the point made above that although, in principle, the Bar Date, determination and adjudication procedure applies to all Scheme Claims, the practical reality is that the claims of the finance creditors holding Notes and RCF debt are unlikely to be the subject to any dispute, whereas the claims of at least some of the Other Scheme Creditors arise in contract and tort and are strongly contested by the Company.

97. The starting point of the analysis in this respect must be the point made by Chadwick LJ in Hawk that where a scheme is put forward as the alternative to a liquidation of an insolvent company, the existing rights which scheme creditors have are those which they would have in that liquidation. Given the evidence of the Company's insolvency, I accept Mr. Trower's submission that the correct comparison for this purpose is that of a winding up in which the claims of the Finance Creditors and the Other Scheme Creditors would all rank equally and be subject to the same procedure for proof of debts. The process under the Scheme for the making, determination and adjudication of Scheme Claims is plainly modelled upon that proof of debt process, albeit that it is manifestly designed to produce a far quicker and cheaper result.

98. Although Mr. Trower acknowledged that there would be greater uncertainty of outcome for some of the Other Scheme Creditors than the Finance Creditors from being required to undergo the process in the Scheme to establish their Scheme Claims, I accept his submission that this is a potential difference that does not constitute a difference of existing rights against the Company or rights conferred under the Scheme. As he observed, in a winding-up, all provable claims against the insolvent company are subject to the same proof of debt process no matter how they have arisen, i.e. whether they sound in contract, tort or equity, and whatever differences might exist in the potential outcome of that process.

99. This is not a case, for example, of a closure scheme for a solvent insurance company in run-off, where the alternative to the scheme is simply a continuation of the *status quo* under which policyholders with claims that had been incurred but not reported (IBNR) could simply exercise their rights to sit tight and wait to see whether or not any claims were actually made against them by third parties to which their policies would then respond, rather than being forced to submit to a process of a bar date and an actuarial estimation: see e.g. the different class meetings ordered by Warren J in respect of the IBNR creditors of the solvent and insolvent companies in Sovereign Marine & General Insurance Co Ltd [2006] BCC 774, and the very recent decision of Hildyard J in Re Stronghold Insurance Company Ltd [2018] EWHC 2909 (Ch).

100. Accordingly, in my judgment, this is not a case in which the two groups of Scheme Creditors have any relevantly different rights against the Company, and nor are any different rights being offered to them under the Scheme, in respect of the making, determination and adjudication of their Scheme Claims. Any differences in the way in which the process bears upon some of the Other Scheme Creditors as opposed to the Finance Creditors, and any prejudice that they might claim to suffer as a consequence, is a matter that can be raised as a matter of fairness at the sanction hearing.

101. The issue in respect of the New Money Debt was summarised in the Ashurst letter to which I have already referred. The essence of the point is that whereas the Finance Creditors are accustomed to providing financial accommodation as part of their core business and have already been in a relationship in which they have voluntarily

extended credit to the Company, that is not the case with some of the Other Scheme Creditors for whom financial accommodation is not part of their core business and whose claims are said to have arisen in an involuntary way because they have been wronged by some breach of contract or tort by the Company. The Ashurst letter implies that such Other Scheme Creditors will obviously not be in a position or would not wish to elect to "risk participate" by advancing new money, and hence that they are in reality being offered a separate deal by the Company which is limited to the Basic Creditor Scheme Consideration and does not include the structurally senior Priority Debt.

102. The response of Mr. Trower for the Company and Mr. Allison for the Ad Hoc Group was that all Scheme Creditors are offered a proportionate right to "risk participate" in the New Money Debt and as a consequence receive the more valuable Priority Debt, and hence there is no difference between them in rights to be conferred under the Scheme which would necessitate placing the Other Scheme Creditors into a separate class from the Finance Creditors. They both characterised any inability or reluctance on the part of some of the Other Scheme Creditors to advance new money to be the result of their individual situations and commercial interests rather than any difference in rights.

103. Before addressing these issues I should deal briefly with a related jurisdictional point which arose in the course of argument. Part 26 applies to a "compromise or arrangement" proposed between a company and its creditors. In APCOA (No.2) at paragraphs [133]-[167] Hildyard J inclined to the view that this jurisdiction does not enable new and additional financial obligations to be imposed on creditors such as requiring them to provide new guarantees and indemnities to third parties. Hildyard J declined, however, to express a concluded view, not least because when he indicated that that was his provisional view, the scheme was amended to make the provision of such new obligations an option for scheme creditors rather than a compulsion: see paragraph [162]. Whilst I would respectfully share Hildyard J's provisional view as to the scope of the Part 26 jurisdiction in this regard, in the case of the Scheme, no such jurisdictional objection arises because "risk participation" in return for New Money Debt is not mandatory, but an option.

104. On the class question, and not without some hesitation, I accept the submissions of Mr. Trower and Mr. Allison. The point is an important one because, as I have indicated, the Priority Debt is clearly the most attractive and valuable consideration on offer to Scheme Creditors under the Scheme. However, it is undoubtedly the case that the opportunity to elect to "risk participate" in return for the Priority Debt is a right that is offered to all Scheme Creditors under the terms of the Scheme. Further, although the Scheme includes provisions under which Scheme Creditors who wish to risk participate can do so in one of two methods – through an Intermediary Bank or the Cash SPV – those alternatives are included to make it easier for all Scheme Creditors to accept the offer if they choose to do so and do not amount to any material difference in the rights offered.

105. I also accept that the reasons why some of the Other Scheme Creditors might be very reluctant or even unable to elect to risk participate ultimately relates to their individual circumstances and commercial interests. As Lord Millett indicated in UDL, it would generally be impractical to attempt to constitute classes based upon an investigation of such matters at the convening stage. As Jonathan Parker J observed in BTR plc [1999]

2 BCLC 675 at 683a, "a journey down that road would lead to impracticability and unworkability".

106. Although I could venture a view, based upon what I am told about the way in which some of the claims of the Other Scheme Creditors have arisen, that they are likely to be very reluctant to risk participate as a means of acquiring the Priority Debt, I simply do not know enough about them, their resources or their attitude to financial risk to be able to conclude with any certainty at this stage that this is the case. Nor indeed do I know enough to conclude that every Financial Creditor will have the same appetite for risk and be willing to put up new money and elect to risk participate. That position may only become clearer at the date of the sanction hearing.

107. My hesitation arose because I was concerned that the manner in which the opportunity to elect to risk participate was offered to the Other Scheme Creditors under the Scheme as originally formulated meant that the offer was an illusion. My main concern lay in the fact that although the essential details of the Restructuring proposals had been discussed and known to the Ad Hoc Group and others who had signed the RSA for some time, and the terms of the New Money Debt and the risk participation agreements had plainly been negotiated among that group for some time, that would not be the case for all Scheme Creditors. In particular, the Other Scheme Creditors unconnected with the Company will be dependent upon receipt of the lengthy Explanatory Statement and its voluminous appendices to commence their due diligence and commercial consideration of whether to elect to risk participate. Coupled with the original timetable under which the risk participation election had to be made by, at the latest, the date of the Scheme Meeting on 8 November 2018, that fact meant that there was, in my view, an impossibly short time within which such Other Scheme Creditors could have been expected to assess the merits of risk participation and make the necessary arrangements to find the money to do so. An offer which does not give the offeree the essential information with sufficient time to consider it and make the necessary arrangements to participate is not a real offer.

108. When I made that concern known at the hearing, a revised proposal was formulated under which the election to risk participate can now be delayed for a further 6 days until 14 November 2018, and the risk participation deadline by which the arrangements need to be in place has been extended by 5 days to 20 November 2018. Whilst still very tight indeed for a matter of this complexity given that the Explanatory Statement was only due to be dispatched on 17 October 2018, the extension of the timetable meant that I cannot conclude at this stage that the timescale is still impossibly short.

109. In reaching that conclusion I do not, of course, rule out the possibility that a dissenting Scheme Creditor might wish to argue at the sanction hearing that the proposals under which the Priority Debt is given in return for risk participation in the New Money Debt is fundamentally unfair to those who do not wish (as they might see it) to throw good money after bad, or that even the revised timetable for the decision to be made on risk participation is unfairly short. They might also wish to argue that the timetable for consideration of the Explanatory Statement itself prior to the Scheme Meetings is unacceptably short. Those arguments must all be open at the sanction hearing, but as I see it they go to the Court's discretion whether or not to sanction the Scheme, rather than to the class question.

Fees and the Ad Hoc Group

110. It seems to be an increasingly common feature of modern restructuring practice for a group of larger or more active creditors of a company in financial difficulty, to band together into a so-called "ad hoc group" and to approach the debtor company to negotiate a restructuring deal. The ad hoc group may provide a beneficial focal point for negotiations with a wide variety of creditors, and the members of the group may provide or arrange interim financial support for the distressed company. However, the identity and criteria for membership of such a group is often opaque; the group may comprise hedge funds and others who have bought their debt as a speculative investment on the secondary market, and are simply seeking a financial return through the restructuring process; and the group may exercise considerable commercial leverage in that they are in a position to block an alternative rescue plan with which they do not agree.

111. It has also become commonplace in complex restructurings for the members of such ad hoc groups to demand and receive a variety of payments during the process of negotiation, under the scheme and the wider restructuring, and under new trading facilities which may be made available to the business after the restructuring takes effect. Any payments to a limited group of creditors in connection with a restructuring can have a potential impact both upon the class question and upon the question at the sanction hearing of whether, to the extent that the recipients of such payments make up the majority voting in favour of the scheme, they are really representative of the interests of the wider class of creditors as a whole. Of necessity, therefore, the making of such payments carries with it a requirement for full and frank disclosure to the Court throughout the scheme process, together with absolute transparency and disclosure to all creditors in the Explanatory Statement.

112. This case is no exception. As I have indicated, the Company has been engaged in complex and substantive discussions with the Ad Hoc Group and other major creditors such as ING and Deutsche Bank over the structure and details of the Restructuring. ING and Deutsche Bank have each been paid substantial fees for continued financial support to the Company during that process.

113. In addition, as well as agreeing to pay each of Akin Gump's and Houlihan Lokey's professional fees, expenses and disbursements in connection with representing and advising the Ad Hoc Group in relation to the Restructuring, the Company has made a number of other payments to members of the Ad Hoc Group during the last year. These are referred to in the documents as "RCF Waiver Fees", "Work Fees" and "Interim Facility Fees". The members of the Ad Hoc Group will also receive payment of so-called "Backstop Fees" under the Scheme. In so far as those payments to or for the benefit of the members of the Ad Hoc Group have been made or will be made to some, but not all, of the Scheme Creditors, they potentially raise class issues.

114. The original evidence in relation to the circumstances leading to the payment of these fees was minimalistic. There was no evidence of the amount of the legal and professional fees paid or payable, and there appeared to me to be a marked reluctance that the members of the Ad Hoc Group should even be identified in any documents placed before the Court (even to the extent of redacting their identity in the exhibited copy of the RSA).

115. Although I have no further information in relation to the legal fees, further information was provided at my insistence at the hearing in relation to the identity of the members of the Ad Hoc Group and the other payees, together with more detail concerning the so-called "Work Fee". In summary, the fees appear to be as follows.

The RCF Waiver Fees

116. In consideration for the grant of a temporary waiver in relation to non-compliance with various terms of the RCF in August 2017, the Company paid the RCF Creditors who consented to the waiver a fee of 0.15% of that RCF Creditor's commitments under the RCF Agreement.

117. Pursuant to an agreement reached in December 2017, in consideration for the grant of an extension to that waiver, an amount equal to 1.5% of the outstanding principal amount under the RCF was capitalised on 30 April 2018. This increased the amount outstanding under the RCF by US$17,151,900.

118. Pursuant to the same agreement in December 2017, a further cash payment of about US$11.4 million was payable on 30 April 2018 for a continued waiver of the breaches of the RCF, but in fact was not paid by the company until 29 June 2018. Of this amount, US$3,861,800 was paid to members of the Ad Hoc Group, and US$7,572,800 was paid to RCF Creditors who were not members of the Ad Hoc Group.

The Work Fee

119. At or about the time in late 2017 that it was agreed that some of the RCF Creditors and some of the Noteholders would form the Ad Hoc Group, it was agreed in principle with the Company that the members of the Ad Hoc Group would, in addition to payment of their fees charged by Akin Gump and Houlihan Lokey, be paid what is described in the evidence as "a fee in consideration of their work in negotiating the terms of the Restructuring" (the "Work Fee"). The Work Fee was agreed to be 2% of each member of the Ad Hoc Group's Scheme Claims, subject to a total cap of US$40 million, and was agreed to be payable on 30 April 2018 even if a restructuring was not implemented.

120. The Company did not pay the Work Fee on the due date of 30 April 2018 because of concerns over its liquidity and access to trade finance. Thereafter certain of the members of the Ad Hoc Group agreed to provide cash collateral for US$117 million of additional trade finance lines under an interim facility provided by Deutsche Bank Singapore ("DBS") to NRIPL (the "Interim Facility"). The Work Fee arrangement was renegotiated at the same time and a second letter agreement letter entered into on 29 June 2018. This provided for the outstanding Work Fee to be paid by 3 July 2018, together with an additional Work Fee of 0.95% of the Scheme Claims of a further member who had joined the Ad Hoc Group mid-way through negotiations in March 2018.

121. The Work Fee was in fact paid by the Company on the same day as the second letter agreement was signed, 29 June 2018, and amounted to just over US$36 million. A number (but not all) of the members of the Ad Hoc Group who received the Work Fee then agreed to provide cash collateral of US$58 million under the Interim Facility.

The Interim Facility Fee

122. As indicated, in early July 2018 DBS entered into the Interim Facility with NRIPL. The members of the Ad Hoc Group agreed to a risk participation arrangement with DBS in relation to that facility, in respect of which they were each paid a fee in cash by the Company of 4% of their commitment. The total amount paid on 5 July 2018 was US$ 4.68 million. The fee was not conditional upon the Restructuring being achieved.

The Backstop Lender Fees

123. As indicated above, a key feature of the Scheme is the provision to the group of the New Money Debt by those Scheme Creditors who agree to "risk participate". To ensure the availability of the new facilities, the issue of those bonds under the Scheme is underwritten ("backstopped") by the members of the Ad Hoc Group and a number of the other Finance Creditors. This "backstop" has been provided in two phases.

124. At the time that the RSA was announced on 14 March 2018, the members of the Ad Hoc Group (referred to as "the Initial Lenders") entered into a conditional risk sub-participation agreement pursuant to which they each committed to fund a pro-rata share of the total amount of the new facilities. Each Existing Notes Creditor and Existing RCF Lender (including the Initial Lenders) was subsequently offered the opportunity to risk participate for a pro rata amount of New Money Debt as a "Backstop Lender".

125. In consideration for backstopping the New Money Debt, the Company will pay "Backstop Fees" to each Initial Lender and each Backstop Lender on the Restructuring Effective Date. Each Initial Lender shall be entitled to a Backstop Fee from the Company equal to 3% of that Initial Lender's initial commitment. Each Backstop Lender shall be entitled to a Backstop Fee from the Company equal to 2% of that Backstop Lender's commitment. The fees to be paid are cumulative.

126. The Backstop Fees are intended to compensate both the Initial Lenders and the Backstop Lenders for their commitment to underwrite the New Money Debt in circumstances where not all Scheme Creditors would be willing to risk participate in the New Money Debt. The fee of 3% payable to the Initial Lenders in respect of their initial commitment is said to reflect their early commitment to underwriting the New Money Debt at a time when the RSA had only just been announced and it was uncertain whether any other Backstop Lenders would be willing to risk participate for the New Money Debt.

127. In aggregate, and in addition to the US$3.75 million to be paid to Deutsche Bank (see above) the Company expects to pay US$31.25 million in Backstop Fees if the Restructuring is completed. Of this, US$25,675,040 will be payable to members of the Ad Hoc Group and the balance of US$5,574,960 will be payable to finance creditors who are not members of the Ad Hoc Group.

Analysis

128. In submitting that none of these fees gave rise to a class issue, Mr. Trower QC suggested that each of the fees that I have described were *de minimis*. I do not think that is the right approach. Excluding the fees payable to Deutsche Bank, by my reckoning, the total fees paid and payable to which I have referred (which it will be recalled do not

include legal fees and expenses) amount to US$80.7 million, of which the Ad Hoc Group has been paid or can expect to receive a total of US$67.5 million – almost 84%. Those are not insignificant amounts, even in the context of this Company. In a case such as this it is necessary to have regard to the totality of fees paid and payable rather than simply dismissing each category of fees seriatim as *de minimis*.

129. In that regard I would also repeat the helpful suggestion made by Nugee J in Re Codere Finance (UK) Limited [2015] EWHC 3206 (Ch) at paragraph [4] and reiterated by me with an additional suggestion from counsel in Global Garden Products at paragraphs [46]-[48]. In addition to dealing with such matters fee by fee, the evidence should also include a statement of what, cumulatively, any particular creditor or creditors stood to get out of the scheme or the wider restructuring that was different from that available to the general body of creditors. That course was not followed in this case until I requested such a statement.

130. That said, I have concluded, again with some hesitation, that whether taken separately or together, the fees to which I have referred do not require me to convene a separate class meeting of the Ad Hoc Group. At this stage the relevant question which I have to ask is whether the payment or anticipated payment of those fees means that the members of the Ad Hoc Group cannot consult together with other Scheme Creditors in their common interest, or whether the making of such payments or promised payments amounts to a separate arrangement or compromise being offered to the members of the Ad Hoc Group. I stress that at this stage I say nothing about the fairness or otherwise as between Scheme Creditors of such payments having been made, or as to the adequacy of disclosure in relation to them in the Explanatory Statement: those are matters for the sanction hearing.

131. As regards the class question, subject to an important caveat, I accept in general terms the proposition that payments made by a company to some creditors independently of a proposed scheme and its associated restructuring agreements, which are not dependent upon the scheme taking effect, ought not to come into the equation for class purposes. The simple reason is that they would not be part of the scheme proposal which all scheme creditors have to consider at the relevant meetings. This was, I think, what David Richards J was alluding to when considering the effect of payments in connection with voting ("lock up") agreements in Telewest Communications plc [2004] BCC 342 at paragraph [54],

> "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. The voting obligations are conditional on prior payment of fees and costs incurred by the bondholder committee in the course of the past two years but Telewest had already, independently of the voting agreements, undertaken to pay these costs and fees. Telewest will also pay their costs of entering into the voting agreements but I consider that to be immaterial." (my emphasis)

132. The important caveat is that any such prior payment which is made to some, but not all, creditors must have been made for legitimate reasons and be genuinely independent of the scheme and restructuring. In other words, it should not amount to a disguised part of the consideration offered under the scheme and restructuring. I alluded to such a requirement when questioning the legitimacy of the "work fees" paid in Global Garden Products at paragraphs [15] and [53]. On the facts of that case I was able to take the view that the payments had been made available to all creditors, and that they were of a relatively low amount (an order of magnitude different to the fees in this case), so that they did not give rise to a class issue.

133. I have also previously made the point that the Court is not bound at a convening hearing to take at face value bare assertions in the evidence. The scheme company has the burden of adducing evidence of sufficient quality to persuade the Court to act, and it has a duty to make full and frank disclosure of all relevant facts and matters to the court: see Indah Kiat at [40].

134. In that respect, I was initially concerned by several aspects of the evidence as regards the RCF Fees and the Work Fees. The evidence was that prior to the formation of the Ad Hoc Group, the RCF waiver fee paid in August 2017 was a mere 0.15%. However, after the Ad Hoc Group became involved, it would seem that in or around December 2017 the Company agreed to pay the vastly increased sum of 2.5% of the outstanding principal amount of the RCF loans for an extension of that waiver (1.5% capitalised on 30 April 2018 and 1% in cash on 29 June 2018). No explanation has been provided for that dramatic increase.

135. At or about the same time, it would seem that the Company also agreed in principle to pay a "Work Fee" to the members of the Ad Hoc Group of 2% of their debt (subject to a cap of US$40 million), which seemed on its face to have been computed simply on the basis of holdings of debt rather than by reference to any identifiable or measurable work actually done or to be done.

136. As I have indicated above, the amounts involved in these two payments were very significant, being about US$28.5 million and US$36 million respectively. The payments also appeared to have been agreed in principle at or about the same time as an agreement for the restructuring was reached in principle with the Ad Hoc Group in January 2018, and the payments were scheduled to be made after the execution of the RSA.

137. After I raised these points regarding the Work Fee at the hearing, further evidence was adduced from Mr. Neil Devaney, a partner of Akin Gump, explaining the background to the Work Fee and reiterating that it was payable by the Company even if the Restructuring was not implemented. Mr. Devaney exhibited the letter agreements in relation to the Work Fee and expressed the belief that the Work Fee was a "commercial fee" paid in return for the members of the Ad Hoc Group committing their time and resources to negotiations with the Company. He stated that the fee was "intended to incentivise" RCF Creditors and Noteholders to work together as the Ad Hoc Group to streamline the negotiation process and reduce costs, and to compensate them for time spent and "opportunity cost" resulting from participation in the negotiations.

138. Mr. Devaney also stated that the Work Fee was paid as a percentage of holdings for "pragmatic reasons", namely that "the members of the Ad Hoc Group are financial institutions that do not typically record their time in any accurate or meaningful way", and "whilst it was expected that all members of the Ad Hoc Group would contribute to the negotiations, it was assumed that those members whose holdings [of debt] were relatively larger than the others would be more involved in the detailed discussions and documentation…". In other words, "it was assumed that those with the most invested would do the most work."

139. Mr. Devaney's evidence does not in fact indicate on what basis or assumptions as to the time to be spent or opportunity costs the figure of 2% (or the cap of US$40 million) was arrived at, rather than any other percentage or cap. Moreover, whilst the letter agreements exhibited to Mr. Devaney's witness statement contain detailed provisions as regards payment of the Work Fee and a series of exclusions of responsibility or liability on the part of the members of the Ad Hoc Group, it is noticeable that they do not actually contain any provisions which oblige the Ad Hoc Group to do any work at all, simply recording that the Work Fee is paid "in consideration of each Member's work in connection with the negotiation of a [financial restructuring of the financial indebtedness owed by the Company to each Member]".

140. For the Company, Mr. Brough simply commented in his second witness statement that that he understood from the Company's advisers that the Work Fees were "in line with market practice for other restructuring transactions" and that "the amount of time the Ad Hoc Group have spent on this restructuring far exceeds that which I expected at the beginning of the process".

141. I am not wholly convinced by this evidence. However, at this stage and without further investigation or disclosure, I cannot reject it or conclude that the RCF Fees agreed in December or the Work Fees are not what they are represented to be. Having regard to the tight timetable for completion of the Scheme to which I have referred, I have been persuaded to proceed at this stage on the basis that the RCF Fees and the Work Fees do not form part of the consideration offered under the Scheme, that they were not offered in exchange for the execution of the RSA under which the Ad Hoc Group promised to support the Scheme, and that the fees in question have been paid for legitimate and genuine reasons independently of the Scheme. On that basis they do not require me to convene separate class meetings of any of the Scheme Creditors.

142. The Backstop Fees are in a different category, because, as indicated above, they <u>do</u> form part of the Restructuring and they are dependent upon the Scheme being sanctioned. They were, however, not offered to all Scheme Creditors and are to be paid in differing amounts depending upon whether the Scheme Creditor was an "Initial Lender" or not.

143. Mr. Brough's initial evidence for the Company as regards the Backstop Fees was as follows,

> "132. I understand that the Backstop Fees are in line with market comparators for underwriting (and indeed are lower than fees payable on other restructuring transactions) and that due to the Company's current financial position, the Company would

> be unlikely to obtain underwriting from a third party on equivalent terms in the market and in the time available.
>
> 133. It is unlikely that a Backstop Lender (who is not entitled to the 3% Backstop Fee payable to Initial Lenders …) or a Scheme Creditor who is not a Backstop Lender who consider any substantive aspect of the Scheme to be against its interest would be persuaded to vote in favour of the Scheme by the existence the Backstop Fees. The alternative of insolvent liquidation would result in the Scheme Creditors suffering very significant losses compared to the proposed rights under the Scheme and in that context the Backstops Fees are not material factors in their decision making process."

144. I pointed out at the hearing that this evidence was unsatisfactory because Mr. Brough did not give any support for his "understanding" in paragraph 132, and his assessment of what a Backstop Lender or Scheme Creditor might or might not be persuaded to do in paragraph 133 simply made no sense. Mr. Brough then clarified and expanded his evidence to indicate that what he had intended to say was that in his view the Backstop Fees are not sufficiently high to induce the recipients of those fees to vote in favour of the Scheme. He said that he based this understanding on information concerning the price at which the Notes have traded over the last three years, which showed that they have rarely traded below 40 cents in the US$. Mr. Brough drew the inference that this would have been the lowest price at which the members of the Ad Hoc Group would have acquired their holdings of the debt.

145. Mr. Brough also indicated that he had asked for a table to be prepared by the Company's advisers setting out the level of backstop fees of which they are aware on other transactions. That showed the fees payable in a number of rights offerings in various jurisdictions (mainly the US) from December 2010 to February 2018, with a mean of 6.3% and a median of 5%.

146. For good measure I was also sent emails from three members of the Ad Hoc Group stating that the Backstop Fees that they were to receive were less than 1.5% of their holdings of senior debt, which in context clearly meant the face value of such debt. Two of those emails referred in general terms to the losses that the creditors concerned contended would be suffered in a liquidation of the Company, and they all variously asserted that the creditor regarded the Backstop Fees as immaterial, irrelevant or entirely separate to their decision to support the Restructuring and vote in favour of the Scheme.

147. These emails and the opinion by Mr. Brough concerning the likely impact of the Backstop Fees upon the creditors due to receive them was doubtless formulated with a number of previous scheme authorities in mind. In particular, at the convening hearing in Re Primacom Holding GmbH [2013] BCC 201, Hildyard J considered whether the payment of a "lock-up" or "consent" fee to creditors entering into an agreement to support and vote in favour of the scheme fractured the class. He stated, at [56]-[57],

> "56. So far as the consent fee is concerned, two points are advanced by the company. The first is that the lockup agreement is stated to have been available to all senior scheme creditors and

> thus the fee payable was likewise available to all who sought to participate. The second is that the amount of the consent fee is *de minimis* when compared to the claims of the senior scheme creditors.
>
> 57. For my own part, I am not persuaded by the first of those reasons, but it does seem to me to be an unlikely determinant of jurisdiction that a relatively small fee should be payable to those who happen to promise their vote on the schemes, which is not an unusual arrangement in the context of schemes such as this. It is most unlikely that the consent fee would determine the behaviour of the member of a given class. Again, I am supported by authority in the shape of Re DX Holdings Ltd [2010] EWHC 1513 (Ch)."

148. A similar point was taken up by David Richards J at the sanction hearing in Re JSC Commercial Company Privatbank [2015] EWHC 3299 (Ch) ("Privatbank") at paragraph [25] where, when considering his discretion whether to sanction the scheme or not, the Judge did place some reliance upon the fact that the fee in question had been available to all noteholders. He then continued, at paragraph [26],

> "26. 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."

149. For my part, I think that in a case in which any form of fees are offered to some, but not all scheme creditors contingently on the scheme being sanctioned, the Court will inevitably have to form a view about the materiality of the fees when judging whether the rights of the creditors who will not be paid the fees are sufficiently dissimilar that they cannot consult together with a view to their common interest with those who will be paid the fees. Put simply, if the fees are immaterial to the decision, then the creditors can consult together: if they are material, then they probably cannot.

150. In making that evaluation, I think the Court will obviously have regard to the level of the fees in question, but in most cases I do not think that it is appropriate simply to look at the percentage which the fee bears to the face value of the debt held by the potential recipients. As David Richards J suggested in Privatbank, that notional figure is unlikely to be a meaningful one in a situation where the company is in financial distress, where its debt is trading at much less than its par value and where the return in a liquidation is predicted to be very low. Likewise, it is hardly meaningful for creditors to talk in

terms of their potential "loss" if the scheme is not approved based upon the face value of the notes, without disclosing the price which they paid for the notes in the first place.

151. What would seem to be far more relevant is the size of the fee when compared to the predicted returns offered to all creditors under the scheme and the returns that creditors are predicted to make in a liquidation. Moreover, in a case in which the fees are offered in return for the provision of financial support or other financial accommodation or risk, as opposed to simply being offered in exchange for an agreement to support the restructuring, evidence as to whether the fee includes an element of bounty or is in line with market rates will also be relevant. The court can then make a judgment as to whether the value of the extra fees is likely to make a real difference to the decision faced by the creditors who will receive them and those who will not.

152. In reaching this assessment, the Court is unlikely to be much assisted by self-serving assertions by the creditors who have negotiated to receive the fees in question that they regard them as immaterial to their own decision whether or not to support the scheme. The Court is likely to be more interested in argument from creditors who do not stand to receive the additional payments. That emphasises the importance of ensuring that all creditors receive the Practice Statement in good time, and it is worth reiterating that creditors who attend to raise legitimate points in a constructive manner at a convening hearing can expect to receive their reasonable costs irrespective of the outcome, rather than being discouraged from attending by concern over exposure to adverse costs orders. If there are no such creditors in attendance, it should be regarded as part of the role of counsel for the scheme company not only to identify the class issues and to provide what he or she contends are the answers, but also to identify for the assistance of the Court how the rival arguments might be put.

153. In this case, as I have indicated, the Scheme is projected to return 24.7% and 33.8% of an accepted Scheme Claim to a non-Participating Creditor, and between 47.4% and 58.4% of an accepted Scheme Claims to a Participating Creditor. That contrasts with a liquidation recovery which is estimated at between 19.5% and 30.3% for all creditors. The parties who stand to receive Backstop Fees will inevitably be Participating Creditors.

154. Given those figures, I suspect that an additional return in the region of 1.5% to the Participating Creditors who also receive Backstop Fees, will make very little difference to the decision of a Scheme Creditor who does not want to risk participate and who will primarily be focussing on the disparity between the likely returns to the Participating and non-Participating Creditors in general. I also think that Participating Creditors who are not going to receive any Backstop Fees are unlikely to be much troubled by the fact that other Participating Creditors will be receiving a Backstop Fee for taking on an underwriting obligation that I am led to believe is within market norms.

155. In those circumstances, and in spite of some real doubts, I cannot conclude on the evidence that the payment of the proposed Backstop Fees makes it impossible for Scheme Creditors who do not stand to receive them to consult with those who do.

Practical considerations

156. In reaching my decision on classes, in addition to the analysis set out above, I have also had regard to considerations of practicality, together with the observations made both by Chadwick LJ in Hawk and by Lord Millett in UDL about the dangers of formulating too many classes so as to give a small minority a right of veto over a scheme.

157. As to considerations of practicality, I have focussed above on the differences between the Scheme Creditors as a whole and (i) the Other Scheme Creditors, and (ii) the Ad Hoc Group. However, when one considers the impact of the different fees (including in particular the Backstop Fees) it is apparent that the Finance Creditors could be divided into a number of classes depending, for example, on whether they were Initial Lenders or only Backstop Lenders. I am concerned that such sub-division would be unworkable.

158. Moreover, as regards questions of giving a minority a disproportionate right of veto, as I have indicated, the total claims of the Financial Creditors amount to some US$3.449 billion. Apart from any guarantee or indemnity claims, there are only a handful of identified Other Scheme Creditors who I have listed above, and the claims of all Other Scheme Creditors are expected to amount only to about US$100-200 million (the higher figure being described as "unlikely"). Requiring the Other Scheme Creditors to be placed into a separate class would, I think, be giving them a disproportionate right of veto which I do not think could be justified in the absence of a very clear dissimilarity of rights.

159. In reaching that conclusion, I should not in any way be taken to be suggesting that the proponents of a scheme can offer manifestly different and unfavourable rights to a small minority and then seek to justify binding them into a larger class by protesting that they cannot be given a right of veto. If that is what, on analysis, the scheme in question requires, then so be it: the solution for the proponents of the scheme if they fear that the small class would vote against the scheme would be to reformulate the proposals. But if the class question is finely balanced, I think it is legitimate for the reasons given by Chadwick LJ and Lord Millett to lean towards a broader view, leaving questions of minority protection and fairness to the sanction stage.

160. I therefore concluded that it was appropriate to convene one meeting for Deutsche Bank and a second meeting for all other Scheme Creditors.

Voting by beneficial Noteholders

161. Each of the series of Notes has been issued in global form, either by way of a global certificate (as in the 2018 and 2022 Notes) or as a global security (as in the 2020 Notes). In each case, legal ownership of the Notes passes by registration and the legal owner is the nominee of a common depositary. A question, therefore, arises over whether the legal owner of the global Note is the only creditor which should be entitled to vote, or whether the underlying beneficial Noteholders should have this entitlement.

162. This issue has arisen in a number of other schemes and it is now well established that if the relevant instruments provide that beneficial Noteholders can acquire direct rights against the Issuer in some (even remote) circumstance, the underlying beneficial Noteholders can properly be classified as "contingent creditors" of the company, and

arrangements should be made to enable them to vote so as to enfranchise those with the ultimate economic interest in the debt: see e.g. Re Castle Holdco 4 Ltd [2009] EWHC 3919 (Ch) and Re Co-operative Bank Plc [2013] EWHC 4072 (Ch) at [38].

163. In the present case, each series of Notes contains provisions enabling beneficial Noteholders to acquire direct rights against the Issuer in certain circumstances. I am therefore satisfied that the beneficial Noteholders can and should properly be regarded as contingent creditors. The trustees in respect of each of the series of Notes have also undertaken not to vote at the Scheme Meetings to ensure that there is no double counting.

164. Further, in the event of a vote being cast by more than one creditor in respect of the same debt, the Chairman of the meeting shall be authorised to count only the votes of the person with the ultimate economic interest in that debt. This is primarily to reflect the fact that, in respect of the English law Notes and New York law notes, account participants may hold an interest in Scheme Claims without being their ultimate beneficial owner. Further, where an account participant holds interests in the Notes on its own account and/or on behalf of one or more ultimate beneficial owners, I have given a direction to enable the votes of the account participant to be split to reflect the votes of the underlying beneficial owners of the Notes.

Appointment of a foreign representative

165. As I indicated at the outset, it is the intention of the Company to seek recognition of the Scheme under Chapter 15 of the US Bankruptcy Code. To that end, by resolutions passed on 12 October 2018 the board of the Company appointed Mr. Brough, its Chairman, and Mr. Jeffrey Alam, its General Counsel, to be the Company's foreign representatives for one year. The two representatives were given authority to bind and represent the Company with respect to the Scheme and the Bermuda scheme. This would include seeking relief available to a "foreign representative" under proceedings to be filed in the US Bankruptcy Court for the Southern District of New York seeking recognition of the Scheme under Chapter 15 of the US Bankruptcy Code.

166. In addition to the order convening the Scheme Meetings, the Company also sought a declaration that Mr. Brough and Mr. Alam have been validly appointed by the board of directors of the Company for such purposes in respect of the Scheme.

167. My inherent jurisdiction to make a declaration is a discretionary power and the authorities indicate that whilst the court will not decide hypothetical issues, the jurisdiction does not depend upon the existence of a dispute: Rolls-Royce plc v Unite [2010] 1 WLR 318 at paragraphs [118]-[120]. The cases also indicate that in deciding whether to grant a declaration the Court should take into account, among other things, whether to do so would serve a useful purpose: see e.g. Financial Services Authority v Rourke [2002] C. P. Rep. 14 (Neuberger J).

168. In the past, Judges of this Court have been prepared to make declarations of due appointment of representatives of English scheme companies for the purposes of assisting the companies to seek recognition in other jurisdictions of schemes sanctioned by this court: see e.g. Re Telewest Communications Plc [2004] BCC 342 at [60]-[61]. Although not dealt with expressly in Judge Peck's evidence, Mr. Trower informed me that such declarations have proved useful in practice in seeking recognition in the US.

I see the utility of such an approach to support the Court's scheme jurisdiction, and I am content to adopt it in this case.

169. In this case, however, the Company is not an English company but a Bermudan one. Questions of who has been validly appointed to act for the Company will therefore be governed by the law of the place of the Company's incorporation – i.e. Bermuda: see Banco de Bilbao v Rey [1938] 2 KB 176. I have therefore simply proceeded on the basis that I should grant the declaration sought to assist the Company in so far as it concerns the English Scheme, and on the assumption that Bermudan law in relation to the appointment of an agent is the same as English law. If necessary, the matter should be raised before the Bermudan Court.

170. I should also make clear, for the avoidance of doubt, that neither person appointed by the Company in relation to the Scheme has the status of an office-holder under the Insolvency Act 1986, nor that of an officer of this Court. In making the declaration, I also do not intend in any way to prejudge the question of whether such persons qualify as a "foreign representative" under Chapter 15, which is, of course, entirely a matter for the US Bankruptcy Court.

The timing of the Scheme process

171. I have already indicated above that I considered the original timetable proposed by the Company for the dispatch of the Explanatory Statement, the holding of the Scheme Meetings and (more particularly) the making of the election to risk participate election to be too short, and that in response the Company provided a revised timetable extending the risk participation election date and the risk participation deadline. However, the date of the Scheme Meetings remains Thursday 8 November 2018. The Company still intends to proceed to seek the sanction of this Court on Monday 12 November 2018 (I asked for that hearing to be advanced by one day to give the Court some flexibility over the hearing), to seek the sanction of the Bermuda scheme on Wednesday 14 November 2018, and to make the Scheme effective on the same day.

172. As I have indicated, that timetable is driven by a need to comply with the requirement of the SIC that the Restructuring should be completed within three months of the passing of the Shareholder Resolution on 27 August 2018. As will be recalled, the Company had known of the SIC's conditions since early August, it held the SGM on 27 August 2018, and it announced the intention to proceed with parallel schemes in England and Bermuda on 30 August 2018. It is regrettable that the effect of the time taken to finalise the terms of the Restructuring and to circulate the PSL meant that the timetable for the convening and sanction hearings is now so tight that there is simply no room for manoeuvre if the SIC's condition is to be met. My requests that the SIC be approached with a view to ascertaining whether it would be willing to extend the timetable to permit greater time for my decision, and for Scheme Creditors to digest and vote upon the Scheme were, however, met with the response that it had not been possible to make such approach to the SIC and evidence from local lawyers explaining how difficult that would be.

173. The result is a timetable under which Scheme Creditors have been presented with an extremely lengthy Explanatory Statement for a very complex Scheme at very short notice. As I have indicated, this is a matter which could be raised by Scheme Creditors at the sanction hearing.

174. As well as the position of Scheme Creditors, I also think that I should make some observations about the way in which the Scheme was brought before the Court. Although the hearing date of Friday 12 October 2018 for the convening hearing had been arranged with the Companies Court as early as 14 September 2018, the hearing bundles were not lodged with the Court until Wednesday 10 October 2018. Mr. Brough's first witness statement ran to 59 pages and the accompanying documents to over 3,200 pages which filled 12 lever-arch files. The Explanatory Statement itself ran to over 260 closely typeset pages and it had 31 Appendices which included a number of the relevant draft documents necessary to give effect to the Restructuring.

175. More significantly, the Company's Skeleton Argument, which is essential for pre-reading, was not filed until Thursday 11 October 2018, the day before the hearing. It ran to 49 pages and suggested, completely unrealistically for a matter of this complexity, that pre-reading and the convening hearing itself would each take half-a-day.

176. In addition, the Company had booked a hearing in Bermuda for Monday 15 October 2018 and had made arrangements to make the Explanatory Statement available electronically to Scheme Creditors on Tuesday 16 October 2018. That timetable obviously pre-supposed that this Court would make the Order requested without further ado at the hearing on Friday 12 October 2018, or at the latest having considered the matter over the weekend.

177. The pressure that this approach created was compounded by evidence from Mr. Brough, the detail of which I have ordered should be kept confidential for the time being, but which I can nevertheless say warned of dire consequences for the Company and its creditors if the timetable set by the SIC was not met. Mr. Brough expressed considerable frustration for this state of affairs and laid the blame for it squarely at the door of the various creditor groups and institutions who (he said) had been engaged in interminable negotiations between themselves right up to the last minute, notwithstanding warnings from the Company and its advisers.

178. In my view this is simply not an appropriate way for the parties involved to approach the Court at the end of a restructuring which has been under discussion for over a year. 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 (and in this case the SIC) will be unwilling to extend their deadlines.

180. In practical terms, solicitors and counsel must ensure that the Court Listing Office is informed well in advance of the true extent of the matter so that a suitable Judge can be assigned and given a realistic amount of pre-reading time in his or her schedule. The hearing bundles and skeleton argument must be lodged well in advance and certainly no later than two clear days before the hearing as required by paragraph 21.77 of the Chancery Guide. Further steps should also not be arranged on a timetable that presumes that the Court will give its decision immediately.

181. Parties who do not assist in this way may find their hearings adjourned or taken out of the list until adequate time can be found. If that imperils a scheme, that will be the consequence of the acts and omissions of the parties themselves.

182. Having made those cautionary observations, I should end by expressing my gratitude to the counsel, solicitors and others who attended the hearings before me and who dealt efficiently and thoroughly with the issues that I raised.