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Case No: CR-2021-000179

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES
INSOLVENCY AND COMPANIES LIST

Rolls Building,
Fetter Lane
London
EC4A 1NL

Date: 23 February 2021

Before :

MR JUSTICE SNOWDEN

- -

IN THE MATTER OF PORT FINANCE INVESTMENT LIMITED

AND IN THE MATTER OF PART 26 OF THE COMPANIES ACT 2006

- -

Tom Smith QC and **Stefanie Wilkins**
instructed by **Baker McKenzie LLP** for the **Company**

Hearing dates: 4, 11 and 17 February 2021

- -

Approved Judgment

COVID-19: This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII and other websites. The date and time for hand-down is deemed to be 10 a.m on Tuesday 23 February 2021.

MR JUSTICE SNOWDEN

MR JUSTICE SNOWDEN :

1. This is an application by Port Finance Investment Limited (the "Scheme Company") for an order convening a meeting of its creditors (the "Scheme Creditors") for the purposes of considering and, if thought fit, approving a scheme of arrangement under Part 26 of the Companies Act 2006 ("Part 26", the "CA 2006" and the "Scheme").

2. I adjourned the hearing on Thursday 4 February 2021 and again on Thursday 11 February 2021 for the Scheme Company to provide further evidence in relation to various aspects of the restructuring, including the proposal to pay a success fee to an adviser to a group of Scheme Creditors, together with corresponding changes to the draft explanatory statement to be sent to all Scheme Creditors.

3. At the reconvened hearing on Wednesday 17 February 2021 I indicated that I would make the order sought by the Scheme Company with certain modifications. I indicated that I would give my reasons in writing, which I now do.

The Global Ports Group

4. Global Ports Holdings Plc ("GPH") is an English public limited company. GPH, and its direct and indirect subsidiaries (together, "the Group"), is a leading global cruise port operator, and operates cruise ports throughout Europe, Asia, and the Caribbean.

5. The Group has two primary sources of revenue:

   i) Core port services: the Group derives revenues from handling cruise ships and their passengers and crew through terminal and marine services. The Group's customers are cruise operators who make payment on their own behalf and on behalf of their passengers. The main driver of cruise port operations is cruise passenger volumes and gross tonnage. The Group receives cruise revenues primarily on a per-passenger basis.

   ii) Ancillary services: at each port, the Group derives revenue from additional services, which vary according to the port, but include vessel and port services, destination and shoreside services and area and terminal management.

6. The COVID-19 pandemic has had a material adverse effect on the global cruise industry, and consequently on the Group's finances. The Group's total consolidated revenue in the nine months ended 30 September 2020 declined by 52% compared to the equivalent period in 2019 and consolidated adjusted EBITDA declined by 73% compared to the equivalent period in 2019. There is continuing uncertainty about the duration of the COVID-19 pandemic, and its overall effect on the Group's revenue is correspondingly unclear.

The Existing Notes

7. The Group's indebtedness includes unsecured senior notes due 14 November 2021 with an aggregate principal amount of US$250 million (the "Existing Notes" and the "Existing Indenture"). These were issued by Global Liman İşletmeleri A.S. ("GLI" or the "Original Issuer"), a Turkish company, which is a direct wholly-owned subsidiary of GPH. The trustee for the Existing Notes is The Bank of New York Mellon acting through its London Branch as the trustee (the "Trustee"). Interest, at 8.125%, is

payable semi-annually in arrears on 14 May and 14 November of each year prior to their maturity. The Existing Notes are unsecured, but are guaranteed by a subsidiary of the Original Issuer, Ege Liman İşletmeleri A.S. ("Ege Liman").

8. Beneficial interests in the Existing Notes may be held by participants in Depository Trust Company, Euroclear Bank SA/NV and Clearstream Banking S.A. (collectively the "Clearing Systems") and are traded through the Clearing Systems. The beneficial interests of participants in the Clearing Systems are recorded in the books and records of the Clearing Systems. Those participants may hold beneficial interests on their own behalf, or on behalf of one or more third parties.

9. Under section 2.06(a) of the Existing Indenture, the holders of book entry investments in the Existing Notes have the right to acquire direct rights against the Original Issuer, in certain circumstances, by calling for the issuance of a definitive registered note. Such persons can therefore, be regarded as "contingent creditors" of the Scheme Company for the purposes of Part 26: see Re Castle Holdco 4 Ltd [2009] EWHC 3919 (Ch), [22]-[24]; Re Noble Group [2018] EWHC 2911 (Ch), [2019] BCC 349, [161]-[164]. The Scheme is therefore based upon treating such persons who have beneficial interests in the Existing Notes, who I shall refer to as "Noteholders", as the primary Scheme Creditors.

10. Under section 12.07 of the Existing Indenture, the Existing Notes are governed by New York law and the parties irrevocably submitted to the jurisdiction of the courts of New York.

Other debt of the Group

11. In addition to the Existing Notes, the Group has the following principal sources of indebtedness which are unaffected by the proposed Scheme:

    i) US$125.0 million 8.0% unsecured notes due 2040 issued by Nassau Cruise Port Limited (GPH owns a minority stake in Nassau Cruise Port Limited but this indebtedness is consolidated into the Group's consolidated financial reports), which is non-recourse to the Group; and

    ii) Additional project finance and working capital facilities incurred partially by the Original Issuer in an aggregate principal amount of US$105.3 million (equivalent) as of 31 December 2020.

The Scheme

12. The continuing uncertainty caused by the COVID-19 pandemic has led the Group to conclude that in order to maintain its liquidity position, it will be necessary for it to defer the interest payments on the Existing Notes. The Group also does not consider that it will be able to repay the Existing Notes in full on their maturity in November 2021. Nor does it envisage that it will be able to find an alternative source of funding to enable it to refinance the Existing Notes.

13. Against this background, the principal objective of the Scheme is to cancel and release the Existing Notes, in consideration for Scheme Creditors being given an entitlement to new notes with an extended maturity date of 14 May 2024 (the "New

Notes" and the "New Notes Entitlements"). The New Notes will be issued by a new issuer which will be a newly formed English company that will become the immediate parent of the Original Issuer.

The New Notes

14. The principal feature of the New Notes are as follows:

    i) The New Notes will be issued in an aggregate principal amount equal to the outstanding Existing Notes (subject to reduction in accordance with the cash option – see below). The New Notes will mature on 14 May 2024.

    ii) The New Notes will be issued by the "New Issuer", a company newly incorporated under the laws of England and Wales which will be a wholly-owned subsidiary of GPH.

    iii) Under the New Notes, interest falling due on or prior to 14 May 2022 will be at 8% per annum but the New Issuer will have the ability to pay part or all of the interest in kind. Interest falling due after 14 May 2022 will be paid in cash at 6.5% per annum. Where the New Issuer pays interest in cash, there is provision for the New Issuer to use certain additional cash to make an offer to all holders of the New Notes to repurchase all or part of such holders' New Notes.

    iv) No later than 90 days after the Scheme becomes effective, GPH will distribute or otherwise transfer the Original Issuer and its subsidiaries to the New Issuer, so that the Original Issuer will become a direct wholly-owned subsidiary of the New Issuer (the "New Issuer Reorganisation").

    v) In addition, GPH, the New Issuer and the Original Issuer will use commercially reasonable efforts to distribute or otherwise transfer the Original Issuer's investments in its non-Turkish operating subsidiaries to the New Issuer, so that the Original Issuer's international operating subsidiaries will be directly or indirectly held by the New Issuer.

    vi) The New Notes will be guaranteed not only by the guarantors of the Existing Notes but also by GPH, the ultimate parent company in the Group.

    vii) No later than three business days following the completion of the New Issuer Reorganisation, the New Notes and the accompanying guarantees will be secured by a pledge over the shares of the New Issuer.

The Cash Option

15. Scheme Creditors may elect to have an opportunity to receive cash in lieu of part or all of their New Notes Entitlement (the "Cash Option"). Payments made to Noteholders who participate in the Cash Option will be funded from the proceeds of the sale by the Group of the shares in one of its subsidiaries (Port Akdeniz-Antalya) in Turkey to an unaffiliated third party (the "Disposition"). The Disposition was completed on 25 January 2021. The Port Akdeniz-Antalya subsidiary was also a guarantor of the Existing Notes but was released as such on 26 January 2021, following the Disposition.

16. The maximum amount of consideration available for distribution under the Cash Option (the "Cash Option Consideration") will be US$85.0 million, less: (a) accrued and unpaid interest, and (b) additional amounts, if any, owing on the aggregate principal amount of the Existing Notes represented by New Notes Entitlements that have been validly tendered and accepted in the Cash Option.

17. There will be a modified reverse Dutch auction procedure to determine which of the New Notes Entitlements that are tendered are accepted for purchase in the Cash Option. In broad terms, the essential features of the modified reverse Dutch auction procedure are as follows:

    i) Noteholders will be able to elect how much of their New Notes Entitlement they wish to tender (in increments of US$1,000) and (if they wish) to specify an offer price in the range of US$800 to US$1,000 per US$1,000 of principal amount of their New Notes Entitlement. Noteholders who do not specify an offer price will be deemed to have specified an offer price of US$800 per US$1,000.

    ii) The New Issuer will identify the Clearing Price, which is the lowest offer price that enables the New Issuer to utilise, as fully as possible, the Cash Option Consideration.

    iii) The New Issuer will accept tenders from Noteholders that have tendered at or below the Clearing Price, in the order of the lowest to highest offer price.

    iv) All Noteholders whose tenders are accepted will be paid out at the same Clearing Price.

18. It is currently envisaged that in order to take advantage of the Cash Option, a Scheme Creditor will need to indicate the amount of their New Notes Entitlement they wish to tender and their offer price by a deadline of 24 March 2021. That is shortly before the currently planned date for the Scheme meeting which is due to be held by remote means on 26 March 2021.

The Consent Fee

19. The Scheme contains provisions under which any Noteholder who delivers a "Scheme Creditor Letter" that (among other things) commits it to vote in favour of the Scheme prior to an "Early Bird Deadline" will be eligible to receive a cash fee which amounts to 1% of the aggregate principal amount of Existing Notes they hold (the "Consent Fee"). The Early Bird Deadline is currently set at 4 March 2021 but is capable of being extended by the Scheme Company.

<u>Timing</u>

20. The Group contends that the Scheme is urgent for the following reasons:

    i) The ultimate parent of the Group (Global Investment Holdings) is required to file its audited financial reports for the year ending 2020 by 10 March 2021, in accordance with the requirements of the Istanbul Stock Exchange (where its shares are listed). The Group considers it is imperative that such reports do not contain any "going concern" qualification. However, if the Scheme is not

sufficiently advanced by 10 March 2021, there is a risk that the reports will be qualified in that way.

ii) The next interest payment in respect of the Existing Notes will fall due on 14 May 2021, and the Group considers it crucial that the refinancing is concluded by that time.

21. The Existing Notes are due to mature in November 2021. If the Group's ability to repay the Existing Notes remains uncertain at that time, the Group considers that its customers and other stakeholders will have little confidence in the financial health of the Group, which in turn would hinder the Group's ability to stabilise its financial position as a whole.

The alternative to the Scheme

22. In the absence of the Scheme, the Group will need to undertake an orderly sale of substantially all of the Original Issuer's subsidiaries and investments. The proceeds of this sale process would be directed to repaying its debts, including to the Scheme Creditors. The Group has commissioned an analysis in the form of a "Comparator Report" from PwC which estimates that such an orderly sale would result in a return to the Scheme Creditors of between 59%-70% of the principal of their holdings of Existing Notes.

The Scheme Company

23. The Scheme Company was incorporated on 31 December 2020 as a wholly owned subsidiary of the Original Issuer. It was incorporated by the Original Issuer solely for the purposes of the Scheme and has no assets or independent operations of its own.

24. Pursuant to section 9.01 of the Existing Indenture,

> "Notwithstanding Section 9.02 of this Indenture, the Issuer, the Guarantor(s) and the Trustee may amend or supplement this Indenture, the Guarantee(s) or the Notes without the consent of any Holder of a Note:
>
> …
>
> (6) to add any Guarantee with respect to the Notes or to release any Guarantee with respect to the Notes in accordance with the terms of this Indenture;
>
> (7) to allow any Guarantor to execute a supplemental indenture and/or a Guarantee with respect to the Notes; or…"

25. In reliance on such provision, on 18 January 2021, pursuant to the execution of a supplemental Indenture, the Scheme Company became a guarantor of the Existing Notes (the "Supplemental Indenture"). The Supplemental Indenture is governed by New York law and the parties to it agreed to submit to the jurisdiction of the courts of New York. The Supplemental Indenture relevantly provides that:

> "Section 2. Party to Indenture. The Additional Guarantor, by its execution of this Supplemental Indenture, thereby is and becomes a Guarantor under the Indenture and is bound by the terms of the Indenture applicable to Guarantors (as defined in the Indenture).
>
> Section 3. Guarantee. The Additional Guarantor hereby provides an unconditional Guarantee on the terms and subject to the conditions set forth in a Guarantee and in the Indenture including but not limited to Article 10 thereof."

26. In addition, on the same date the Scheme Company and the Original Issuer entered into a deed of contribution, pursuant to which the Scheme Company effectively assumed liability as a primary obligor in respect of the Existing Notes ("the Deed of Contribution"). The Deed of Contribution is governed by English law and is subject to the exclusive jurisdiction of the English courts. The Deed of Contribution relevantly provides that:

> "Right of Contribution
>
> If the [Original] Issuer makes payment in respect of any obligation of the [Original] Issuer under the terms of the Indenture, then the Company irrevocably and unconditionally agrees to pay to the [Original] Issuer by way of contribution an amount that is equal to the Company's share of the amount of such obligation that has been paid by the [Original] Issuer (calculated on the basis that the relevant obligation will be split in equal proportions between the Company and the [Original] Issuer on a joint and several basis as primary obligors), such payment to be made within five (5) Business Days of written demand by the [Original] Issuer to such account as the [Original] Issuer advises to the Company in writing…"

27. It is accepted that the formation of the Scheme Company and the execution of the Supplemental Indenture and the Deed of Contribution, by which it became liable in respect of the Existing Notes, were steps taken purely for the purpose of establishing a jurisdictional link with England in order to utilise Part 26. The aim is that the Scheme should provide for the compromise of the rights newly (and unilaterally) conferred on Scheme Creditors by the Scheme Company, and in order to render that compromise fully effective, it should also provide for the execution of documents compromising the rights of Scheme Creditors against the Original Issuer and Ege Liman (as co-obligors).

Engagement with the Ad Hoc Group of Noteholders

28. Hogan Lovells International LLP (the "Legal Adviser"), the law firm advising an informal ("ad hoc") group of Noteholders who together hold approximately 47% of the Existing Notes (the "AHG"), contacted the solicitors to the Group in October 2020. At that stage the Group did not engage in discussions with the AHG because it was considering a number of options in relation to the Existing Notes and was concentrating on concluding the Disposition.

29. The Legal Adviser wrote again to the Group on 1 December 2020 indicating that the AHG wished to engage in discussions with the Group regarding the Disposition and the maturity of the Existing Notes.

30. The Group replied on 21 December 2020 indicating a willingness to engage with the AHG and to cover the costs of the Legal Adviser, following which a non-disclosure agreement was entered into on 29 December 2020 by the Legal Adviser to enable it to receive, on a confidential basis, a copy of the term sheet that the Group proposed to put to Noteholders. Proposals were made for a further non-disclosure agreement and protocol that would have allowed the members of the AHG to consider, and if possible agree, the proposed term sheet whilst still trading the Existing Notes, but such arrangements were not finalised before the Group published its proposed term sheet in early January this year.

Engagement with Scheme Creditors

31. On 7 January 2021 the Original Issuer published on the London Stock Exchange RNS, where GPH is listed, a notice announcing the proposed refinancing, together with a term sheet and a presentation to Noteholders outlining the principal features of the Scheme. A similar announcement was made on 8 January 2021 on the Irish Stock Exchange and through the Clearing Systems.

32. From 11 January 2021, the Original Issuer held a series of one-to-one conference calls with certain Noteholders, during which it responded to questions concerning the proposed refinancing. These culminated in an open conference call on 14 January 2021 which was made available to all Noteholders.

33. In addition, the Group engaged with a sub-group of the AHG, which as a result of non-disclosure agreements entered into on 29 January 2021, was able to receive, via the Legal Adviser and the Financial Adviser (as defined below), certain confidential information relating to the Group. The AHG then provided its comments on the Scheme proposals and made a counterproposal via the Legal Adviser on 4 February 2021.

Payment of Advisers' Fees

34. In connection with, but other than pursuant to the terms of the Scheme, the Scheme Company has agreed or is intending to agree to pay two categories of advisers' fees (the "Advisers' Fees") directly to the advisers concerned.

35. The first set of Advisers' Fees are the professional fees of the Legal Adviser to the AHG. The payment of the Legal Adviser's fees is not conditional on the approval of the Scheme.

36. The second set of Advisers' Fees are fees which are proposed to be paid to the financial adviser to the AHG, DC Advisory (the "Financial Adviser"). The details of such proposals were distinctly opaque in the original evidence and draft Explanatory Statement. All that was said was,

> "The Scheme Company has also agreed to pay the financial advisory fees of a smaller group of noteholders which is

> structured such that a monthly fee will be payable or, if certain conditions are met, a success [fee] will be paid in part in lieu of the monthly fee."

37. After I had queried the position at the first hearing, the Scheme Company produced further evidence and a revised draft of the explanatory statement giving some more information.

38. The evidence was to the effect that a sub-group of the AHG holding about 38% of the Existing Notes had informed the Group that their support for the Scheme was conditional upon (i) their being able to engage a financial advisory firm specialising in restructuring at the expense of the Group, and (ii) such financial advisory firm "being allowed to carry out additional due diligence on the Group" and to assess the structural features of the New Notes.

39. Although no agreement had been reached with the Financial Adviser, the proposal was that the Group should pay the Financial Adviser a fee comprising two elements. The first element would be a monthly fee of US$100,000, payable in arrears from 20 January 2021. The second element was that if the relevant members of the AHG voted in favour, and the Scheme was sanctioned, the Group would pay the Financial Adviser a success fee of US$1 million ("the Success Fee"), with credit being given for the payment of the first two months of the retainer (i.e. US$200,000).

40. As a result of discussions concerning that evidence between myself and Mr. Smith QC at the second hearing, further evidence was filed that indicated that the proposal was not that the Financial Adviser would conduct "due diligence" on the Group in the sense in which that expression is ordinarily understood, namely being allowed direct access by the Group to its unpublished financial information and records. Instead, the role of the Financial Adviser is intended to be to assist the AHG in negotiations with the Group which are designed to improve the terms of the offer to all Noteholders. The Financial Adviser is intended to be able to make such enquiries of the Group as it might think appropriate to that end.

41. It was also clarified that to promote equality between Noteholders, (i) all of the members of the AHG (rather than just a sub-group) would be advised by the Financial Adviser; (ii) the Group would have no objection to any other Noteholders joining the AHG if they wished to do so, (iii) although it would only be the members of the AHG who would receive the <u>advice</u> provided by the Financial Advisor, if any additional financial or other <u>information</u> was provided by the Group, it would be made available to all Noteholders, and (iv) any improvements in the Group's proposal arising from discussions between the AHG and their advisers would be offered to, and would inure to the benefit of, all Noteholders.

42. The further evidence also indicated that all members of the AHG were aware of the proposal that the Financial Adviser would be remunerated on a basis that included the potential payment of the Success Fee, and were content to receive advice from the Financial Adviser on that basis.

Notice of the Convening Hearing

43. The Practice Statement (Companies: Schemes of Arrangement under Part 26 and Part 26A of the Companies Act 2006) dated 26 June 2020 [2020] BCC 691 (the "Practice Statement") sets out the issues that can be considered at a convening hearing and then continues,

> "7. Where an application is made to convene a meeting or meetings in respect of a scheme which gives rise to any of the issues identified in paragraph 6 above, unless there are good reasons for not doing so, the applicant should, prior to the convening hearing, take all steps reasonably open to it to notify any person affected by the scheme of the following matters:
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> a. that the scheme is being promoted,
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> b. the purpose which the scheme is designed to achieve and its effect,
>
> c. the meetings of creditors and/or members which the applicant considers will be required and their composition,
>
> d. the other matters that are to be addressed at the convening hearing, including the issues identified in paragraph 6 above,
>
> e. the date and place fixed for the convening hearing,
>
> f. that such persons are entitled to attend the convening and sanction hearings, and
>
> g. how such persons may make further enquiries about the scheme.
>
> It is the responsibility of the applicant to ensure that such notification is given in a concise form and is communicated to all persons affected by the scheme in the manner which is most appropriate to the circumstances of the case.
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> 8. Save for the circumstance in which there are good reasons for not giving the notification identified in paragraph 7 above, it should be given to persons affected by the scheme in sufficient time to enable them to consider what is proposed, to take appropriate advice and, if so advised, to attend the convening hearing. What is adequate notice will depend on all the circumstances. The evidence at the convening hearing should explain the steps which have been taken to give the notification and what, if any, response the applicant has had to the notification…
>
> …

> 10. While members and/or creditors will still be able to appear and raise objections based on an issue identified in paragraph 6 above at the sanction hearing, the court will expect them to show good reason why they did not raise the issue at an earlier stage."

44. In Re Indah Kiat International Finance Co BV [2016] EWHC 246 (Ch), [2016] BCC 418 at paragraphs [28]-[30], I explained the relevant principles as regards notice of a convening hearing under the old Practice Statement as follows:

> "The primary purpose of following the Practice Statement is to enable scheme creditors to have an effective opportunity to appear at the convening hearing at which the constitution of the classes is determined ... These purposes can self-evidently only be served if the notice of the convening hearing to creditors is adequate.
>
> What is adequate notice will depend on all the circumstances. The more complex or novel the scheme, and the less consultation that has taken place with creditors as a whole before the scheme is launched, the longer the notice should generally be. That said, if the scheme is being put forward as a matter of great urgency when the company is in real financial distress, there may not be time to give very much notice to creditors if a default is to be avoided. In such a case the scheme company may well be able to persuade the court that there is good reason to shorten the period of notice or depart altogether from the Practice Statement; and in such a case, any opposing creditor would have a good reason why he had been unable to raise a class or jurisdictional question prior to the sanction hearing."

45. Zacaroli J also explained in Re ED&F Man Treasury Management plc [2020] EWHC 2290 (Ch) at paragraph [8] that:

> "…There is no hard and fast rule as to the appropriate notice period, but in reaching a view in a particular case, the following factors are relevant: the urgency of the case as a result of the financial condition of the Company, not as a result of the delay in the Company getting to this point; the extent to which there has been prior engagement with creditors; the likely degree of sophistication of the creditors; and the complexity of the scheme and of the issues raised for consideration at the convening hearing."

46. In the instant case, a letter pursuant to the Practice Statement was distributed to Scheme Creditors via the Clearing Systems on Tuesday 19 January 2021 (the "PSL"). The PSL provided details of the convening hearing and identified a website on which further information about the Scheme would be distributed.

47. Although the PSL was placed into the Clearing Systems 16 days prior to the convening hearing, the Scheme Company's evidence was that due to the need to pass through intermediaries, it could typically take on average between 1-5 business days for information provided to the Clearing Systems to reach the ultimate Noteholders.

48. As the authorities make clear, whether there has been adequate notice of a convening hearing to Scheme Creditors is an intensely fact-sensitive matter. At the first hearing on 4 February 2021 I indicated that I was not satisfied that the notice given in this case was sufficient. I reached that conclusion for the following reasons.

    i) While I accept there is some urgency on the part of the Scheme Company given the maturity date of the Existing Notes and the next interest payment date in mid-May, I do not consider this is particularly pronounced given there is still a considerable period of time before those events occur.

    ii) Although the Scheme Company notified Scheme Creditors of the intention to propose a scheme in early January, there was no earlier engagement or consultation process with the general body of creditors, and there is the clear possibility that many Scheme Creditors only became aware of the proposed Scheme when they received the PSL.

    iii) Although the PSL was sent 16 days prior to the convening hearing, regard needs to be had to the delays in the Clearing Systems to which I have referred, which may have meant that a Scheme Creditor could have had only about 8 days (or 6 business days) from receipt of the PSL to the convening hearing.

    iv) There was no information as to the nature or location of the body of Scheme Creditors which might suggest that they were accustomed or prepared to deal swiftly with proceedings or other matters relating to the Existing Notes in the English courts. The business of the Group is international, the Original Issuer and Ege Liman are Turkish companies and the Existing Notes are governed by New York law and have a New York jurisdiction clause.

    v) The Scheme and associated proposals raises a number of issues that are not entirely straightforward which required consideration at the convening hearing.

    Further, the issues raised by the proposals for payment of the Advisers' Fees to the advisers to some, but not all, of the Scheme Creditors, together with the proposals for access to additional information concerning the Group to which I refer below, were not mentioned in the PSL.

49. In all the circumstances, therefore, I was not satisfied that Scheme Creditors had been given sufficient time to enable them to consider what was proposed, to take appropriate advice and, if so advised, to attend and participate effectively in the convening hearing.

50. However, I did not consider that these were matters which required me to adjourn the convening hearing. Mr. Smith QC submitted that if I was not satisfied that adequate notice had been given, I could:

i) give the Scheme Creditors liberty to apply to vary or set aside the convening order (which was the approach I took in Re ColourOz Investment 2 LLC [2020] EWHC 1864 (Ch), [2020] BCC 926); or

ii) direct that the Scheme Creditors should not be subject to the restrictions identified in paragraph 10 of the Practice Statement and would, therefore, be entitled to raise any relevant issues at the sanction hearing (which was the approach adopted in Re Swissport Fuelling Ltd [2020] EWHC 1499 (Ch) and Re HEMA [2020] EWHC 2219 (Ch) among others).

51. I indicated at the first hearing on 4 February 2021 that in the interests of efficiency I would adopt the second of these two courses, and Mr. Smith QC confirmed that this was also the Scheme Company's preference. Having expressed that view, I did not consider that it would be appropriate to change my approach notwithstanding that I subsequently adjourned the convening hearing for further evidence on the issue of the Advisers' Fees and the role of the Financial Adviser.

Approach at the Convening Hearing

52. The central task for the Court at the convening hearing is to determine whether to order a meeting or more than one meeting of different classes of creditors, and to give directions in that regard. The court can also consider matters going to the *existence* of the court's jurisdiction over the scheme company and its creditors. It will not, however, consider the merits of the scheme or any of the factors relevant to the *exercise* of the court's discretionary power to sanction the scheme, save perhaps to indicate whether it sees any obvious "roadblocks" in that regard. As I indicated in Re ColourOz 2 Investment LLC [2020] EWHC 1864 (Ch), [2020] BCC 926 at paragraphs [52]-[53] and [57],

> "52. [The] formulation of the New Practice Statement tracks the jurisprudence which I explored in Re Noble Group Limited (convening) [2018] EWHC 2911 (Ch), [2019] 2 BCLC 505 at [60]-[76]. The authorities make clear that at the convening hearing the court will consider class questions and other issues that go to the existence of the court's jurisdiction to sanction the scheme, but that the court will "emphatically not" consider the merits or fairness of the proposed scheme, and will also generally not consider other factors which properly form part of the discretionary question of whether the court should ultimately exercise its jurisdiction to sanction the scheme.
>
> 53. In addition, paragraph 6d of the New Practice Statement requires the company to draw the attention of the court at the convening hearing any issues not going to merits or fairness, but which might lead the court to refuse to sanction the scheme. The purpose of that requirement is give the court the opportunity, if appropriate, to indicate whether or not it sees an obvious "roadblock" which would prevent the scheme from being sanctioned in due course.
>
> …

> 57. In the case of a foreign company, the questions (i) whether there is a "sufficient connection" with England, and (ii) whether the scheme will have international effectiveness do not go to the existence of jurisdiction: they go to the exercise of the court's discretion whether or not to sanction the scheme, and should therefore not be determined at the convening hearing."
>
> (emphasis in original)

Jurisdiction

53. There are three matters which I need to address under this heading:

    i) whether the Scheme Company is a company for the purposes of Part 26;

    ii) whether there is a "a compromise or arrangement …between a company and …its creditors, or any class of them" within Part 26; and

    iii) whether it is permissible to vary rights that Scheme Creditors have against persons other than the Scheme Company.

54. Prior to the expiry of the transitional period for the departure of the UK from the EU, the practice of the Court was to consider whether it had jurisdiction over scheme creditors pursuant to the Recast Jurisdiction and Judgments Regulation (EU 2012/1215). However, that Regulation does not apply to these proceedings which were issued after 31 December 2020: see the Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019, regulation 92. Accordingly I do not need to address that question.

"Company liable to be wound up"

55. Part 26 applies to a "company". For these purposes, "company" means a company liable to be wound up under the Insolvency Act 1986: see section 859(2)(b) CA 2006.

56. The Scheme Company is incorporated in England. Accordingly, I am satisfied that the Scheme Company is a company for the purposes of Part 26.

"Compromise or arrangement between a company and its creditors"

57. The issue under this heading is not so much whether the terms of the Scheme under which the Existing Notes would be exchanged for an entitlement to New Notes would amount to a "compromise or arrangement" within Part 26. There is plainly sufficient "give and take" in such a proposal. The real issue is whether it is a compromise and arrangement between the Scheme Company and its creditors. That depends upon whether the Scheme Company has become indebted to the Noteholders by reason of its entry into the Supplemental Indenture. That is a question of New York law as the governing law of the Existing Notes. I do not currently have any expert evidence of New York law, but have been told that such evidence will be available at sanction. I am prepared to proceed on that basis, to assume that such evidence will be forthcoming, and to determine this issue at the sanction hearing.

Variation of rights against third parties

58. The Scheme provides for the release of Scheme Creditors' rights against the Original Issuer and Ege Liman. It is settled law that a scheme under Part 26 may include a mechanism providing for the release or variation of creditors' rights against third parties such as guarantors. That appears from the decision of the Court of Appeal in Re Lehman Brothers International (Europe) (in administration) (No 2) [2009] EWCA Civ 1161, [2010] Bus LR 489.

59. The issue in that case was whether a scheme could compromise the proprietary rights of owners of assets held on trust by the scheme company. The Court of Appeal held that this was outside the scope of a Part 26 scheme notwithstanding that such owners were also creditors (or contingent creditors) of the scheme company by reason of having potential monetary claims for non-delivery or delays in delivery of their assets. In the course of the judgments, consideration was given to the extent to which a scheme could provide for a release of creditors' rights ancillary to the scheme debt. In that regard, Patten LJ stated, at paragraph [65],

> "It seems to me that an arrangement between a company and its creditors must mean an arrangement which deals with their rights inter se as debtor and creditor. That formulation does not prevent the inclusion in the scheme of the release of contractual rights or rights of action against related third parties necessary in order to give effect to the arrangement proposed for the disposition of the debts and liabilities of the company to its own creditors. But it does exclude from the jurisdiction rights of creditors over their own property which is held by the company for their benefit as opposed to their rights in the company's own property held by them merely as security. "

60. In Re ColourOz Investment 2 LLC [2020] EWHC 1864 (Ch), [2020] BCC 926 at paragraph [72] I also gave an explanation of the way in which schemes have conventionally been used to compromise the liabilities of other companies to scheme creditors:

> "Such a feature is commonly to be found in schemes proposed by a borrower where other group companies have granted guarantees to scheme creditors of the scheme company's debt. Thus, if X is the borrower and Y is the guarantor, then X may propose a scheme to compromise the creditors' claims against X (as borrower) but which also contains a term under which creditors are required to give up their claims against Y (as guarantor). Otherwise, the creditors would be entitled to sue Y under the guarantee, and Y would be entitled to claim the entire amount back from X in accordance with the guarantor's right of indemnity. This "ricochet claim" would defeat the purpose of the scheme, since X would ultimately remain liable for the very amount that was purportedly compromised by the scheme."

61. As indicated in paragraph 27 above, in the instant case, the Scheme Company submits that it will be commercially necessary to give effect to the compromise of the rights of

Scheme Creditors against the Scheme Company also to compromise Scheme Creditors' rights against the Original Issuer and Ege Liman. It contends that otherwise those companies would be able to seek an indemnity from the Scheme Company under the Deed of Contribution, thereby defeating the purpose of the Scheme in so far as it relates to the compromise of the Scheme Company's liabilities to the Scheme Creditors.

62. That submission has to be considered against the fact that before the Scheme Company entered into the Supplemental Indenture and the Deed of Contribution it had no liabilities to Scheme Creditors that needed to be compromised, and no contingent obligation to indemnify the Original Issuer or Ege Liman. As I have indicated, the execution of the Supplemental Indenture and the Deed of Contribution had no independent commercial purpose so far as the Scheme Company was concerned. The only purpose of those arrangements was for the Group to achieve a particular legal result, namely that there would be an English company with liabilities to the Existing Noteholders and against which the Original Issuer and Ege Liman would have rights of contribution. By that means, the Group has sought to create a new scheme company amenable to the jurisdiction of the English court and with newly assumed liabilities to the existing companies, the compromise of whose liabilities under the Existing Notes is the real commercial purpose of the Scheme.

63. There are, however, other recent cases in which a similar technique has been used in Part 26 schemes which have been sanctioned by the court.

64. For example, in Re AI Scheme Ltd [2015] EWHC 1233 (Ch) (convening judgment) and [2015] EWHC 2038 (Ch) (sanction hearing) the structure entailed the establishment of a new English scheme company (A) to propose a scheme to compromise the claims for mis-selling of financial products of a large number of consumers against a different English company (Affinion) and its business partners. Affinion and its business partners undertook to provide the scheme company with the necessary monies to finance the compensation scheme, and the scheme company entered into a so-called "Co-obligor deed poll" by which it purported to assume primary liability to the scheme creditors for any claims they might have against Affinion or the business partners

65. At paragraph [18] of the convening judgment, Norris J indicated that he was satisfied that insofar as the scheme of arrangement included releases by scheme creditors of direct claims against Affinion or the business partners, those features were a necessary element of the proposed compensation scheme. At paragraph [20] he also held that the arrangement was with creditors of the scheme company because of the execution of the Co-obligor deed poll.

66. Norris J also dealt at paragraphs [25]-[26] with the possible objection that the scheme was artificial, stating,

> "25. The scheme company has voluntarily assumed liability as co-obligor with Affinion and its original business partners in order that the scheme company shall promote the scheme of arrangement. There is a sound commercial justification for this. Even though Affinion is a solvent company, if it itself were to enter into a scheme of arrangement, that may trigger "an event

> of default" under its various United States financing documents, hence the need for a separate scheme company. The existence of a separate scheme company also facilitates the garnering-in of potential claims against all of the exposed defendants, Affinion and its principal business partners. The existence of a scheme also facilitates the settlement of the other claims between Affinion and the principal business partners under warranties and indemnities to which I earlier alluded.
>
> 26. Mr Trower QC submitted that the fact that this is a deliberately created scheme company does not affect the jurisdiction, though it may affect the exercise of discretion at the sanction stage. I agree with that submission. The scheme company is, as I have said, a "company" proposing an "arrangement" with its creditors within section 895, and there is no reason to read into that section some limitation to exclude entities such as the scheme company. The structure has not been created as a matter of mere artifice; it has a solid grounding in commercial necessity. I therefore hold that the proposed scheme is one within the section, in relation to which I can order convening meetings."

67. Likewise, in Re Swissport Fuelling Ltd (No.2) [2020] EWHC 3413 (Ch), Trower J sanctioned a scheme that involved an English scheme company entering into a deed of contribution under which it assumed liability as a primary obligor for the liabilities of other group companies in order that the liabilities of those co-obligors could be compromised. The scheme was attacked by a dissentient creditor on a wide variety of bases, albeit that the opposition was withdrawn before the sanction hearing. Trower J nonetheless dealt with the arguments which had been raised. These included an attack on the artificiality of the mechanism by which the scheme company, which was only a relatively insignificant guarantor of the debts of other group companies which were sought to be compromised, had nonetheless entered into a contribution deed under which it undertook a liability in the other direction to contribute to the principal borrower and issuer of the scheme debt if they were called upon to pay.

68. At paragraphs [66]-[73] of his judgment, Trower J noted that courts in other jurisdictions such as Singapore and Ireland have held that the existence of such a "ricochet claim" is unnecessary to enable a scheme to be sanctioned, but that it appeared to be necessary according to the current state of English law as explained by Patten LJ in Lehman Brothers. Trower J referred to the AI Scheme case as an example of the technique of generating a ricochet claim for the purpose of a scheme, and concluded that there was nothing "intrinsically objectionable" about using such a technique "so long as it is done with a view to achieving the best possible outcome for creditors as a whole".

69. That reference to achieving "the best possible outcome for creditors" was a reference to a dictum in one of the other cases in which the technique has been deployed, namely Re Codere Finance (UK) Ltd [2015] EWHC 3778 (Ch). That was a case in which, at the instigation of an ad hoc committee of scheme creditors, a newly formed English company had been acquired by the group whose debts were sought to be compromised, and in order to establish the jurisdiction of the English court to sanction

a scheme, it had acceded as a co-obligor to the relevant notes with the agreement of the group and 97% of the noteholders. In the event, the scheme was approved by 98.78% of the total scheme indebtedness, with not a single noteholder voting against. In sanctioning the scheme, Newey J (as he then was) referred to the AI Scheme and observed,

> "18. In a sense, of course, what was done in the AI Scheme case, and what is sought to be achieved in the present case, is forum shopping. Debtors are seeking to give the English court jurisdiction so that they can take advantage of the scheme jurisdiction available here and which is not widely available, if available at all, elsewhere. Plainly forum shopping can be undesirable. That can potentially be so, for example, where a debtor seeks to move his COMI with a view to taking advantage of a more favourable bankruptcy regime and so escaping his debts. In cases such as the present, however, what is being attempted is to achieve a position where resort can be had to the law of a particular jurisdiction, not in order to evade debts but rather with a view to achieving the best possible outcome for creditors. If in those circumstances it is appropriate to speak of forum shopping at all, it must be on the basis that there can sometimes be good forum shopping.
>
> 19. In the particular circumstances of this case, I cannot see that the fact that the company has been acquired only recently, and with a view to invoking the scheme jurisdiction, should cause me, in the exercise of my discretion, to decline to sanction the scheme. For reasons I have already touched on, the scheme appears to be very much in the interests of the group's creditors. I bear in mind in that context the fact that it was devised following close consultation with creditors; the overwhelming level of support that it has enjoyed from creditors; the fact that no creditor has opposed the scheme; the lack of alternatives available to the group in other jurisdictions; and the fact that, on the evidence, my declining to sanction the scheme could cause the group and its creditors a loss of value of around €600 million, by any standards a large sum."

70. To that series of cases can now be added the decision of Zacaroli J in re Gategroup Guarantee Limited [2021] EWHC 304 (Ch), a decision in relation to a restructuring plan under Part 26A CA 2006 that was handed down shortly after I made the order convening the Scheme meeting in the instant case. The Gategroup case concerned what was acknowledged to be an artificial co-obligor structure using a recently incorporated English subsidiary in order to engage the jurisdiction of the English court in relation to a plan to restructure the obligations of a Luxembourg incorporated finance company.

71. In a detailed judgment addressing a number of other significant issues, Zacaroli J also held, at paragraphs [141]-[176], that the artificiality of the structure was no jurisdictional impediment to convening meetings of creditors under Part 26A, albeit

that it would be very relevant to the exercise of the court's discretion at sanction. Zacaroli J stated, at [171]-[174],

> "171. In the context of a plan under Part 26A, the artificiality of the structure is undoubtedly an issue of direct relevance to the discretion to sanction the plan. It is possible to imagine uses of the co-obligor structure employed in this case that would be wholly objectionable. That might be the case where it unfairly overrode legitimate interests of creditors pursuant to the contracts governing their relationship with the primary obligor companies or under the system of law, including relevant principles of insolvency law, which applies to the relationship between them.
>
> 172. Similarly, there may be cases where the attempt to compromise plan creditors' rights against third parties was bound to fail because that compromise would not be recognised in any of the relevant foreign jurisdictions where it mattered.
>
> 173. The circumstances considered in the above two paragraphs would be principally relevant at the sanction hearing, although it is possible that in a given case the obstacles were so great and so clear that they would amount to a blot on the plan so that the court would refuse to convene meetings of creditors….
>
> 174. On the other hand, it is possible to envisage a case where the artificial structure is the only solution to enable a restructuring to be effected, all other possible alternatives having been explored and rejected for one or other reason of law or practicability; where the alternative is a value-destructive liquidation; and where the terms of the restructuring demonstrably benefit the affected creditors. In such a case, there would be a powerful argument that the artificiality of the structure should not prevent the company and its creditors being able to take advantage of the English scheme or plan jurisdiction."

72. The cases to which I have referred above show that the English court has been prepared (at least at first instance and without full contrary argument) to hold that there is jurisdiction to sanction a scheme where a (newly formed) English company has voluntarily assumed a liability to creditors of a different company and entered into a co-obligor or contribution deed in favour of that other company.

73. In doing so, the courts appear to have treated Patten LJ's comment in paragraph [65] of his judgment in Lehman Brothers that Part 26 can include releases of third parties that are "necessary in order to give effect to the arrangement proposed for the disposition of the debts and liabilities of the company to its own creditors", to be satisfied simply by the existence, as a matter of law, of a contingent liability on the part of the scheme company that has been voluntarily undertaken to the third party. Questions of the degree of artificiality of the structure, the relative lack of benefit to

the scheme company, and the commercial justification for the scheme from the perspective of the third party have been treated as matters going to the exercise of the court's discretion, together with questions such as whether the scheme is an example of "good forum shopping", whether there is a high level of support for the scheme from scheme creditors, and whether the scheme is likely to be recognised in other jurisdictions.

74. At this convening stage, I do not consider that I need to, or should, express my own view on whether that is a correct approach to the jurisdictional question of whether third party releases can be included in a scheme in a case such as the present. As I have indicated, I have no expert evidence of the efficacy of the Supplemental Indenture or the Deed of Contribution under New York law which will be the essential foundation for the Scheme Company's arguments. Moreover, the notice to Scheme Creditors of the convening hearing was short, this issue was not expressly flagged in the PSL, and it is at least possible that Scheme Creditors may wish to address contrary argument on the point.

75. Instead, I consider that it will suffice to say that in light of the approach taken in the other cases to which I have referred, there is no obvious "roadblock" to the argument of the Scheme Company succeeding. The jurisdictional question can be left to be determined at sanction together with the question of whether it is appropriate to exercise the court's discretion to sanction the Scheme.

Class Composition

Principles

76. It is well-established that a class of creditors "must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest": see Sovereign Life Assurance v Dodd [1892] 2 QB 573, 583.

77. In Re UDL Holdings Ltd [2002] 1 HKC 172 at 184-5 Lord Millett NPJ emphasised that the test is to be applied by reference to the rights to be varied or released and those which are to be granted under the scheme:

> "The [class] test is based on similarity or dissimilarity of legal rights against the company, not on similarity or dissimilarity of interests not derived from such legal rights. The fact that individuals may hold divergent views based on their own private interests not derived from their legal rights against the company is not a ground for calling separate meetings … The question is whether the rights which are to be released or varied under the scheme or the new rights which the scheme gives in their place are so different that the scheme must be treated as a compromise or arrangement with more than one class."

78. In the end, the question of whether the rights of creditors are "so dissimilar as to make it impossible for them to consult together with a view to their common interest" is a matter of judgment for the court on the facts of each case, based upon an

identification of the most important commercial or financial issues which creditors have to weigh up when deciding whether to vote for or against the scheme. The rights of those included in a single class can be subject to differences which are material, certainly more than *de minimis*, without leading to separate classes. Practical considerations, both of the extent of any differences in rights, and of attempting to define separate classes, also play a role. See e.g. re Telewest Communications plc (No.1) [2004] BCC 342 at paragraphs [19]-[22] and [37].

79. In order to carry out this analysis of the extent and importance (or otherwise) of differences between creditors of their current rights which are to be released or varied, and the rights which are to be given in their place under the scheme, it is generally necessary to identify a comparator to the scheme – i.e. the position that would apply if the scheme were not to proceed. In the instant case, for the reasons that I have identified above, the comparator is not an immediate insolvency, but an expedited sale process of the business and assets of the Group, the possible outcome of which is considered in the Comparator Report from PwC.

80. In this case, the Scheme Company proposed that there should be a single class of the Scheme Creditors. That is obviously the correct starting point for the class analysis as all Noteholders have the same rights against the Scheme Company and would fare equally in an expedited sale of the business and assets of the Group.

81. However, Mr. Smith QC very properly directed me to what might be seen as potentially different rights that are proposed to given to Scheme Creditors under the Scheme in relation to the Consent Fee and the Cash Option. He also addressed the question of whether payment of the Advisers' Fees in connection with the Scheme fractured the class. In the course of that debate a further potential issue arose in relation to whether the class might be fractured not on account of any difference in rights, but by a difference in access to information among the Scheme Creditors. I shall deal with those issues in turn.

Consent Fee

82. In recent times it has become increasingly common for a scheme company to offer a "lock-up" or "consent" fee to scheme creditors in return for an agreement, usually by way of a separate contract, to commit at an early stage to support and vote in favour of the scheme. There can be no doubt that the Consent Fee is potentially relevant to the class question, because payment of the Consent Fee is a right conferred on Noteholders by the terms of the Scheme itself, albeit subject to satisfaction of the condition that they should have committed to vote in favour of the Scheme by the Early Bird Deadline.

83. Mr. Smith QC submitted, however, that because the opportunity to commit to support the Scheme by the Early Bird Deadline was available to all Noteholders, there was no difference in rights between Scheme Creditors which was capable of fracturing the class. Although I agree that it is important that all Noteholders should have a realistic opportunity to qualify for the Consent Fee, I do not accept that this provides a complete answer to the class question. At the time at which Noteholders come to vote at the scheme meetings - which on the face of it is the relevant time for application of the class test of whether creditors can consult together with a view to their common interest - there will be two different groups of Noteholders who stand to receive

different rights under the Scheme. The first group will be those who have consented prior to the Early Bird Deadline, who will be voting on a Scheme under which they will receive rights to all the benefits the Scheme offers, including the right to payment of the Consent Fee. The second group who did not respond by the Early Bird Deadline will be voting on a Scheme under which they have no entitlement to the Consent Fee.

84. It was, I think, for reasons such as these that Hildyard J expressed doubt in Re Primacom Holding GmbH [2013] BCC 201 at [57] that the mere fact that all creditors had the opportunity to qualify for a consent fee was not determinative of the class question. Moreover, in all of the cases in which the issue of lock-up fees or consent fees has received any detailed consideration, the class question has been resolved by the court asking both whether the opportunity to qualify for the lock-up or consent fee was made available to all creditors, and then going on to ask whether the lock-up or consent fee is sufficiently large that it might have materially influenced the decision of a reasonable creditor as to whether to support the scheme: see e.g. Re DX Holdings Ltd [2010] EWHC 1513 (Ch) at [7]; re JSC Commercial Co Privatbank [2015] EWHC 3299 (Ch) at [26]; and KCA Deutag UK Finance plc [2020] EWHC 2779 (Ch) at [35]-[36].

85. I summarised the position that I consider has been reached on the authorities in Re ColourOz Investment 2 LLC [2020] EWHC 1864 (Ch), [2020] BCC 926 at [98]:

> "The full implications of the practice of paying consent fees in this way have never been considered at an appellate level. However, a number of authorities at first instance indicate that in principle a consent fee of this nature will not fracture a class provided that it is made available to all scheme creditors, and provided also that it does not induce creditors to commit to vote in favour of a scheme which they might otherwise reject."
>
> (emphasis added)

86. As to how a court might assess the materiality of a given consent fee, I observed in Re Noble Group [2018] EWHC 2911 (Ch), [2019] BCC 349 at [149]-[151] that:

> "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. …
>
> 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."

The reference to the returns that creditors would be predicted to make in a liquidation was to the alternative scenario in the absence of the scheme in that case. In the instant case, as explained above, the relevant alternative is not a liquidation but an orderly sale of the Original Issuer's subsidiaries and investments, the proceeds of which would be directed to repaying its debts.

87. Applying this approach, the quantum of the Consent Fee (1% of the principal value of the Existing Notes) in this case must be assessed in light of the predicted returns to all creditors under the Scheme and in the absence of the Scheme. In the absence of the Scheme, following an orderly sale of assets, PwC estimates that the Scheme Creditors would recover between 59%-70% of the principal on the Existing Notes. Under the Scheme, subject to the Cash Option, the Scheme Creditors are expected to recover 100% of the principal on the Existing Notes, albeit at a later date.

88. On that basis, given the relatively high levels of return under both scenarios but also the significant differential between the two estimated outcomes, I do not consider that a Noteholder who would otherwise have wished to vote against the Scheme to see some money sooner rather than later, would nevertheless be likely to be induced to vote in favour of the Scheme by the offer of a mere 1% now.

89. Accordingly, on the facts, I do not consider that the Consent Fee requires any sub-division of the single class of Scheme Creditors.

The Cash Option

90. Under the Scheme, all Scheme Creditors have the option to exercise the Cash Option. Although that may lead to Scheme Creditors receiving their consideration for the cancellation of their Existing Notes in different forms, Mr. Smith QC submitted that there was no difference in rights for the purposes of the class question, because all Noteholders will have the same right to exercise the Cash Option, and any difference in outcomes is the result of a commercial decision by individual Noteholders as to whether or not to do so. He also pointed out that all those who are successful in the tender process will have their New Notes Entitlement acquired for the same Clearing Price.

91. That argument would be unassailable if the Cash Option was open to all Noteholders after the Scheme became effective. The potential argument against it is that as the Scheme timetable currently stands, the Cash Option is required to be exercised two days before the Scheme meeting. In much the same way as with the Consent Fee (above), it might be said, therefore, that at the time the Scheme meeting is held there will be two different groups of Noteholders: one group will be voting on a Scheme under which they have the prospect of their New Note Entitlements being acquired for cash, and the other group will be voting on a Scheme without any such possibility.

92. Applying the same approach that I have outlined in relation to the Consent Fee, I would therefore ordinarily look to assess whether that potential difference in rights between these two groups would be sufficiently great that they could not consult

together at the class meeting. That exercise is not at all easy given the complexities of the terms of the reverse Dutch auction process under the Cash Option.

93. However, in addition to the fact that the opportunity to elect for the Cash Option has been made available to all Noteholders at least for some period, there is a more practical reason why I consider that I should not sub-divide the class because of the Cash Option. By its nature, the question of who will potentially be entitled to benefit from the Cash Option will not be known until the Scheme Company has analysed the responses from Noteholders; and the question of who will actually be entitled to benefit, and in what amount, will not be known until the Scheme Company has gone through the exercise of the reverse Dutch auction to identify the Clearing Price and the particular Noteholders who have succeeded in the auction. Given the complexities of the exercise and the manner in which the Existing Notes are held through intermediaries, I do not see how I could define a separate class in a way which was practically workable on the timetable currently proposed for the Scheme meeting.

94. In my judgment, the appropriate course to take is therefore not to divide the Noteholders on the basis of whether or not they elect to participate in the Cash Option, but instead to allow Noteholders to raise any concerns that they might have, either as to class or as to the fairness of the design of the Scheme in this respect, at the sanction hearing. That will have the added advantage that if the point is taken, the court will be able to be informed by the Scheme Company – at least in general terms - of the likely take-up of the Cash Option.

Advisers' Fees

95. The payment by a scheme company of the fees of advisers to "ad hoc groups" of influential creditors in relation to the formulation of the scheme has become a feature of schemes in recent years. In Re Noble Group Ltd (convening) [2018] EWHC 2911 (Ch), [2019] BCC 349 I explained, at [110]-[111],

> "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."

96. On the issue of payment of advisers' fees, referring to the observations of David Richards J in re Telewest Communications plc [2004] BCC 342 at [54] I also stated, at [131]-[132] that:

> "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…
>
> 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…"

97. In Re Lecta Paper UK Limited [2019] EWHC 3615 (Ch) at [18], Zacaroli J likewise considered the payment of disbursements incurred by members of a co-ordinating committee of creditors, stating,

> "…certain fees of the coordinating committee (the members of which have been heavily engaged in negotiating and drafting the documentation for the restructuring) are to be paid by the Company. Since, however, this is limited to reimbursing the members of the committee for the disbursements actually incurred by them, and since they are payable in any event (and not dependent upon sanction of the scheme), this does not fracture the class."

98. As set out above, there are two types of Advisers' Fees proposed to be paid in this case.

99. The Legal Adviser's Fees are to be paid directly to the Legal Adviser. I understand that they are limited to reimbursement of reasonable professional fees actually incurred (or to be incurred) by the AHG, and that they are not conditional on the sanctioning of the Scheme. On that basis and consistent with the authorities to which I have referred, I am satisfied that the Legal Adviser's Fees are not a disguised part of the consideration offered in connection with the Scheme and that they do not fracture the single class of Noteholders.

100. The proposal to pay the Financial Adviser's Fees is different and somewhat unusual. It was unclear to me whether, and if so, to what extent, the proposal to pay the fee was designed to discharge any liability of the members of the AHG to the Financial Adviser for services rendered since 20 January 2021; the proposed fee contains a significant element (the Success Fee) that would not merely be remuneration for work done, but would be conditional on the Scheme being sanctioned; and it raises the question of whether the Group should be offering what might be a thought to be a significant financial incentive to the Financial Adviser to give positive advice to the AHG in favour of the Scheme.

101. Without further explanation, I also initially was concerned that the Group might be planning to allow (and indeed pay for) what was described as "due diligence" to be carried out by the Financial Adviser for the benefit of certain Noteholders rather than others. The scheme process and the formulation of classes depends on an assumption that all creditors who attend and vote in a class meeting should do so on the basis that the necessary information has been provided to them all in the same explanatory statement. Even if not within the conventional class test based on a comparison of rights, I think it would be highly relevant to the question of whether the court ought to convene a single class meeting on the basis of the proposed explanatory statement if there was also to be a parallel process for provision of additional information to some, but not all, creditors: see the similar concerns I expressed in re Sunbird Business Services Limited [2020] EWHC 2493 (Ch); [2020] Bus LR 2371.

102. In the end, however, I was satisfied in these respects by the further evidence and assurances from the Scheme Company.

103. In particular, it became clear that there is no intention that the Financial Adviser should conduct a private "due diligence" process and the members of the AHG will not simply be receiving the paid assistance of the Financial Adviser to understand and assess the merits of the Scheme for their own benefit. Rather, the intention is that, with the assistance of the Financial Advisor, the AHG will be acting (in the manner that is more normally undertaken by such a group prior to the launch of a scheme rather than afterwards), as a focal point for negotiations with the Group in an effort to improve the terms of the Scheme for the benefit of all Noteholders.

104. I was also reassured by the willingness of the Group (and one assumes the members of the AHG themselves) that other Noteholders should be able to join the AHG (subject no doubt to suitable undertakings being given as to confidentiality and conduct); by the assurance that any improvements in terms that might be achieved by discussions with the Group will be offered equally for the benefit of all Noteholders

under an amended Scheme; and by the assurance that any relevant additional information provided to the members of the AHG as a result of the process involving the Financial Adviser will be made available to all Noteholders by the Scheme Company by way of supplement to the Explanatory Statement.

105. The evidence is less clear as to the basis upon which the Financial Adviser has been acting to date and whether the proposed payment of the Financial Adviser's Fees are designed to relieve the members of the AHG of liabilities (including for the Success Fee) which they would otherwise have. It would appear that the Financial Adviser has been acting on the basis of an informal agreement or understanding with the members of the AHG, but that no final or binding agreement has been reached. In particular, the evidence is that the precise circumstances in which the Success Fee will be payable remain to be finally negotiated and agreed between the Group, the Financial Adviser and the AHG. What I take from that, however, is that the proposal for payment of the Success Fee is not intended to relieve the members of the AHG from any actual liability to pay such a fee to the Financial Adviser contingent upon the Scheme being sanctioned, and it is not designed to provide any element of additional benefit or disguised consideration to the members of the AHG to induce them to vote in favour of the Scheme.

106. The possibility that the Financial Adviser to the AHG will be given a financial incentive by the Group by way of the Success Fee to advise the members of the AHG to vote in favour of the Scheme is an unusual arrangement. In my experience it is certainly not "market standard" as the Scheme Company's evidence sought to suggest. However, I accept Mr. Smith QC's point that since the members of the AHG are fully aware of the proposal and consent to it, it is a matter for them to take into account in their deliberation on the merits of the Scheme, and does not give rise to any class question. The other Noteholders will also be aware of the possibility of payment of such a Success Fee from the Explanatory Statement. They will therefore be able to take that matter into account in deciding what, if any, weight they might choose to place on any support that might be expressed by the members of the AHG in favour of the Scheme (in its current or any amended form).

107. On that basis, I conclude that the proposals for engagement and payment of the Financial Adviser will not involve any sufficiently different treatment of the members of the AHG so as to make it impossible or otherwise inappropriate for them to consult together with the other Noteholders on the merits of the Scheme.

Conclusion on Class Composition

108. I am accordingly satisfied that it is appropriate to convene a meeting with a single class of Scheme Creditors. The Scheme Creditors all have the same existing rights against the Scheme Company as holders of the Existing Notes governed by the same legal instrument (the Existing Indenture); and for the reasons given above I do not consider that the Consent Fee, Cash Option and Advisers' Fees require me to sub-divide the single class.

The Explanatory Statement

109. Paragraph 15 of the Practice Statement requires the Court to consider the adequacy of the Explanatory Statement. As I explained in Re ColourOz Investment 2 LLC [2020] EWHC 1864 (Ch), [2020] BCC 926, [123]:

> "The reference to the court "considering the adequacy" of the explanatory statement is not intended to suggest that the court will generally do anything other than to ascertain that the essential elements which it would expect to see in an explanatory statement are present. If they are not, or if the form of the statement is for some other reason obviously unsuitable, the court may decline to make a meetings order: see e.g. Re Indah Kiat International Finance Co BV [2016] BCC 418. As the New Practice Statement goes on to makes clear, however, what the court will most assuredly not do is to approve or give its imprimatur to the contents or accuracy of the explanatory statement."

110. In this case, I initially had concerns about the paucity of information provided to Scheme Creditors about the proposals to pay Advisers' Fees (and in particular the Financial Adviser's Fees) in the draft Explanatory Statement. I also noted that the Explanatory Statement (and the draft order) did not contain any specific indication as to how voting was to take place at the Scheme meeting that is to be held virtually without attendance in person of any Noteholders due to the coronavirus pandemic.

111. However, as a result of various amendments made over the course of the three hearings, I was satisfied that the draft Explanatory Statement contained the necessary components and is in a comprehensible form. It describes the reasons for the promotion of the Scheme, the background to its formulation, the alternative to the Scheme by reference to the PwC Comparator Report and the effect of the Scheme on Scheme Creditors. It also contains the required statement of directors' interests.

The proposed directions as to the summoning and conduct of the Scheme meeting

112. In outline, as soon as practicable after my convening order, the Scheme Company will send the Scheme documentation to Noteholders, and an appointed representative of the Scheme Company will file for recognition of the proceedings in the United States under Chapter 15 of the US Bankruptcy Code.

113. The Scheme Creditors will then have until the Early Bird Deadline of 4 March 2021 to lock-in support for the Scheme and qualify to receive the Consent Fee. Scheme Creditors will have until 24 March 2021 to submit Scheme Creditor Letters in order for their votes to be taken into account and to elect for the Cash Option if they wish to do so. The Scheme meeting is scheduled for 26 March 2021.

114. I am satisfied that this timetable, and in particular the gap between the circulation of the Explanatory Statement and the Scheme meeting, is sufficient.

115. In light of the COVID-19 pandemic, it is proposed that the Scheme meeting will be held "virtually" by webinar. Trower J considered this issue in Re Castle Trust Direct plc [2020] EWHC 969 (Ch), [33]-[44] and concluded that the Court had jurisdiction to direct a virtual meeting. I am entirely content to follow this course. The evidence submitted by the Scheme Company at the sanction hearing should deal with the matters relating to the conduct of the meeting identified by Trower J in Re Castle Trust Direct plc.

Chapter 15 Foreign Representative

116. The Scheme Company asked for a declaration that, by reference to a resolution passed by the board of the Scheme Company, one of its directors has been validly appointed as a foreign representative for the purpose of seeking recognition of the Scheme under Chapter 15 of the US Bankruptcy Code. I consider that I am able to make such a declaration and that it would be appropriate to do so to assist the Scheme Company: see Re Noble Group [2018] EWHC 2911 (Ch), [2019] BCC 349 at [168].

Conclusion

117. For the reasons that I have given, I made convening order on the basis sought by the Scheme Company.