Neutral Citation Number: **[2022] EWHC 387 (Ch)**

Case No: **CR-2021-002359**

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

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

Date: **12 January 2022**

Before:

Mr Justice Miles

- -

Re:

IN THE MATTER OF SMILE TELECOMS HOLDINGS LIMITED
- and -
IN THE MATTER OF THE COMPANIES ACT 2006

- -
- -

Felicity Toube QC and **Charlotte Cooke** (instructed by **Kirkland & Ellis International LLP**) for the **Company**

Tom Smith QC (instructed by **Greenberg Traurig, LLP**) for **966 CO. S.A.R.L.**

Hearing date: **12 January 2022**

- -

APPROVED JUDGMENT

Mr Justice Miles:

1. This is an application by Smile Telecoms Holdings Limited (the "Company") for an order pursuant to section 901C of the Companies Act 2006 (the "Act") convening a meeting of a class of creditors for the purpose of considering, and if thought fit, approving a proposed Restructuring Plan between the Company, certain of the Company's creditors, and the Company's shareholders.

2. The Company contends that there is only one class of Plan Participants with a genuine economic interest in the Company, and, therefore, has applied for an order pursuant to section 901C(4) of the Act that only a single meeting of that class need be convened. In broad terms, the purpose of the proposed Restructuring Plan is the injection of additional liquidity to allow the Company to avoid going into an immediate administration, and the restructuring of the Company's indebtedness so as to enable it to seek to dispose of its assets and those of its subsidiaries on a solvent basis.

3. The principal evidence in support of the application is in three witness statements of Mr Osman Sultan, a director of the Company. The second of those statements contains confidential information about the valuation of the assets of the Company and a sales process which has already taken place. I have already indicated earlier that the confidential evidence should be sealed and should be held subject to restrictions on the court file.

4. I turn to the background. The Company is the holding company of a group of companies (the "Group") and together they operate an internet and telecoms business in Tanzania, Nigeria, Uganda and the DRC. The Group's key operating companies include Smile Communications Tanzania Limited ("Smile Tanzania"), Smile Communications Nigeria Limited ("Smile Nigeria"), Smile Communications Uganda Limited, ("Smile Uganda") and Smile Communications DRC SA ("Smile DRC") (together, the "Operating Companies").

5. The Group operates in a regulated industry and highly competitive markets. Each of the Operating Companies holds operational licences obtained from local regulators which are necessary for operating the Company's business. The Company is a private company incorporated in the Republic of Mauritius with an establishment registered with Companies House in England on 20 November 2020. The Company contends that its centre of main interests ("COMI") is located in England.

6. The share capital of the Company consists of Ordinary Class A and Class B Shares which are held in accordance with the terms of an English law governed Shareholders' Agreement, and Preference Shares of an amount of US$20 million which were subscribed for in accordance with the terms of the South African law governed IDC Preference Share Subscription Agreement. The Preference Shares are also governed by the terms of an English law governed intercreditor agreement which is addressed in more detail below.

7. Some 51.3 per cent of the Ordinary Shares are owned by Al Nahla Technology Co ("Al Nahla Technology"), which is an investment vehicle whose ultimate beneficial owners are based in the Kingdom of Saudi Arabia. An affiliate of Al Nahla Technology holds some 6.44 per cent of the Company's Ordinary Shares, bringing the total Al Nahla Technology controlled shareholding to 57.74 per cent. All of the Preference Shares are held by the Industrial Development Corporation of South Africa Ltd ("IDC").

8. The Company has a number of existing creditors. The Company is the Borrower and the Operating Companies (other than Smile Tanzania) are Guarantors in respect of the Super Senior Facility, which is governed by English law and dated 18 December 2020 as amended from time to time between the Company and 966 CO. S.à.r.l ("966"). That is for an amount of some US$63.6 million. There are also a number of Senior Facilities which are owed to a number of banks, including African Export-Import Bank ("Afreximbank") as Lender. The total Senior Facilities come to about US$235 million. There is also an agreement called the IDC Preference Share Subscription Agreement, to which I have already referred, under which IDC subscribed for the Preference Shares and is the creditor. Some US$35.5 million has been lent to the Company by IDC under that agreement.

9. The Company also owes various Subordinated Shareholder Liabilities. These are unsecured claims owed to 966 and Al Nahla Technology. The total amount outstanding under the Super Senior Facilities and the Senior Facilities, together with the amounts owed to the Preference Shareholder and the Subordinated Shareholder liabilities, including accrued but unpaid interest, is slightly over US$400 million as at 15 December 2021.

10. The Super Senior Facility, the Senior Facilities, and the IDC Preference Share Subscription Agreement are secured by various transaction security documents in favour of Afreximbank as Transaction Security Agent. The Super Senior Facility has additional security in favour of GLAS Trust Corporation Limited as Super Senior Security Agent.

11. I have already mentioned the Intercreditor Agreement. To establish the rights of the creditors as between themselves under the Super Senior Facility, the Senior Facilities and the IDC Preference Share Subscription Agreement, a number of parties, including the Company, the Operating Companies, Afreximbank as Security Agent, GLAS Trust Corporation Limited as Super Senior Security Agent, the Transaction Security Agent, 966, Afreximbank and various other companies, and IDC entered into an English law governed Intercreditor Agreement on 2 April 2015 as amended and restated from time to time, including on 11 May 2021.

12. Clause 17 of the Intercreditor Agreement sets out an enforcement waterfall. This applies where Afreximbank as Transaction Security Agent or GLAS Trust Corporation Limited as Super Senior Security Agent are applying proceeds for realisation or enforcement of transaction security or where disposal proceeds are

being distributed following what is called a Distress Event. This will occur if, among other things, the Company passes a resolution for its winding up or administration, or if an administrator is appointed in relation to the Company.

13. The enforcement waterfall provides for recoveries to be applied in an order of priority which includes the following: first in discharge all sums owing to Afreximbank as Transaction Security Agent or GLAS Trust Corporation Limited as Super Senior Security Agent or any receiver or delegate on a pro rata basis; second in discharging all costs and expenses incurred by any Super Senior Loan Creditor or any Senior Creditor in connection with the realisation of the Super Senior Loan Security or Transaction Security; third in repayment of liabilities relating to the Super Senior Facility; fourth in payment of agent liabilities; fifth in payment of the liabilities relating to the Senior Facilities; and sixth in payment of the liabilities relating to the IDC Preference Share Subscription Agreement.

14. There are other liabilities of the Company and Group. The Company owes some US$1.2 million to Afreximbank acting as agent under the Senior Facilities, and as transaction Security Agent under the terms of a fee letter dated 11 May 2021, various shareholders of the Company have provided a guarantee to IDC in respect of liabilities owing by the Company to the Preference Shareholder (the "IDC Preference Guarantee") and those shareholders hold certain contingent claims against the Company arising in relation to those rights held by IDC under the IDC Preference Share Subscription Agreement and the IDC Preference Guarantee.

15. The Company also owes a total of some US$2.9 million to certain Other Plan Creditors who have unsecured claims against the Company which the Company says are not critical to the continuation of its business. These include (among other claims) a claim of Beth Mandel as lender under a short-term loan agreement dated 7 June 2018, and amounts owed to Darisami International Limited (formerly known as Darisami International Consultancy Ltd) in respect of professional services provided to the Company or (it argues) the Operating Companies.

16. The proposed plan, therefore, is intended to cover the following creditors: the Super Senior Lender (i.e. 966), the Senior Lenders, Afreximbank as Agent Creditor in respect of the liabilities under the fee letter, the Subordinated Shareholder Creditors, the claims of Contingent Creditors in respect of their possible liabilities under the IDC preference guarantee, and the other creditors whom I have mentioned. There are certain liabilities of the Company which are not the subject of the Restructuring Plan. These include liabilities owed to trade creditors and certain finance and operational leases and have been excluded because they relate to suppliers, lessors, or other creditors whose continued support is critical to the Group continuing to operate, or to professional advisers and auditors whose services are required on a continuing basis, or are less than a de minimis limit of US$25,000 set by the Company.

17. The evidence shows that since 2016 the Company's business has been severely affected by a number of macro-economic and operational factors. These are

summarised in Mr Sultan's first statement at paragraphs 40-53, and I shall not recite them in any detail here. They may broadly be summarised as follows.

18. First, there was a devaluation of the Nigerian naira in June 2016 and July 2020 which had a significant adverse impact on the Company's cash inflows since it has substantial operations in Nigeria and financial obligations in US dollars. The 2016 devaluation by over 50 per cent caused the Group to miss a dollar revenue milestone under one of the Senior Facilities, and this has led to further funding problems under the terms of the Senior Facilities.

19. Second, the Group's funding problems have caused essential service providers including infrastructure operators to suspend their services which has led to intermittent network shutdowns. These have led to the Group having further difficulties in meeting its financial obligations to infrastructure providers and this has eroded consumer and regulator confidence. The Group operates in highly competitive markets where there is aggressive pricing. The Group's problems have been exacerbated by the outbreak of COVID 19 which has affected its ability to make sales. The evidence shows that part, at least, of its sales take place through door to door visits or other physical contact between customers and the Operating Companies.

20. In addition, the Group's operations in Nigeria, which is its largest market, have been adversely affected by the ban by the Nigerian communications commission on new SIM sales between December 2020 and May 2021 as well as a requirement for existing and new customers to register a national identity number, which apparently led to some impact on sales.

21. The Group is concerned that if a relevant Operating Company is unable to pay its debts as they fall due or enters into an insolvency process, the licences which enable those companies to operate will be placed at risk, as they include termination provisions in the event of insolvency. There are also concerns that the Operating Companies and the Company itself have not been able to finalise audited accounts or pay in full the fees owing to the regulators which are required in order to maintain the licences. The evidence suggests that the position from a regulatory perspective is, therefore, extremely precarious.

22. There was an earlier restructuring plan which was proposed in early 2021, whereby the Company issued a practice statement letter on 1 January 2021 to commence a restructuring process ("RP1") in order to facilitate the provision of urgent funding by 966, the Super Senior Lender to the Group, and to implement a framework to permit the solvent disposal of the Company's operations in Tanzania, DRC, Uganda and Nigeria.

23. RP1 was voted on by the Super Senior Lenders, the Senior Lenders, and IDC. All of the members of each class were present and all save for one Senior Lender voted in favour of RP1. RP1 was sanctioned by the court on 30 March 2021. However, the

process to amend the relevant transaction documents to allow for the injection of new money and implementation of other key terms of RP1 was protracted and did not conclude until 11 May 2021.

24. Following the implementation of RP1 on 11 May 2021, additional funding was advanced by 966 under the terms of the Super Senior Facility and the Group proceeded to run Sales Processes to dispose of its assets in Tanzania, DRC, Uganda, and Nigeria. The Intercreditor Agreement, which was amended and restated as part of RP1, required that Sales Processes should take place, and that binding offers for such assets should be received by mid-October 2021. Under the terms of the Intercreditor Agreement, as so amended, the Company may not sell the business and assets of Smile Nigeria unless the net proceeds of the disposal, together with the other realisations, are sufficient to pay the lenders at par.

25. At the time of RP1, the Company's intention was, therefore, to sell the Operating Companies or their assets in order to repay the Senior Lenders and the Super Senior Lender at par within the timelines specified in the Intercreditor Agreement.

26. Since 11 May 2021, the Group has sought to undertake the Sales Processes. The steps that have been taken are described by Mr Sultan in paragraphs 65-81 of his first statement. The Sales Processes have generated relatively little interest and have not yielded offers that would be sufficient to repay the Group's existing financial indebtedness. Only highly conditional, non-binding offers have been received in respect of the Group's assets in Tanzania and the DRC. The non-binding offer in respect of the Tanzanian assets was subsequently withdrawn. The board of the Company considers that there remain significant challenges to overcome before the non-binding offer received in respect of the assets in DRC can be executed on the terms offered. There has been, in particular, a recent change in the law of the DRC which may lead to a need to change the transaction structure. No offers have been received in respect of the Group's assets in Uganda.

27. As far as the Group's Nigerian business is concerned, the Company appointed FBNQuest Merchant Bank Limited (“FBN”) as of 23 August 2021 as a financial adviser to run an accelerated process to close by 31 December 2021. The appointment of FBN was approved by the Senior Lenders as well as the Super Senior Lender. FBN then carried out a Sales Process including by providing information to various targeted potential purchasers. In December 2021, an offer was received from a strategic bidder in respect of a part of the Nigerian licences. This was a non-binding offer, and the price offered was lower than a low case valuation provided by FBN to the Company.

28. The final purchase price under that non-binding offer remains to be determined, based on due diligence findings. It is expressed in naira, so the Company would take a material currency risk. There are other aspects of the non-binding offer which render it in many ways unattractive from the Company's point of view. No other

offers for the Company's assets in Nigeria or for the equity in Smile Nigeria were received before 31 December 2021.

29. It is anticipated that any transaction in respect of the Nigerian business would take at least six months to complete and a transaction in respect of the assets of the other Operating Companies would take at least four to six months to complete.

30. I was provided with a report by FBN dated 15 December 2021 explaining the disposals process it has taken. In addition, FBN has provided a desktop valuation of the Smile Nigeria business, and set out the likely outcome of the disposals process being run by FBN.

31. I am satisfied on the evidence that the Company is now facing very serious cashflow issues and has insufficient funds to pay trade creditors or the existing Super Senior Facility which matured on 31 December 2021. This led to the Group entering further negotiations with the various lenders. The Senior Lenders were advised by well-known city solicitors and PwC.

32. The Company invited proposals for further restructurings to deal with its overburdened balance sheet and liquidity issues. By 30 November 2021 the only proposal that had been received was one from 966. No alternative restructuring proposals have been received from the Company's other stakeholders and the board does not anticipate that any other proposals will be received.

33. A number of the Senior Lenders have indicated that they are prepared to support the proposals made by 966. Others, however, including Afreximbank and Access Bank, have indicated that they are not prepared to support the proposals.

34. The present application was issued on 15 December 2021 and a separate application was issued on the same date seeking an order under section 901C(4) of the Act. The evidence in support of both applications was provided by email late on 15 December 2021. This followed earlier negotiations and discussions that had taken place with the Senior Lenders and their advisers. Since 15 December 2021 there have been substantial further discussions between the Company's advisers, including FBN, and the Senior Lenders and their advisers. There have been a number of calls and meetings and the advisers to the Company have answered questions raised by the advisers to the Senior Lenders and other creditors about the evidence that has been served by the Company. This has included a series of detailed questions and answers provided to Afreximbank concerning the valuation carried out by FBN.

35. 966 provided a letter dated 9 December 2021 agreeing to forbear from exercising its rights to demand repayment of the existing Super Senior Facility until 31 March 2022, or when 966, after consultation with the Company, determines (acting reasonably) that it is no longer likely that the 966 proposal can be implemented before 31 March 2022.

36. The forbearance is also conditional on the Company applying for and proceeding with a Restructuring Plan under Part 26A of the Companies Act 2006. If the proposed Restructuring Plan is not sanctioned, the forbearance by 966 will therefore terminate on 31 March 2022 at the latest, although it is likely that 966 will in fact terminate its forbearance before that date. If 966 brings its forbearance to an end, it is likely to pursue repayment of the sums due under the Super Senior Facility, rendering the Company cashflow insolvent.

37. In the light of the current conditions affecting the Group and the Group's trading performance, the board takes the view that the Group's current level of debt is unsustainable, and that the Group's financial position is not sufficiently robust to enable its business to continue.

38. The Company contends that based on the FBN valuation, the results of the Sales Processes that have taken place to date, and advice from Grant Thornton (see more below), in the event that the Restructuring Plan is not sanctioned, the only realistic alternative is that the Company will be placed into administration and that the Operating Companies will enter either liquidation or some similar insolvency process in their respective places of incorporation.

39. The Company has therefore proposed the Restructuring Plan in order to enable it to have a breathing space and additional liquidity to continue operating on a solvent basis beyond 31 December 2021 to enable it and the Operating Companies to seek to dispose of their assets at the best price they can achieve.

40. The board takes the view that a further restructuring along these lines would enable the Group to enhance its value. Mr Sultan explains this in paragraph 107 of his first statement and paragraph 18 of his third statement. In short, the board expects economic growth in Nigeria, Uganda, Tanzania, and the DRC to accelerate in 2022, owing to the fading impact of the Covid-19 pandemic, among other factors. The board has noted an increase in the scarcity of spectrum licences in Nigeria. The board's view is that undertaking a sales process on a more stable capital structure provided through the implementation of the proposed Restructuring Plan will avoid potential bidders viewing the sales process as being undertaken on a distressed basis.

41. Mr Sultan also suggests that there are other local factors relating to the markets in Nigeria, Uganda, DRC, and Tanzania which will enable a sale to take place.

42. The proposed restructuring will involve a number of steps. First, the injection of additional funding of up to US$35.6 million to the Company by 966; second, the acquisition of control of the Company by 966 through the issuance of 100 per cent of the Company's new ordinary share capital to 966; third, the conversion of the Ordinary Shares and the Preference Shares into redeemable deferred shares which may be redeemed for nominal consideration; fourth, an ex gratia payment of US$10,000 to the Preference Shareholder and an ex gratia payment of US$10,000 to the Ordinary Shareholders (pro rata and pari passu); fifth, the full compromise of any

amounts owed to the Agent Creditor in its capacity as facility agent, and for a nominal consideration the transfer of the Senior Facilities to 966 as the new lender under such facilities and the amendment and restatement of those Senior Facilities into shareholder loans; sixth, the full and unconditional release of all security created or expressed to be created in relation to the Senior Facilities; seventh, an ex gratia payment of US$10 million to the Senior Lenders (pro rata and pari passu) and US$1.2 million to the Agent Creditor; eighth, the full compromise and release of the claims of the Preference Shareholder against the Company, under the terms of the IDC Preference Share Subscription Agreement; ninth, the full compromise of the Subordinated Shareholder Liabilities and the ex gratia payment of US$10,000 from the Company to the Subordinated Shareholders (pro rata and pari passu); tenth, the full compromise of the contingent claims of the Contingent Claim Creditors against the Company and an ex gratia payment of US$10,000 to the Contingent Claim Creditors (pro rata); eleventh, the full compromise of the unsecured claims held by the Other Plan Creditors and the ex gratia payment of US$10,000 to them (pro rata and pari passu); and, twelfth, the issuance of a contingent value rights instrument in favour of 966 and the Senior Lenders which would provide that the net proceeds of any actual or deemed realisation of value in the Operating Companies, following the application of such net proceeds to an amount equivalent to the amounts payable to the Super Senior Lender, will be applied 72.5% to 966 and 27.5% (pari passu and pro rata) to the Senior Lenders.

43. On 6 January 2022, the Company and 966 entered into a new English law governed Emergency Funding Facility Agreement in the sum of US$5 million. If the restructuring is completed, there will be a new funding facility of US$35.6 million of Super Senior funding due on 31 December 2022. That figure will include the existing US$5 million of emergency funding which has already been provided.

44. The Company contends that the Restructuring Plan will have benefits for the various Plan Participants. The Super Senior Lender's claims will be preserved and it will have the opportunity to advance new funding to the Company and will also have the ability to potentially participate in any future growth and capital growth of the Company through the issuance of the new shares and the contingent value rights. The Agent Creditor and the Senior Lenders will receive ex gratia payments of US$1.2 million and US$10 million respectively, and the other Plan Participants will receive the smaller ex gratia payments.

45. The Company has considered various alternative options to the Restructuring Plan. This is explained by Mr Sultan in paragraphs 125-140 of his first statement. They have been advised in this regard by Grant Thornton which has provided a report dated 15 December 2021 called “the relevant comparator report”. This was provided as part of the evidence served late on 15 December 2021.

46. The Company, based on the professional advice, considers that the relative alternative to the Restructuring Plan is the administration of the Company and liquidation or similar insolvency process of the Operating Companies. In this regard,

it notes that there was an Event of Default under the Super Senior Facility on 1 January 2022, and that if the Restructuring Plan is not sanctioned by the long-stop date of 31 March 2022, the Super Senior Lenders are likely to take action. They may also take action if the Senior Lenders take any form of enforcement action before that date.

47. The Company also needs to draw approximately US$2 million of the Emergency Funding Facility in the first week of February 2022 to avoid becoming cashflow insolvent at that time and expects that it may need to make further drawdowns depending on when the restructuring becomes effective. If the Emergency Funding Facility is brought to an end because the Restructuring Plan is not implemented, the Company lacks the funds to repay the amounts already drawn down. It is very unlikely that the Company will be able to obtain funding from any source other than 966. The Group is in a critical position with its relevant regulators, and will be unable to comply with the conditions of the licences without sufficient funding. Moreover, there are challenging macro-economic conditions in Nigeria.

48. In these circumstances, on 9 December 2021 the board met and resolved that in the event that the 966 Forbearance is terminated, or if, in the opinion of the board, there is no realistic prospect of the Restructuring Plan being implemented by the long-stop date of 31 March 2022, the Company shall appoint administrators as soon as reasonably practicable. The Company has engaged insolvency practitioners at Grant Thornton as prospective administrators.

49. The Company considers that in order to realise value for the creditors of the Company, any administrators would seek to dispose of the Company's assets with a view to delivering a better result from the Company's creditors as a whole than would be likely if the Company were wound up without first being in administration. But the only assets of the Company are its equity interests in the Operating Companies. Any disposal of those assets would require the consent of the Senior Lenders and that may be difficult to obtain. Suppliers in all jurisdictions in which the Group operates would be likely to insist on cash on delivery on any public insolvency event occurring, leading to further liquidity constraints and claims by creditors in all jurisdictions, and the boards of the Operating Companies would, in all likelihood, be required to file for immediate insolvency in each of the relevant jurisdictions, which would in turn probably trigger insolvency events of default under the various licence agreements.

50. The relevant comparator report provided by Grant Thornton sets out a range of indicative financial outcomes for the various Plan Participants in each Operating Company of the Group on a consolidated basis. A number of insolvency scenarios are considered, being licence revocation, a low case, and a high case. These show that under the licence revocation case there would be no return even to the Super Senior Lender of the Company. Under the low case and high case scenarios, value would break in the Super Senior Facility with a 54.9 per cent and 72.6 per cent return to the Super Senior Lenders respectively. There would be no return in either scenario

to the Senior Lenders or any other stakeholder. The Company emphasises that the low case and high case scenarios are based on valuations, and that the best evidence of the value of the assets is in fact the non-binding offer or offers which have so far been made in respect of the assets, which are lower than either of the two scenarios.

51. Against this factual background, I turn to the statute. Section 901A of the Act applies where two conditions known as Conditions A and B are met in relation to a company. Condition A is that the company has encountered or is likely to encounter financial difficulties that are affecting or will or may affect its ability to carry on business as a going concern. Condition B is that a compromise or arrangement is proposed between the company and its creditors, or any class of them, or to its members or any class of them, and the purpose of the compromise or arrangement is to eliminate, reduce or prevent, or mitigate the effect of, any of the financial difficulties mentioned in subsection (2). Subsection (4) provides that in this part of the Act, "company", means any company liable to be wound up under the Insolvency Act 1986.

52. Where the requirements of Section 901A are met, the court is empowered by section 901C to order a meeting or meetings of creditors or members. That section provides (materially) as follows:

> "901C Court order for holding of meeting
>
> (1) The court may, on an application under this subsection, 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.
>
> (2) An application under subsection (1) may be made by -
>
> (a) the company,
>
> (b) any creditor or member of the company,
>
> (c) if the company is being wound up, the liquidator, or
>
> (d) if the company is in administration, the administrator.
>
> (3) Every creditor or member of the company whose rights are affected by the compromise or arrangement must be permitted to participate in a meeting ordered to be summoned under subsection (1).
>
> (4) But subsection (3) does not apply in relation to a class of creditors or members of the company if, on an application under this subsection, the court is satisfied that none of the members of that class has a genuine economic interest in the company.

> (5) An application under subsection (4) is to be made by the person who made the application under subsection (1) in respect of the compromise or arrangement."

53. Section 901F provides that if a number representing 75 per cent in value of the creditors or class of creditors or members or class of members (as the case may be), present and voting either in person or by proxy at the meeting summoned under section 901C, agree a compromise or arrangement, the court may, on an application under this section, sanction the compromise or arrangement.

54. If a restructuring plan is not approved by one or more classes of creditors or members, the plan can still be sanctioned by the court under section 901G. This is described in the explanatory notes as a cross-class cram down. The additional jurisdictional conditions that must be satisfied for a cross-class cram down are as follows: (a) if a plan is sanctioned, none of the members of the dissenting class would be any worse off than they would be in the event of the relevant alternative; and (b) the plan has been approved by at least one class of creditors or members who would have a genuine economic interest in the company in the relevant alternative. The "relevant alternative" is defined as, "whatever the court considers would be most likely to occur in relation to the company if the compromise or arrangement were not sanctioned under section 901F" (see section 901G(4)).

55. The Practice Statement, which covers both schemes under Part 26 and restructuring plans under Part 26A of the Act, explains at paragraph 6 that it is the responsibility of the applicant to draw to the attention of the court at the convening hearing to a number of issues, including any issues as to the existence of the court's jurisdiction to sanction the scheme and in relation to a Part 26A scheme, any issues relevant to the conditions to be satisfied pursuant to section 901A of the 2006 Act, and if an application under section 901C(4) of the 2006 Act is to be made, any issues relevant to that application, and any other issue not going to the merits or fairness of the scheme but which might lead the court to refuse to sanction the scheme.

56. The applications before me therefore give rise to a number of issues. First, any jurisdictional requirements; second, satisfaction of Conditions A and B in section 901A; third, class composition; fourth, any other issues not going to merits or fairness which might cause the court to refuse to sanction the restructuring plan; and fifth, practical issues concerning the adequacy of notice, documentation, and proposals for the meetings of creditors. I shall address these in turn.

57. As already mentioned, section 901A of the Act is available in respect of a company. It has been held that the term, "company", in this section is to be read in the same way as that term is used in Part 26. A company is therefore any company liable to be wound up under the Insolvency Act.

58. It is well established that a foreign company may be wound up under the Insolvency Act as an unregistered company. There is, nonetheless, in general, a requirement for

there to be a sufficient connection with this jurisdiction in order for a foreign company to be wound up as an unregistered company, see *Re Drax Holdings* [2004] 1 WLR 1049.

59. There are a number of cases which demonstrate that at the convening stage, while it is appropriate for the court to consider whether there is any insuperable roadblock to the court exercising jurisdiction, in general questions of sufficient connection are to be addressed at the sanction stage, see, for example, *Re Noble Group Limited* [2019] BCC 349 per Snowden J.

60. In the present case it seems to me that there is no obvious roadblock to the Company being able to establish a sufficient connection.

61. The plan being proposed involves a number of interconnected factors, including affecting the rights of creditors and the existing members.

62. As for the creditors, there are a number of factors that may well lead the court at the sanction stage to conclude that there is a sufficient connection. A number of the relevant facility agreements are governed by English law, including the Existing Super Senior Facilities Agreement, all of the Senior Facilities Agreements and the Intercreditor Agreement to which the Super Senior Lender, the Senior Lenders, and the Preference Shareholder, among others, are parties. Under these contracts, the courts of England and Wales also have exclusive jurisdiction to settle any disputes arising from or connected with them. I am also satisfied that there is at least a good arguable case that the Company's COMI is in England. Trower J was satisfied of that when dealing with RP1, and the evidence shows that there are a number of features of the management and operations of the Company's affairs which are connected with England. These include notice having been given to creditors that the Company's COMI is in England.

63. In a letter written on 8 January 2022, Watson Farley & Williams, the solicitors for Afreximbank, contended that the court would not have jurisdiction in respect of the proposed restructuring plan because it also affected the rights of members and it is incorporated abroad. They relied on a passage in *Re Drax Holdings* at paragraph 29 where Lawrence Collins J said:

> "It is almost impossible to envisage circumstances in which the English court could properly exercise jurisdiction in relation to a scheme of arrangement between a foreign company and its members which would essentially be a matter for the courts of the place of incorporation".

64. I am not satisfied that the point is sufficiently clear as to constitute an insuperable roadblock for a number of reasons.

65. First, the comments of Lawrence Collins J in *Drax* concerned a scheme between a solvent company and its members. The same considerations may not apply to a

restructuring plan concerning a company threatened with insolvency where the members do not have a realistic economic interest.

66. Secondly, it is arguable that where the restructuring plan involves both the rights and interests of creditors and members, it is necessary to take a broader, more holistic view of the connections between the company and this jurisdiction than the passage from *Drax* might suggest. In such a case, while the position of the members as members of an overseas company may be a factor to be taken into account, it may not be decisive if the connections between the creditors and this jurisdiction are sufficiently strong.

67. Thirdly, it may be material that, although the relevant company is incorporated abroad, its COMI is within this jurisdiction. As has been explained in a number of cases, there is a close relationship between the concept of sufficient connection and the question of the effectiveness of a scheme or restructuring plan. Moreover, considerations which might lead the court to conclude that the COMI was located in England may well be material to the likelihood of the Restructuring Plan being effective in the place of the Company's incorporation. It seems to me that the answer to this issue may depend to some extent on further evidence which the Company proposes to serve, including Mauritian expert evidence, as to the effectiveness of the Restructuring Plan in the place of incorporation. It would be better dealt with at the sanction stage rather than the convening stage.

68. Fourthly, I note that the shareholders have not sought to object to an order being made convening a meeting, or taken the jurisdictional point. The only party to take the point is in fact a creditor.

69. The next issue is the satisfaction of the statutory conditions under section 901A. As to Condition A it must be shown that the applicant company has encountered or is likely to encounter financial difficulties that are affecting or will or may affect its ability to carry on business as a going concern. I am satisfied that there is strong evidence that this condition has been met. It seems to me clear that the Company is in severe financial difficulties and that these difficulties are affecting or will or may affect its ability to carry on business as a going concern. I am satisfied that, but for the proposed Restructuring Plan, the Company would, in all likelihood, already be in administration and it is also likely that that would also lead to the liquidation of the Operating Companies. I note that in RP1 Trower J was satisfied that this condition was met, and many of the same circumstances concerning the Company's financial difficulties continue to apply.

70. As to Condition B, I am satisfied, first, that the proposal constitutes a compromise or arrangement between the Company and its creditors or members. Trower J was satisfied of that in relation to RP1. The current Restructuring Plan differs from RP1, but it nonetheless shares a number of features with RP1: in particular it involves a facilitation of further super senior funding in order to provide the Company with breathing space and further liquidity in order to seek to undertake a successful sales

process. I am also satisfied that the purpose of the proposed Restructuring Plan is to eliminate, reduce, or prevent or mitigate the effect of the Company's financial difficulties under Condition A. The purpose of the Restructuring Plan is to eliminate, reduce or mitigate the effect of the Company's financial distress by giving it further breathing space and liquidity to enable it to seek to undertake a solvent sale.

71. I turn, next, to the question of class composition. I was referred to the well-known principles, including those set out in *Re Hawk Insurance Company Ltd* [2002] BCC 300 at [30] and [42]. A similar approach is applied in respect of restructuring plans under Part 26A as applies to schemes under Part 26.

72. Putting to one side for a moment the application under section 901C(4), the Company considers that applying the usual principles, there would be several relevant classes. These are the Super Senior Lender, the Agent Creditor, the Senior Lenders, the Preference Shareholders, the Subordinated Shareholder Creditors, the Contingent Claim Creditors, Other Plan Creditors and Ordinary Shareholders. I see no reason to conclude that the Company's assessment of those classes is wrong.

73. I turn to the application under section 901C(4). The Company contends that only one class needs to be consulted, or to participate in a meeting ordered under section 901C, namely the Super Senior Lender.

74. I have already set out the relevant parts of section 901C(4).

75. There is no previous case where this provision has been relied upon. However, it was considered in some detail in a helpful discussion in the case of *Re Virgin Active* [2021] EWHC, 1246 (Ch) at [247]-[249] by Snowden, J. He was considering the provisions governing cross-class cram down, but in the course of doing so he said this at paragraphs 247-249.

> "247. Against that background, there is nothing in the provisions finally enacted as Part 26A, or in the Explanatory Notes, that indicates that the legislature intended any different approach to be adopted by the court to the position of creditors who are out of the money under the relevant alternative. Quite the reverse: the provisions of Part 26A build upon that approach. Although section 901C(3) provides that every creditor whose rights are affected by a plan must be permitted to participate in a class meeting, section 901C(4) provides that this does not apply to a class of creditors if the court is satisfied that no member of that class "has a genuine economic interest in the company". It is, I consider, tolerably clear that this test of a "genuine economic interest" reflects the observations of Mann J in *Bluebrook* that what the court must ascertain is whether a purported class "actually has an economic interest in a real, as opposed to a theoretical or merely fanciful, sense", and that it is to be applied to the plan company by reference to the relevant alternative for the company if the plan is not sanctioned.

> 248. That conclusion is, to my mind, put beyond doubt by paragraph 188 of the Explanatory Notes to Part 26A that explains that as a default under section 901C(3), all creditors whose rights are to be affected by the compromise or arrangement must be permitted to participate in the class meetings, but then states
>
> > "However, if the court is satisfied that a class of creditors or members has *no genuine economic interest in the company (an 'out of the money' class)*, the court may order for that class of creditors or members to be excluded from the meeting summoned in subsection (1)." (my emphasis)
>
> 249. The express equation of creditors with "no genuine economic interest in the company" with an "out of the money class" is striking. The logic of this point is that if creditors who would be out of the money in the relevant alternative could be bound to a plan which effects a compromise or arrangement of their claims without even being given the opportunity to vote at a class meeting, the fact that they have participated in a meeting which votes against the plan should not weigh heavily or at all in the decision of the court as to whether to exercise the power to sanction the plan and cram them down. Nor is it easy to see on what basis they could complain that the plan was "unfair" or "not just and equitable" to them and should not be sanctioned. That point was made expressly by Trower J at the end of paragraph 51 of his judgment in *Deep Ocean*."

76. Snowden J's comments about section 901C(4) were obiter. However, they were carefully considered and I find them persuasive.

77. It seems to me that the following conclusions can be drawn from those comments and from the section itself:

    a. First, in considering whether a creditor or member, or class of creditors or members, has a genuine economic interest in the company, the court considers the position by reference to the relevant alternative for the company if the plan is not sanctioned.

    b. Second, the court should address the question by applying the civil standard of balance of probabilities: see *Virgin Active* at [134] and [239].

    c. Third, at a convening hearing the court may in an appropriate case conclude that in assessing matters under section 901C(4), the evidence is not sufficiently complete or satisfactory to enable the court to reach a concluded view under the section. It may for instance be the case that inadequate notice has been given in relation to the relevant application. Or objections may have been raised by creditors or members which the court considers need further evidence or investigation. On the other hand, if the court is satisfied by the evidence at the convening stage that none of the members of the relevant class has a genuine

economic interest in the company, then the court may properly conclude that there is no purpose to be gained from requiring any meeting of that class.

78. Against that background, I turn to the question of whether the court can properly be satisfied in the present case to the necessary standard of proof that none of the members of any class other than the Super Senior Lender class has a genuine economic interest in the Company.

79. On this issue the following features appear to me to be salient:

a. First, a valuation has been prepared by FBN. FBN's appointment was accepted by the Senior Lenders as well as the Super Senior Lender. Its efforts in selling the assets were reviewed by PwC. Its valuation has been provided to all of the interested parties who have been prepared to give appropriate confidentiality undertakings.

b. Second, the valuation has been interrogated and explored by the Senior Lenders and their advisers at length. FBN has provided answers to detailed questions raised by the Senior Lenders.

c. Third, on the relevant comparator report, the Senior Lenders are clearly out of the money. Earlier versions of excerpts of the report prepared by Grant Thornton were provided to the Senior Lenders in November and December 2021, and the Senior Lenders have had ample time to consider them. I note in this regard that the evidence of Mr Sultan is that the Senior Lenders accepted at a number of meetings in November and December 2021 that they were out of the money. I was told in the course of the hearing that Afreximbank says that it does not accept that it was out of the money, and that it has made this position clear to the Company. However, Afreximbank has not put in any evidence contradicting that adduced by the Company.

d. Fourth, the relevant comparator report by Grant Thornton, which was provided with the other evidence in support of the application, explained that they had applied a discount using their experience as insolvency practitioners for distressed sales. It is commonplace for some discount to be applied to reflect the fact that any sale out of an insolvency process would be likely to be discounted. That is in part because insolvency practitioners are unwilling or unable to give extensive warranties.

e. Fifth, the application of the discount by Grant Thornton and the values given in the report are supported by the real world evidence of the marketing and sales process which has taken place. I agree with the Company that that is probably the best evidence of the actual valuation of the assets. As I have already explained, the non-binding offers which were made were lower than either of Grant Thornton’s best or low case scenarios. The marketing and sales process

was carried out by an experienced bank, and it was monitored by Grant Thornton and by PwC on behalf of the Senior Lenders.

f. Sixth, the evidence establishes that, using the Grant Thornton analysis, the Senior Lenders and those below the Senior Lenders are well out of the money. This is not a marginal case.

g. Seventh, as already noted, the application was made on 15 December 2021, supported by extensive evidence, including the valuations and the Grant Thornton report. It was served on all of the interested parties. They have had about a month's notice of this application. There were also earlier discussions going back at least into November 2021. In a case of this kind, notice of about a month is more than adequate to enable a party to decide whether to contest or oppose the application, and to put in contrary evidence, if only to explain to the court why it is suggested that some further investigations might be required. But nobody has turned up to oppose the application, and no party has put in any contrary evidence.

80. I note that though Afreximbank did not oppose the convening order at the hearing, Watson Farley & Williams wrote on behalf of Afreximbank on 8 January 2022, contesting the conclusions of the evidence put forward by the Company to suggest that the Senior Lenders were out of the money. The essential contention was that in RP1 the Company had put forward evidence concerning the possibility of a sale of the equity of the Operating Companies, including the Nigerian Operating Company, and that a sale of the equity might lead to better returns than an asset sale.

81. I start by observing that this point was raised late in the day. There have already been substantial discussions between the Company and their advisers and the Senior Lenders and their advisers in which it appears this point was not taken. But in any event I am satisfied that the Company has adequately answered the concerns raised in the letter of 8 January 2022. Essentially, the Company relies on the empirical evidence provided by the extensive sales process that has taken place since August 2021, with the company having undertaken a pre-sounding process with potential bidders between May 2021 and August 2021. It says that the market has been tested, that the sales process did not dictate or stipulate any particular structure for the sale, but that the only interest in the Nigerian business was the non-binding offer for one of the licences already referred to above. Moreover, the Company has explained that even in RP1 an equity sale valuation was not the focus of its evidence; it was just one amongst a number of possible scenarios. It also appears clear that the evidence put before Trower J in relation to RP1 has turned out to have been over-optimistic.

82. The points raised in the 8 January 2022 letter were also addressed separately by Grant Thornton in a letter provided on 10 January 2022, in which they explained that they agreed with the Company's assessment that a sale of the equity in the Nigerian Operating Company was unlikely to be achieved.

83. After the response from the Company's solicitors on 10 January 2022, Watson Farley & Williams wrote a further letter in which they explained that they did not accept the Company's position on valuation, but having raised the issue in correspondence and noted that their letter dated 8 January 2022 and the responses given by the Company would be put before the court at this hearing, Afreximbank has decided not to appear at the hearing, although representatives of it would attend to observe the proceedings. No substantive response was given to the points made by the Company in their long letter of 10 January 2022, and no further reason was given for Afreximbank's contention that the Company's position on valuation should not be accepted.

84. Taking things in the round, I am satisfied to the necessary standard that the only class of creditors or members with any genuine economic interest in the Company is the Super Senior Lender, and I shall make an order under section 901C(4) of the Act accordingly.

85. There is no issue in having a meeting of a single member of a class if there is only one member of that class, see *Re Altitude Scaffolding Limited* [2006] BCC 904 at [18].

86. I turn next to consider whether there are any other issues not going to the merits or fairness of the Restructuring Plan but which might lead the court to refuse to sanction it. It is well established that in general questions of merits or fairness should be considered at the sanction hearing, and I consider that the same principle applies to restructuring plans as applies to schemes. The Company did not raise any matters under this head, and I have not identified any. As already noted, the Company has indicated that it intends to adduce evidence at the sanction hearing concerning the effectiveness of the scheme under South African law and the law of Mauritius.

87. I turn next to practical issues. I am satisfied that on the facts of this case sufficient notice has been given of this hearing. A number of emails were despatched on 15 December 2021 containing the substantial evidence in support of the applications. These documents were also uploaded to the Information Agent's portal on 15 December 2021. As already noted, those documents followed substantial communications between the Company and its various stakeholders, ultimately going back as far as RP1. I have in particular noted that the Senior Lenders were provided with a good deal of information about the sales process and about the various valuations from November 2021 onwards.

88. The proposed meeting of the Super Senior Lender is to take place on 10 February 2022, and it seems to me that there is sufficient time between now and that date to make that a fair and appropriate date.

89. I have read the Explanatory Statement, and I am satisfied that it fairly and properly communicates all material matters in a way that would be readily comprehensible to its intended addressees. In that regard I take into account the fact that the stakeholders, in particular the Senior Lenders, have been professionally advised.

90. It is proposed that the meeting will be held virtually following the guidance set out by Trower J in *Re Castle Trust Direct Plc* [2020] EWHC 969 (Ch). I am satisfied that that is appropriate here.

91. In conclusion, I will make an order in the form proposed by the Company, including an order under section 901C(4) of the Act.