THE HIGH COURT

[2023] IEHC 549

Record No. 2023 90 COS

IN THE MATTER OF MAC – INTERIORS LIMITED

AND

IN THE MATTER OF PART 10 OF THE COMPANIES ACT 2014

Judgment of Mr. Justice Michael Quinn delivered the 9th day of October 2023

1. The Examiner of Mac Interiors Limited ("the Company") has applied for an order pursuant to Section 541 of the Companies Act 2014 ("the Act") confirming his proposals for a scheme of arrangement between the Company and its members and creditors.

2. Section 541 identifies the conditions which must be met before the court can confirm such proposals. The first condition, which is central to the issue in this case is that at least one class of creditors whose interests or claims would be impaired by implementation of the proposals has accepted the proposals.

3. Proposals are deemed accepted by a meeting of creditors when a majority in number representing a majority in value of the claims represented at the meeting have voted in favour (s.540). In this case, only one class of impaired creditors has approved the proposals, a class referred to in the proposals as the Retained Project Creditors.

4. The Revenue Commissioners who are owed a total debt of €14.36m object to confirmation of the proposals. They submit that the formation of the class of Retained Project Creditors breached the established principles governing the classification of creditors for the

purpose of considering and voting on proposals for a scheme of arrangement. They submit that the members of that class ought to have been included in the class of Unsecured Creditors, which did not accept the proposals, and therefore that the requirement that at least one class of impaired creditors, validly formed and convened, has voted to accept the proposals has not been met, and that the court has no jurisdiction to confirm the proposals.

The Company and the examinership

5. The business of the Company is that of specialist interior fitout of commercial facilities and general construction in Ireland, the UK and elsewhere.

6. Before petitioning for examinership the Company employed 41 persons directly and was engaged in projects in Ireland alone worth €72 million. At the time of this application the Company still retained 31 direct employees.

7. On 30 May 2023, the Company petitioned for the appointment of an examiner pursuant to Part 10 of the Act. Mr. Kieran Wallace, of Interpath Ireland Limited was appointed interim examiner pending the hearing of the petition.

8. On 14 June 2023, the petition was heard. The petition was not contested, and the court appointed Mr. Wallace examiner.

9. The Company was incorporated in Northern Ireland. It was therefore not a company within the meaning of that term as defined in s. 2 (1) of the Act. Nonetheless, the court was satisfied that the company had its centre of main interests in the State and therefore that it had jurisdiction to make the appointment pursuant to Article 3.1 of the European Insolvency Regulation Recast 2015/848 ("the EIRR"). A full description of the reasons for the court's decision and the appointment of the Examiner is contained in the judgment of the court delivered on 11 July 2023 ([2023] IEHC 395) (the "First Judgment").

10. As required by s. 534 of the Act, on 17 August 2023, the Examiner formulated proposals for a scheme of arrangement in relation to the Company. He convened and held

meetings of members and creditors for the purpose of considering and voting on the proposals.

11. One class of creditors having voted in to accept the proposals, the Examiner issued this application for confirmation of the proposals.

12. The application is grounded on an affidavit sworn by the Examiner on 1 September 2023. In that affidavit he exhibited his report as required by s. 534 of the Act which includes the proposals, an explanatory memorandum, his report on the outcome of the meetings of members and creditors, a statement of the assets and liabilities of the Company, and his recommendation that the proposals be confirmed.

The Proposals

13. The proposals were based on the Company securing an investment from Quartz Holdco Limited, a company said to have significant expertise in the construction sector, which would make the following investments: -

(a) a subscription for 55% of the ultimate shareholding in the Company;

(b) a shareholder loan of €2.25 million, non – interest bearing and subordinated to the Company's other debt;

(c) a working capital facility of €1.5 million available to the Company for drawdown at any time after the effective date of the proposals.

14. The investor would also acquire the shares in two subsidiary companies Mac Contracts and Mac Belgium.

15. The subscription for shareholding by the investor required the investment to be notified to the Competition and Consumer Protection Commission under Part 3 of the Competition Act 2002 (as amended). The court has been informed that the required clearance of the CCPC has been obtained.

16. The only proposed change in the management of the Company was the addition to the board of Mr. Damien Treanor, representing the investor. Mr. Paul McKenna, the managing director of the Company, would continue in office.

17. The proposals as originally presented identified eight classes of creditors. I shall refer to these classes below and describe the intended dividend intended under the proposals: -

(i) Senior Secured Creditor - dividend: 100% of its pre – petition debt;

(ii) Preferential Creditors – dividend: 100% of its debt;

(iii) Revenue Non – Preferential – dividend: 1.5%

(iv) Retained Project Creditors – dividend: 1.5%

(v) Unsecured Creditors – dividend: 1.5%

(vi) Contingent Guarantee Creditors – dividend: 1.5%

(vii) Guaranteed Creditors – dividend: 1.5%

(viii) Contingent Litigation Creditors – dividend: 1.5%.

18. The proposals provided for payment to be made within 30 days of the date on which the proposals became effective, or in the case of unagreed creditors, 30 days of the determination of the amount of their claims in accordance with the expert determination provisions contained in the scheme.

19. The proposals contained at Appendix 3, a statement of the assets and liabilities of the Company on a going concern basis as at the date of the proposals, namely 17 August 2023. They contain at Appendix 4 an estimated financial outcome of a winding up as of the same date.

20. The statement of assets and liabilities on a going concern basis shows the Company having total assets of €9,549,508. It shows funds available for creditors (after examinership costs) of €8,965,258, and funds available for unsecured creditors (after payment of the secured creditor and preferential creditors) in the sum of €7,737,702.

21. The amount owing to unsecured creditors is €26,919,692, leaving a total deficiency of €19,181,990. On this basis the outcome for unsecured creditors would be a dividend of 0.287%.

22. The estimated financial outcome of a winding up shows realisable assets totalling €2,518,628, and funds available for creditors (after discharge of examinership costs and costs of liquidation) of an amount of €1,688,376. After payment of amounts owing to secured and preferential creditors the funds available to unsecured creditors would be estimated at €35,820. The total unsecured debt is €26,919,692 leaving a deficiency of €26,883,872, and therefore an estimated dividend available to unsecured creditors in a winding up of 0.133%.

23. The only secured creditor is Bank of Ireland, owed €153,431.08.

24. The only preferential creditor is Revenue for an amount of €1,108,087.30. The Revenue Non – Preferential Debt is stated at €13,251,596.88.

25. The Retained Project Creditors are trade suppliers of goods and services, being 168 parties in Ireland and 13 in the UK.

26. The Unsecured Creditors comprise 413 trade suppliers of goods and services.

27. The Contingent Guarantee Creditors are BNP Paribas and Mitsubishi.

28. The Guaranteed Creditors are Merlin Attractions Operations Limited and Northwood Birmingham Limited.

29. The Contingent Litigation Creditors comprise a total of eight parties, being four natural persons and four companies.

30. Nowhere in the proposals, the explanatory memorandum, the s. 534 report or the Examiner's grounding affidavit is there found a definition – other than by reference to the list of names of creditors – or description of the class of Retained Project Creditors or of the distinction between them and the creditors listed in the class of Unsecured creditors.

31. An explanation as to how members in the Retained Project Creditors class were distinguished from the Unsecured Creditors is to be found firstly in correspondence between Revenue and the Examiner's solicitors A&L Goodbody after Revenue queried the basis for the separate classes. The explanation is then found in more detail in a supplemental affidavit of the Examiner sworn on 18 September 2005 in reply to the objections made by Revenue. I shall return to that description in more detail later. In essence, the Examiner says that this class comprises creditors whose claims arise from or are associated with projects of the Company which have not been terminated by the Company or by the relevant clients and are referred to as ongoing projects.

The Statutory Meetings and Modification of the Proposals

32. The statutory meetings were convened for 24 August 2023 for each of the classes described above. On the morning of the meetings the Examiner received from Revenue a request that in respect of its Non – Preferential debt it be placed in the class of Unsecured Creditors. The Examiner says that given the materiality of Revenue's claim he decided to adjourn three of the meetings, namely the meeting of Unsecured Creditors, the meeting of the Preferential Creditor and the meeting of Revenue Non – Preferential. The purpose of the adjournment was to consider Revenue's request.

33. The meetings of all other classes were duly held on 24 August 2023 including the meeting of the Retained Project Creditors class.

34. The Examiner then decided to accede to Revenue's request that its Non – Preferential debt be included in the Unsecured Creditors class.

35. On 25 August 2023, the Examiner informed the creditors of his decision to include the Revenue Non – Preferential debt in the class of Unsecured Creditors. He issued notices reconvening for 31 August 2023 the meeting of Unsecured Creditors, now including Revenue for its non-preferential debt, and the meeting of the Preferential Creditors class. The notices

of the reconvened meetings included modified proposals in which the class of Revenue Non – Preferential was deleted, and the Revenue non – preferential debt was included in the class of Unsecured Creditors. The proposed dividends were unchanged. Those are the proposals put to the meetings and submitted to the court now for confirmation and I shall refer to them as "the Proposals".

36. The Examiner states that he made this change without prejudice to his position that the Revenue non – preferential debt ought to have been a class of its own. In subsequent correspondence and on the hearing of this application he has maintained the position that as a matter of law Revenue non – preferential debt ought not be included in the class of Unsecured Creditors having regard to the fact that Revenue has a dual interest in the scheme, notably its separate interest as a preferential creditor. That reservation was not contained in the notice reconvening the meetings for 31 August 2023. The letters of 25 August 2023 giving notice of the reconvened meetings issued both to Revenue and to all unsecured creditors stated as follows: -

> "I have decided to include Revenue Commissioners in the Unsecured Creditor class and to remove the "Revenue Commissioners Non – Preferential" class from the scheme. Enclosed with this letter is a modified version of the Scheme ("the Modified Scheme") with the amendments noted by way of a markup".

37. This unequivocal statement is contained in the Examiner's letter to Revenue and to all unsecured creditors.

38. A controversy arose at the hearing as to whether the Examiner could still maintain his position that the Revenue preferential debt ought to have been classed separately. However, it is clear from the letter of 25 August 2023 that the decision he made to include non – preferential Revenue in the class of Unsecured Creditors was made and, importantly, communicated unequivocally and without reservation.

39. In further correspondence between Revenue and A&L Goodbody, Revenue queried the basis for the formation of the class of Retained Project Creditors. In that correspondence, and in the affidavit of the examiner sworn on 18 September 2023 the Examiner asserted that Revenue had not objected to the Examiner proceeding on 24 August 2023 with the meeting of Retained Project Creditors.

40. There was a dispute as to what transpired on this subject in correspondence and conversations between representatives of Revenue and of the Examiner. For two reasons, I am not required to resolve that dispute. Firstly, at the hearing of this application, counsel for the Examiner confirmed that he was not maintaining that Revenue were precluded or "estopped" by those communications from making its objection to the formation of the Retained Project Creditors class. Secondly, I would not hold that Revenue were "estopped" by those communications from making its objection at the confirmation hearing regarding class composition. It is a substantial and serious objection which goes to the jurisdiction of the court and a proper matter for the court to consider and examine at the confirmation hearing.

Voting results at the meeting

41. In the event, the only class of impaired creditors which voted in favour of the Proposals, was the Retained Project Creditors class. Of that class, 59 creditors representing debt of €1,760,261 voted in favour. Eleven creditors representing debt worth €757,584 voted against the Proposals and one creditor abstained.

42. The Senior Secured Creditor class voted in favour of the Proposals but is not impaired.

43. Two classes of creditors voted against the proposals, namely the Preferential Creditors (Revenue) and the class of Unsecured Creditors, which of course now included the Revenue non – preferential debt of €13,251,596. In the Unsecured Creditors class, 46 creditors voted

in favour representing debt of €1,918,527. Nineteen voted against the Proposals, representing debt of €15,039,766, which comprised Revenue's €13,251,596 and other unsecured debt of €1,788,170.

44. The issues the court is required to determine are:

1. Whether the composition of classes for an examiner's scheme of arrangement is governed by the same principles which govern class composition in schemes of arrangement outside examinership, now regulated by Part 9 of the Act. For convenience I refer to such schemes as 'traditional schemes.'
2. Whether the formation in this case of the class of Retained Project Creditors was valid having regard to the applicable principles for class composition.

45. I shall consider:

(i) the case law and practice governing class composition in traditional schemes

(ii) the case law and practice regarding examinership schemes under Part 10

(iii) the differences between Part 9 and 10 of the Act, including recent amendments to Part 10

(iv) the evidence in this case as to the formation of the Retained Project Creditors class.

The Act of 2014 as amended

46. Section 541 identifies the process for and preconditions to confirmation of proposals for a scheme of arrangement. Section 543 identifies the grounds on which an interested party may object to confirmation.

47. These sections were amended by the European Union (Preventive Restructuring) Regulations 2022 (SI no. 380 of 2022) ("the Regulations") which came into effect on 27 July 2022, transposing into Irish law Directive EU 2019 / 1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks ("the Directive").

48. The amended s. 541, as relevant to this application provides as follows: -

"(3) At a hearing under subsection (1), [to consider the Examiner's Report] *the court may, as it thinks proper, subject to the provisions of this section and sections 542 and 543 —*

(a) confirm,

(b) confirm subject to modifications, or

(c) refuse to confirm,

the proposals for the compromise or arrangement concerned (referred to subsequently in this section as "proposals").

(3A) Where the court confirms proposals under subsection (3) (with or without modification), the conditions of such confirmation shall be clearly specified by the court and shall confirm at least the following:

(a) a majority in number of creditors whose interests or claims would be impaired by implementation of the proposals, representing a majority in value of the claims that would be impaired by implementation of the proposals, have accepted the proposals in accordance with section 540; (I refer to this as an "Overall Majority")

(b) the exercise of voting rights has been carried out in accordance with section 540;

(c) creditors with sufficient commonality of interest in the same class have been treated equally, and in a manner proportionate to their claim;

(d) notice of the proposals has been given to all members and creditors whose interests or claims will be impaired by the proposals in accordance with subsection 540(11);

(e) where there are dissenting creditors, that the proposals satisfy the best-interest-of-creditors test;

(f) where applicable, that any new financing is necessary to implement the proposals and does not unfairly prejudice the interests of creditors.

(3B) Where any proposals have not been accepted in accordance with section 540, the court may, upon the application of the examiner or with the examiner's agreement, confirm the proposals under subsection (3) (with or without modification) if –

(a) the proposals have been accepted by –

(i) a majority of the voting classes of creditors whose interests or claims would be impaired by the proposals, provided that at least one of those classes is a class of secured creditors, or is senior to the class of ordinary unsecured creditors, (I refer to this as a "Senior Class Majority") *or*

(ii) where the classes of creditors specified in subparagraph (i) have not accepted the proposals, at least one voting class of creditors whose interests or claims would be impaired by the proposals other than a class of creditors which, upon a valuation of the company as a going concern, would not receive any payment or keep any interest, or which could be reasonably presumed not to receive any payment or keep any interest, if the normal ranking of liquidation priorities under sections 621 and 622 were applied, (i.e. a class which is not 'out of money' on liquidation priorities) (This I refer to as a "Single Class Majority". It is the single class vote relied on in this case to meet the voting requirement of the section.)

and

(b) the court is satisfied that –

(i) the conditions specified in paragraphs (b) to (f) of subsection (3A) have been met, and

(ii) no class of creditors whose interests or claims will be impaired by the proposals can, under the scheme of arrangement, receive or keep more than the full amount of its interests or claims.

(4) The court shall not confirm any proposals unless—

(a) at least one class of creditors whose interests or claims would be impaired by implementation of the proposals has accepted the proposals, and

(b) the court is satisfied that—

(i) the conditions specified in subsection (3A) or (3B) have been met

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

(iii) the proposals are not unfairly prejudicial to the interests of any interested party, and in any case shall not confirm any proposals if the sole or primary purpose of them is the avoidance of payment of tax due.

4(A) The court shall refuse to confirm any proposals where the proposals would not have a reasonable prospect of facilitating the survival of the company, or the whole or part of its undertaking as a going concern".

49. Section 543 provides that at a hearing to confirm the proposals a member or creditors whose interests are impaired may object to confirmation on any of the following grounds: -

"(a) that there was some material irregularity at or in relation to a meeting to which section 540 applies;

(b) that acceptance of the proposals by the meeting was obtained by improper means;

(c) that the proposals were put forward for an improper purpose;

(d) that the proposals unfairly prejudice the interests of the objector;

(e) that the proposals fail to satisfy the best-interest-of-creditors test;

(f) that the proposals breach the conditions specified in section 541(3B) (a)(ii)".

50. The objection made by Revenue in this case relates only to ground (a) above, in that it says that the class of Retained Project Creditors has been improperly formed and that this is a material irregularity at or in relation to a statutory meeting. No other grounds of objection are invoked.

51. When these provisions are taken together, apart from the requirements as to voting majorities and other procedural requirements, the substantive requirements may be summarised as follows: -

(i) that the proposals satisfy the "best interest of creditors test (s.541(3A)(e));

(ii) that creditors with sufficient commonality of interest in the same class have been treated equally and, in a manner proportionate to their claim (S.541(3A)(c));

(iii) that proposals are fair and equitable in relation to any class of members or creditors that has not accepted the proposals and whose interests or claims would be impaired by implementation (S.541(4)(b)(ii));

(iv) the proposals are not unfairly prejudicial to the interests of any interested party (S.541(4)(b)(iii));

(v) it must be shown that the proposals have a reasonable prospect of facilitating the survival of the company or the whole or part of its undertaking as a going concern (s.541(4A)).

52. In this case there is no dispute about the Proposals' compliance with the above requirements.

53. The grounds of objection in s.543 overlap somewhat with those substantive requirements and extend further to such matters as material irregularity (s.543(a)), and improper means or purpose (s.543(b) and (c)).

54. Most of these concepts and conditions have featured in examinership since its original enactment in the Companies (Amendment) Act 1990. The test of "best interests of creditors" has some resonance with traditional considerations such as the comparison of a scheme against alternatives such as an insolvent winding up. But the term "best interests of creditors test" is new, incorporated by Regulation 17 of the Regulations.

55. There is no definition of this phrase in the Act or the Regulations. A definition is contained in Article 2.1 (6) of the Directive which provides: -

> *"Best-interest-of-creditors test' means a test that is satisfied if no dissenting creditor would be worse off under a restructuring plan than such a creditor would be if the normal ranking of liquidation priorities under national law were applied, either in the event of liquidation, whether piecemeal or by sale as a going concern, or in the event of the next-best-alternative scenario if the restructuring plan were not confirmed".*

56. In this case the dissenting creditors are of course Revenue and those members of the class of Unsecured Creditors, Retained Project Creditors and certain Contingent Litigation Creditors, who voted against the Proposals. Revenue will receive 100% of its preferential debt. The other dissenting creditors will receive, if the Proposals are confirmed, a dividend of 1.5% and are no worse off under the proposed scheme than they would be on a winding up of the company at 0.133% or even on a going concern basis, of 0.287%. Therefore, the 'best interests of creditors' test is satisfired.

<u>Other requirements</u>

57. The Proposals treat all creditors with commonality of interest in the same class equally (s. 541(3A)(c)). Subsection 3(3A)(c) is invoked in the submissions regarding class composition, in my view wrongly. (See paragraph 114).

58. The Examiner's report at para. 12.4 states that he is satisfied that implementation of the proposals will facilitate the survival of the Company and the whole of its undertaking as a

going concern, and that such survival is in the best interests of the members and creditors as a whole.

59. In the Proposal, the Examiner states that he is satisfied that the acceptance and implementation of the proposals is in the best interests of the creditors of the Company.

60. In his affidavit sworn on 18 September 2023 the Examiner states that: -

> "The scheme satisfies the best interest of creditors test and that the company has a reasonable prospect of survival as a going concern".

61. The Examiner does not elaborate on his statement of his view that the Company has a reasonable prospect of survival as a going concern. He makes the statement by way of agreement with the report of the Independent Expert, and which accompanied the petition for his appointment. He refers to the proposed investment amounting to a loan of €2,250,000 and the provision of working capital of €1,500,000. The examiner says that the investment, in conjunction with the Proposals "delivers a greater return to the company's unsecured creditors than they would receive in a liquidation scenario. It also allows for payment in full of the senior secured creditor and preferential creditors of the company".

62. A replying affidavit was delivered on behalf of the Revenue Commissioners by Mr. Philip Byrne, sworn 13 September 2023. There was exhibited to that replying affidavit a report of Mr. Nicholas O'Dwyer of Grant Thornton, himself also an experienced insolvency professional.

63. Mr. O'Dwyer takes issue with the manner in which the Examiner has formulated the class of Retained Project Creditors. Before I return to that subject, it is important to note that Mr. O'Dwyer confirms that he believes that the Proposals satisfy all of the other tests which are a precondition for confirmation of the scheme. Mr. O'Dwyer states the following: -

(i) he has conducted "variance analyses" comparing the Examiner's proposals against the liquidation and going concern estimated outcomes and against the information which was contained in the report of the Independent Accountant.

(ii) Mr. O'Dwyer believes that the assumptions made both by the independent expert and the Examiner which underpin the statements of assets and liabilities and estimated outcome now presented by the Examiner are fair and reasonable;

(iii) He believes that the proposals satisfy the best interest of creditors test.

(iv) Based on the financial information made available to him and his further discussions with the Examiner together with his understanding of the working capital requirements of the Company, he believes that the Proposals have a reasonable prospect of facilitating the survival of the Company, in whole or in part.

64. The Company's Managing Director swore an affidavit on 15 September 2023 in which he expands on both the historical performance and future outlook of the Company, the success which the Company has achieved in retaining its specialised staff and the continued support of a number of key clients and stakeholders, the benefit which the investment will bring to the Company, and what he describes as the "sound business fundamentals which have the support of its employees, key clients and the investor".

65. Taking all this evidence into account, the Court can be satisfied that – apart from the critical jurisdictional question of whether any validly formed class of creditors has approved the proposals – the other requirements to confirm the proposals have been met. They are that the proposals satisfy the best interests of creditors test, they treat creditors with common interests in the same class equally, they are fair and equitable and not unfairly prejudicial to the interests of any interested party. Furthermore, the undisputed evidence is that the proposals have a reasonable prospect of facilitating the survival of the Company or the whole or part of its undertaking as a going concern.

66. It is also clear – again apart from the jurisdiction question – that confirmation of the proposals in the circumstances of the case would be consistent with the policy of Part 10 of the Act, which is the preservation of enterprise and employment (See *Re Traffic Group Limited* [2008] 3 I.R. 253; and the First Judgment in this case). No discretionary considerations favour refusing confirmation.

67. The Examiner submits that based on the financial information in evidence, notably the comparison with a liquidation outcome, demonstrates that all of the impacted creditors, including Revenue, would "fare worse in a liquidation", and that no party, including Revenue, has alleged unfair prejudice. This is correct, but it is equally relevant that unsecured creditors, including Revenue whose debt of €14.36m is many multiples of the next largest debt due by the Company, voted to reject the proposals as they were entitled to do.

68. The Examiner submits also that the Court is entitled to take into account the view of parties who he says will have a continued business relationship in the future with the Company, namely the Retained Project Creditors. That also is correct, as far as it goes, but they are less than half in number of the unsecured creditors, and the question I have to decide is whether the creation of a class of such parties, which has proved vital in meeting the voting requirement of s.541(3B)(a)(ii) and s.541(4)(a) was valid. Not only are the Retained Project Creditors less in number than half of the unsecured creditors, but those of them who voted in favour of the proposals represent in the value of their claims an amount of €1,760,261, an amount which would clearly not outweigh the vote against the Proposals in the unsecured creditors class.

69. The Examiner makes the point that were Revenue not in the Unsecured Creditors class, it would have voted in favour of the Proposals. The Proposals before the court and recommended for approval included Revenue in that class and, as noted earlier, represents the overwhelming majority in value of the voting "debt". In truth, the outcome of the voting is

not the central point in the case, which must be decided on the jurisdictional question of whether the "Single Class Majority" requirement has been met.

Affidavit of the Examiner sworn 18 September 2023.

70. In his replying affidavit the Examiner describes the criteria which he applied for formulation of the Retained Project Creditors class. He states the following:

> *"10. With the assistance of the Company I compiled a list of all creditors of the Company that are associated with projects which are "live" or "ongoing". Those creditors are primarily subcontractors that have been employed to work on the live projects. In total, I identified 181 creditors that are directly associated with such projects and who, if the Company survives, are likely to have a continuing trade relationship with the Company on the relevant projects. I formed the view that by reason of their involvement in the live projects this cohort of creditors were likely to have a commonality of interest not shared by other unsecured creditors, including Revenue in respect of its non-preferential debt. It was in the context of the specific interest of these creditors, vis their continue interest in in [sic] work on those contracts and having some ongoing relationship with the Company, post examinership that I considered a separate class was warranted. I was also concerned in this context that if there was simply on [sic] unsecured class of creditors comprising the Retained Project Creditors, the Unsecured Creditors and Revenue there would be a real danger the separate interests of the Retained Project Creditors could effectively be vetoed by the votes of other creditors, including Revenue, who do not share the same or any commercial interest in voting in favour of the survival of the Company.*
>
> *12. Furthermore it is wholly inaccurate to suggest that I have selected creditors from the broader unsecured creditor base who I perceived to be supportive of the Scheme.*

Indeed one of the Notice Parties to these proceedings, Structural Steelwork Limited, is associated with one of the Retained Projects (a term not defined anywhere), *Project Alpha. I was aware that Structural Steelwork Limited, as one of the more material creditors of the Company, was likely to vote against the Scheme. Notwithstanding that I did not deviate from the criteria identified above in formulating the class and included Structural Steelwork Limited in the Retained Project Creditors class.*

14. While the 1.5% dividend payable to all unsecured creditors in the Scheme is in the best interests of unsecured creditors when compared to the dividend payable to unsecured creditors in a liquidation of the Company, the 1.5% scheme dividend is, by any objective assessment, not a material return to unsecured creditors. For that reason the Scheme dividend may not be a sufficient incentivisation for unsecured creditors who may have no future relationship with the Company (being the Unsecured Creditor class) to vote in favour of the Scheme. The Unsecured Creditor class will not benefit from the Company being able to finish out the Retained Projects, post examinership.

15. To the contrary the Retained Project Creditors have a material interest in seeing the Company successfully emerge from examinership as they will benefit from future revenues generated from the retained projects. It is for that reason that I formed the view that Retained Contract [sic] Creditors and other unsecured creditors did not have sufficient commonality of interest such that they were in a position to properly consult with one another for the purpose of voting on the scheme and should, therefore be separated into separate classes."

71. The Examiner continues by stating that it is not uncommon for examinership schemes to segregate categories of unsecured creditors into separate classes. He says that such a practice has developed over a considerable number of years. The Examiner exhibits a report

compiled by his solicitors based on every examinership scheme confirmed by the High Court in the past six years as uploaded to the Companies Registration Office. He says that of the fifty schemes or court orders reviewed every scheme had more than a single class of unsecured creditors that would otherwise rank *pari passu* in a liquidation of the relevant company. He exhibits this report, and I shall return to its contents later.

72. It is not in dispute that the Retained Project Creditors and the Unsecured Creditors enjoy precisely the same character of legal claims against the Company pre-examinership and are being treated in an identical fashion under the Proposals in terms of their proposed dividend. Each of them would rank as an unsecured creditor for a dividend in a winding up and it is proposed that they would receive a dividend of 1.5% on the amount of their claims. The distinction made by the Examiner is based entirely on the fact that those in the Retained Project Creditor's class are creditors whose claims arise associated with projects which the Examiner says is ongoing.

73. The question is whether this "likely" interest on the part of the creditors is sufficient to warrant the division of unsecured trade creditors into two classes.

74. It is also clear, and not disputed, that nothing else is contained in the Proposals which would alter the legal position of these parties. No other benefits or rights, such as future trading commitments, are conferred on the members of this class under the scheme. The distinction is based entirely on the Examiner's opinion that these creditors are likely to have a greater interest in the success of the examinership, this interest deriving from the fact that their pre-petition claims arise from the supply of goods and services associated with ongoing projects and therefore are likely to have a continuing trade relationship with the Company on those projects.

75. Mr O'Dwyer agrees that it is not uncommon to subdivide certain creditor classes on the basis that there is a justification which is clearly defined in how they are treated

differently within the proposals for a scheme of arrangement. In particular he says that in his experience particularly relating to companies in construction and in the contracting industry Retained Project Creditors are often afforded different treatment in this scheme, typically a higher dividend. He says that this is done in circumstances where those parties "are considered critical to completing existing works which in turn allows for continuity of trade, collection of retentions and avoids the additional costs in having to seek replacement subcontractors for ongoing work in progress which is critical for the survival of the company". He says that the typical solution to this is to provide a more favourable scheme treatment than that of the general unsecured creditor base thereby incentivising those creditors to support the company after the examinership.

76. In this case no different treatment is proposed for this class of creditors. Their legal position is identical in terms of the ranking of their claims against the Company and in their proposed treatment under the scheme. Mr O'Dwyer expresses the opinion that it is to him "unclear to understand the rationale for the proposed separate classes with the exception of the potential risk to the scheme of the creditors consulting together as a single class". This risk is borne out in this case because if the Retained Project Creditors were treated in the same class as the unsecured creditors including Revenue for its unsecured balance no class of impaired creditors would have approved the proposals.

77. Mr. O'Dwyer's Report predates the Examiner's replying affidavit, so he has not commented on the Examiner's description of the rationale. In any event, the high points of his observations are simply:

(i) that it is not uncommon to subdivide certain classes of creditors, including secured creditors

(ii) that it is usually done when a different treatment under the scheme is proposed.

Previous schemes confirmed

78. The Examiner says that it is common practice in examinership schemes to form more than one single class of the unsecured creditors which would otherwise rank *pari-passu* in a liquidation. He exhibits a helpful table prepared by his solicitors of schemes reported to have been confirmed over the last six years. He refers in particular to schemes which have sub divided categories of creditors who would on a winding up rank as unsecured. He cites examples of categories such as "contingent", "intercompany", "connected/shareholder/related", "unnotified litigation", "landlord", "French litigation creditors" (in *Re Citijet DAC*), "IT supplier", "key supplier", (in the matter of *Cara Pharmacy* where a payment of 100% was proposed under the scheme), "essential creditors" (in the matter of *Cosmetic Creations* again where a dividend of 100% was proposed for this group.

79. Reference is made to the reported scheme in *Re Mallinckrodt* which subdivided categories of unsecured claims, many receiving different treatment in the scheme.

80. Reference was made also to the scheme of arrangement confirmed by this court in *Re Norwegian Air Shuttle* and related cases where a number of categories of unsecured creditors were described as follows: "Retained Guaranteed Creditors" and "Non-Retained Guaranteed Creditors" and "Terminated Contract Creditors" and finally "Retained Lease Creditors" and "Terminated Lease Creditors".

81. For understandable reasons, the details of the confirmed schemes in all of these cases were not opened to the court. But it is clear even from these various descriptions that in many cases the leases or other contracts which were being either retained or terminated and the status of which informed the formation of classes were the contracts between the company proposing the scheme and the creditors or classes of creditors, or in some cases the creditors were parties to guarantees of the company's obligations to them. These classifications were

constructed by reference to the known continuance or otherwise of those legal relationships and not on speculation as to whether the creditors could have a future relationship with the company.

82. Although no details were given of any such distinctions being made by reference to a grouping such as that identified in this case, the point being made by the Examiner is that there is ample precedent for subdividing unsecured creditors.

83. I was not referred to any reported judgment in a case in which such classifications were contested, save for the *Mallinckrodt* case which I consider later. Therefore, *Re Tivway Limited & The Companies Act* [2009] IEHC 494 (see paragraph 115) is the only reported judgment drawn to my attention which considered the application of the Sovereign Life test in an examinership, where the court applied that test.

84. The Examiner's evidence is that examiners including himself and others have had a practice, not challenged, of forming and convening meetings of "sub classes" not always based on different legal rights.

85. Although none of the cases referred to above were disputed on this point, it is submitted by the Examiner that because the court has throughout these cases been exercising a supervisory jurisdiction I should, based on the schedule he exhibited, regard all of those confirmation orders as conclusive and binding for the decision in this case. The examiner went so far as to submit that to do otherwise would mean that all of the previous schemes were wrongfully confirmed by the court. That is an interesting submission which I reject. I have not been referred to any case in which a class formation comparable to the facts in this was case challenged and examined by the court.

86. The Examiner's information as to examinership practice is helpful and informative and I take into account the fact that many schemes have been confirmed by this and other courts which subdivide unsecured creditors. But the existence of that practice does not

preclude the court from examining the submission now made by the largest creditor in this case.

Submissions of Revenue

87. The Revenue Commissioners rely on the established case law by reference to schemes of arrangement. The seminal authority is the judgment of Bowen L.J. in *Sovereign Life Assurance Company v. Dodd* [1892] 2 QB, where he stated the following: -

> *"The word 'class' used in the statute is vague, and to find out what is meant by it we must look at the scope of the section, which is a section enabling the court to order a meeting of a class of creditors to be called. It seems to me that we must give such a meaning to the term 'class' as will prevent the scheme being so worked as to result in confiscation and injustice, and it must confine its meaning 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"* (emphasis added).

88. The parties agree that the "Sovereign Life" test is strictly "rights based". This means that the starting point is to class creditors by reference to their existing legal rights (including in an insolvency case their rank in liquidation) and by reference to the treatment of their rights in the proposed scheme.

89. Revenue submit that principles developed in the Sovereign Life authorities apply to class formation in examinerships. They expand as follows: -

> (i) S.201 of the Companies Act 1963 did not specify any general rules for the formation of classes. Neither did the Companies (Amendment) Act 1990 when introducing schemes of arrangement in examinership. Nor did the consolidating Companies Act 2014, Part 10 of which now governs examinership;
>
> (ii) the meaning of the term "class" is well understood and has received judicial pronouncement in all of the case law applying Sovereign Life;

(iii) the meaning of "class" or "class of creditors" in the 1990 Amendment Act was intended to correspond to the meaning of those words in s. 201 of the Act of 1963, the Acts being in *pari materia* (the provisions are now of course contained in the same one Act);

(iv) if the Oireachtas had intended that any different principles governing class formation would apply in examinership it would have so provided;

(v) reference is made to the discussion of class formation in the works of Lyndon MacCann on the Companies Act 1963 – 1990 p. 117, Brian Conroy "The Companies Act 2014" An Annotation, p. 698, and O'Donnell on Examinerships (pp. 100 – 102). All of these authors cite the Sovereign Life test when referring to class formation for schemes of arrangement in examinership;

(vi) that nothing in the text of Part 10 of the Act and the amendments affected by the Regulations suggests that the Sovereign Life test does not apply to examinerships;

(vii) that when the State was transposing the Directive, it elected not to lay down specific rules governing class formation for the purposes of Part 10 and that the reason for this was that the established law is the pre – existing jurisprudence applying Sovereign Life;

(viii) that if the court in analysing this question were to deviate from the Sovereign Life line of authority, endorsed in numerous judgments of this Court, this would require an express statutory enactment. It is said that there is no reason to suggest that the common law principles governing class formation were displaced by the Regulations;

(ix) in applying these principles the starting point is to identify the appropriate comparator. Where the company is insolvent the appropriate comparator is an

insolvent winding up and classes should be formed by reference to the rights and ranking of creditors in such an alternative scenario;

(x) that in this case both sets of creditors have identical legal rights as unsecured creditors. They will rank as unsecured in the winding up and will rank *pari passu*;

(xi) the Proposals do not grant any new or additional rights to the Retained Project Creditors. They will receive precisely the same dividend in the scheme namely 1.5% and are afforded no additional rights or benefits;

(xii) that the scheme itself is silent as to what distinguishes the two classes other than what can be gleaned from the title Retained Project Creditors;

(xiii) that the explanation offered by the Examiner seeks to justify the formation of a separate class of creditors divorced entirely from a consideration of their rights in a winding up and is wholly dependent on an assumption that they may wish to continue trading with the Company and therefore have a different interest in the overall outcome of the process for the Company.

(xiv) that the case law requires classification of creditors to focus on legal rights and any interest arising from those rights. It is submitted that an interest in the examinership succeeding which is derived from an aspiration of having a future relationship trading with the Company is not even associated with any rights.

(xv) that even if such an interest were a basis for forming a class there is a lack of verifiable criteria or evidence to support the distinction between those creditors listed in the class and the Unsecured Creditors.

Submissions of the examiner

90. The examiner submits the following.

(i) that the Sovereign Life line of authority can be treated as a starting point for the principles governing class formation;

(ii) that on a proper construction of the different language to be found in Parts 9 and 10 of the Act respectively a greater degree of flexibility should be applied to the formation of classes in an examinership;

(iii) s. 534 (2) (a) requires the examiner to convene and preside at such meetings of members and creditors "as he or she thinks proper for the purpose of s. 540". This confers a measure of discretion on examiners which takes account of their experience and the circumstances of each case and does not warrant a rigid application of the Sovereign Life test and that the exercise of this discretion is subject only to a "rationality" review. He cites *Re Ladbrokes Ireland Ltd* and *Re Eircom*, which I consider later.

(iv) that the well stated policy and objectives of Part 10 of the Act are wider than Part 9. They include such matters as the saving of employment and the saving of business direct and indirect, and that where there is doubt about any scheme the court should lean in favour of confirmation;

(v) that the Proposals in this case meet all the requirements stipulated in Part 10 as amended by the Regulation;

(vi) that the Examiner has provided evidence of verifiable criteria based on which he formed the Retained Project Creditors class. Its members are "associated with" live projects, of the Company. They are therefore "likely to have a continuing trade relationship with the Company on the relevant project". The examiner submits that by reason of this involvement on the live projects, this cohort of creditors is "likely to have a commonality of interest not shared by other unsecured creditors, including Revenue in respect of its non – preferential debt";

(vii) there is a real danger that the interests of the Retained Project creditors could be vetoed by the votes of other creditors who do not share the same or any commercial interests in voting in favour of the Proposals;

(viii) that the text of Part 10 throughout refers to both interests and claims, by contrast with Part 9 which, in its reference to the "general law", focuses purely on legal rights;

(ix) that based on the Directive and amendments to the Act the approach to class formation is focused on "commonality of interests of the creditors in a particular class" as opposed to legal rights;

(x) tha phrases used in Part 10 such as "interests" and "commonality of interests" denote a concept wider than legal rights;

(xi) the question is not whether the class composition in an examinership would "pass muster" if this were a Part 9 scheme of arrangement. The question instead is whether there is any proper basis for the court to find a "material irregularity in relation to a meeting";

(xiv) Revenue have not contested that the proposals are fair and equitable, are not unfairly prejudicial to any interested party, that they meet the 'best interests of creditors' test, and that their implementation would facilitate the survival of the company as a going concern. Where all these substantive criteria are met the court should, consistent with the policy of the Act, lean in favour of confirmation.

Schemes of arrangement and classification of creditors

91. The concept of utilising statutory schemes of arrangement to bind dissenting parties for the collective benefit of a company's stakeholders, subject to the protection of court supervision where objections are heard and established tests of honesty and integrity are applied, can be traced back as far, at least, as the Joint Stock Companies Arrangement Act,

1870. For Ireland it was re-enacted in s. 201 of the Companies Act, 1963 and is to be found in Part 9 (Sections 449-455) of the Act of 2014, and now its variant Part 10.

92. There is extensive caselaw concerning the principles which govern the formation of classes in the context of company schemes of arrangement outside of examinership namely part 9 of the Act of 2014 and its predecessors. For convenience I shall refer to them as 'traditional schemes' or 'part 9 schemes'. In the 33 years since the enactment of the Companies (Amendment) Act 1990 there has been only very limited consideration of this question in the context of examiners' schemes of arrangement pursuant to part 10. Revenue submit that the principles which apply to class formation in traditional schemes, apply in examinership and that the absence of any distinction in terms of the legal rights of the creditors means that there is no justification for the subdivision of the Unsecured Creditor's Class between unsecured creditors generally and Retained Project Creditors.

93. The Examiner submits that on a proper reading of part 10 (as amended) and having regard to practice and procedure by examiners since 1990, the rigid "rights based" principles which apply to schemes, are a starting point for the analysis, but are modified for examinership.

Part 9 of the Act of 1990

94. Section 453 identifies the conditions in which a scheme of arrangement can be rendered binding on all creditors or classes of creditors namely the following: -

(a) Where a special majority of each class to be affected has voted in favour of the proposals. A special majority is a majority in number representing at least 75% in value of the creditors or class of creditors affected.

(b) Where notice of the passing of the resolution approving the scheme has been published and registered, and

(c) the scheme is sanctioned by the court.

95. Section 450 establishes the power to convene meetings of members or creditors:

"(1) Where a compromise or arrangement is proposed between a company and -

(a) its creditors or any class of them, or

(b) its members or any class of them, the directors of the company may convene -

(i) the appropriate scheme meetings of the creditors or the class concerned of them, or

(ii) the appropriate scheme meetings of the members or the class concerned of them (emphasis added).

(2) References in subsections (1) and (5) to the appropriate scheme meetings of creditors or members, as the case may be, are references to either -

(a) separate scheme meetings of the particular creditors or members (as appropriate) who fall into the separate classes that, under the general law, are required to be constituted for the purpose of voting on the proposals for the compromise or arrangement, or

(b) where, under the general law, no such separate classes are required to be constituted for that purpose, a single scheme meeting of the creditors or members (as appropriate)" (emphasis added).

96. The Examiner submits that the absence of the words "appropriate" and "under the general law" in the equivalent sections in Part 10 is significant. There are many differences in the text between Part 9 and 10 and I do not attach the same weight to the absence of these words in Part 10. This is discussed further at paragraph 113(3).

97. Subsection (3) provides that where the directors do not exercise the power to convene meetings the court may on the application of the Company or any creditor or member order meetings "to be summoned in such manner as the court directs".

98. Subsection (5) provides: -

> *"(5) Without prejudice to the court's jurisdiction under section 453 (2)(c*) (i.e. at the scheme sanction hearing) *to determine whether the scheme meetings that have been held comply with the general law referred to in subsection (2), the court, in exercising its jurisdiction to summon meetings under subsection (3), may, in its discretion, where it considers just and convenient to do so, give directions as to what are the appropriate scheme meetings that must be held in the circumstances concerned."*

99. A typical feature of Part 9 schemes is that the directors or the company apply for and obtain directions concerning the convening of meetings on an ex parte basis. Increasingly it has become the practice that such applications are made on notice to intended affected parties. At this application directions are made regarding the conduct of meetings, including the classes to be formed and convened.

Jurisprudence on creditor classification

100. In *Re Nordic Aviation Capital DAC v The Companies Act* [2020] IEHC 445 Barniville J. (as he then was) considered the established law regarding schemes of arrangement:-

> *"The test in Sovereign Life Assurance was approved in this jurisdiction by Laffoy J. in the High Court in In Re Millstream Recycling Ltd [2009] IEHC 571. It has also been approved and applied by me in several of the recent cases. In the case of a scheme of arrangement between a company and its creditors, the proper focus is on the legal rights possessed by the creditors of the company. If those rights are not so dissimilar as to make it impossible for the creditors to consult together with a view to their common interest, then it is appropriate to treat the creditors as a single class."*

101. Barniville J. continued by agreeing with the description of a two stage test identified in *Re Stronghold Insurance Company Limited* [2018] EWHC 2909 (Ch.) by Hildyard J. as follows:

"At the first stage, the focus is on rights: if there is no difference in their respective rights the fact that they may have, opposing commercial or other interests is not relevant to class constitution (though it may become relevant at a subsequent stage). This requires consideration of (a) the rights of creditors in the absence of the scheme and (b) any new rights to which the creditors become entitled under the scheme. At the second stage of the test, if there is a difference in such rights, the question is whether, in the court's assessment and looking at the issue from the point of view of the two groups in the round (that is, not having regard to individual and special or separate commercial interests), the differences in their rights and their treatment under the proposed scheme are such as to make it impossible for them to consult together with a view to their common interest…" (at para. 42)

102. Barniville J. continued by endorsing the further observations of Hildyard J. as follows: -

"As was submitted in the company's skeleton argument the question of class composition is a matter of judgment on the facts of each particular case, but the following points are relevant: -

'(1) Only those whose rights are sufficiently similar that they can properly consult together with a view to their common interest should be included in a single class; but equally, those with rights sufficiently similar to the rights of others that they can realistically be expected to consult together to that end should be required to do so, lest by ordering separate meetings the court gives a veto to a minority group … (*Re Sovereign Marine & General Insurance Co. Ltd* (2006) BCC 774.)

(2) The test should not be applied in such a way that it becomes an instrument of oppression by a minority: Re Hawk at [33] (Chadwick LJ).

(3) In assessing class composition, the court considers whether there is more that unites creditors than divides them (in considering the terms of the scheme at their proposed scheme meeting): Re Telewest Communications Plc (No 1), [40] (emphasis added).

(4) A broad approach is to be taken, and the differences may be material, certainly more than de minimis, without leading to separate classes: Re Telewest Communications Plc (No 1) [2004] EWHC 924 (Ch), [2005] 1 BCLC 752, [37]."

103. In *Millstream Recycling Limited* [2010] 4 IR 253 Laffoy J. cited the judgment of Chadwick LJ in *Re Hawk Insurance Company Limited* [2001] EWCA Civ. 241, [2001] BCLC 418 and continued: -

"… it is necessary to ensure not only that those whose rights really are so dissimilar that they cannot consult together with a view to a common interest should be treated as parties to distinct arrangements and have their own separate meetings but also that those whose rights are sufficiently similar to the rights of others that they can properly consult together should be required to do so. He (Chadwick LJ) cautioned that the test should not be applied in such a way that it becomes an instrument of oppression by a minority."

104. Laffoy J. held that one of the creditors which was in common ownership with the scheme company ought not to be included in the one class with other "contamination" credits because it would not then be possible for the non-connected contamination creditors to consult with a view to their common interest. In respect of other distinctions, she rejected submissions that separate classes should be formed. The creditors in those other groups differed in the following respects: -

(1) Reference was made to certain contamination creditors who would benefit from the provisions of s. 62 of the Civil Liability Act 1961 (recourse against the proceeds of insurance policies held by the scheme company were the company to enter liquidation) with differences depending on the current status of their legal proceedings against the company.

(2) Some creditors held their own insurance covering third-party claims for product liability..

105. Laffoy J. rejected these distinctions stating *"While there are inevitably distinctions and the detail of the claims of the contamination creditors (such as their precise value, procedural progress and so forth), in their basic form these claims are characterised by an overriding similarity: the claims themselves are of a similar nature; they fall to be determined on similar basis; they arise from the same incident and in all cases the creditors have suffered a considerable hardship".*

106. In Re *UDL Holdings Limited & Ors* [2002] 1 HKC 172 Lord Millett considered all of the authorities leading back to *Sovereign Life*. He stated the following: -

"The principle upon which the classes of creditors or members are to be constituted is that they should depend upon the similarity or dissimilarity of their rights against the company and the way in which those rights are affected by the schemes and not upon the similarity or dissimilarity of their private interests arising from matters extraneous to such rights."

107. Lord Millett considered the question of whether different "interests" may warrant a division of a class and stated as follows: -

"The case [referring to Re Hellenic and General Trust Limited] was relied on by the present appellants as showing that a separate meeting should have been held because the shareholders had conflicting interests rather than different rights, and it is true

that Templeman J. consistently referred to the parties' respective 'interests' rather than their 'rights'. But it is important not to be distracted by mere terminology. Judges frequently use imprecise language when precision is not material to the question to be decided, and in many contexts the word interests and rights are interchangeable. Key to the decision is that M. was effectively identified with H. It would plainly have been inappropriate to include M. in the same class as the other shareholders if it had been buying their shares; it should not make a difference that the purchaser was its parent company."

108. In a passage apposite to the present case Lord Millett said the following: -

"The risk of empowering the majority to oppress the minority to which Bowen LJ referred in Sovereign Life Assurance v Dodd is not the only danger. It must be balanced against the opposite risk of enabling a small minority to thwart the wishes of the majority. Fragmenting creditors into different classes gives each class the power to veto the scheme and would deprive a beneficent procedure of much of its value. The former danger is averted by requiring those whose rights are so dissimilar that they cannot consult together with a view to their common interest to have their own separate meetings; the latter by requiring those whose rights are sufficiently similar that they can properly consult together to do so."

109. The balance referred to by Lord Millet – which in my view should not be confined to traditional schemes – is directly relevant to this case. In the same way that it has frequently been stated that the establishment of a class has the potential to confer a veto on such a group, the converse but equally relevant proposition is that caution should be exercised where the formulation of a class may have the effect of rendering eligible for confirmation a scheme, rejected by all other impaired classes, which would not otherwise have been so eligible.

110. Finally, Lord Millett identified the rationale which underlies the calling of separate meetings as follows when he said: -

> *"A company can be regarded as entering into separate but linked arrangements with groups whose members have different rights or who are to receive different treatment. It cannot sensibly be regarded as entering into a separate arrangement with every person or group of persons with his or her own private motives or extraneous interests to consider. ... The fact that individuals may hold divergent views based on their private interests not derived from their legal rights against the company is not a ground for calling separate meetings".*

111. In *Re Hawk Insurance Company Limited* Chadwick LJ cited the judgment of Lush J. in *Nordic Bank v International Harvester Australia Limited* [1982] 2 VR 298 where he said the following: -

> *"To break creditors up into classes, however will give each class an opportunity to veto the scheme, a process which undermines the basic approach of decision by a large majority, and one which should only be permitted if there are dissimilar interests related to the company and its scheme to be protected. The fact that two views may be expressed at a meeting because one group may for extraneous reasons prefer one course, while another group prefers another is not a reason for calling two separate meetings."* (emphasis added)

Chadwick LJ continued -

> *"It is necessary to ensure not only that those whose rights really are so dissimilar that they cannot consult together with a view to a common interest should be treated as parties to distinct arrangements - so that they should have their own separate meetings - but also that those whose rights are sufficiently similar to the rights of*

others that they can properly consult together should be required to do so, lest by ordering separate meetings the court gives a veto to a minority group."

112. Whilst the Sovereign Life test is frequently and correctly described as rights based, in fact it carries the modification, in the cases discussed above, that even where rights differ, there may be sufficiently common interests, or "more that unites than divides", such that creditors who would otherwise be divided by the rights based test can be required to consult together. That is the relevance of "interests". It is not a basis for building a class based only on a "common interest".

Differences between Part 9 + 10

113. The key differences between Part 9 and Part 10 and relevant to class formation are as follows: -

(1) The architecture of Part 9 is entirely different. Distinguishing features of Part 9 include automatic court protection, appointment of an independent officer, the examiner, to examine the company's affairs, formulate proposals for a scheme of arrangement and make recommendations to the court, the requirement for a Report of an Independent Expert to accompany the petition, the requirement to establish that the company has a reasonable prospect of survival, both at the petition stage and at the scheme confirmation stage, and the requirement that before the court can consider confirmation of proposals only one class of creditors must have accepted the proposals and that such acceptance is by a simple majority (in number and value) of creditors by contrast with the special majority required in Part 9 meetings. The ability to impose a scheme on non-consenting classes, commonly referred to as a "cross-class cramdown" is one of the most significant differences.

(2) The composition of classes is a matter in the first instance for the examiner. He must exercise his discretion by virtue of s. 534(2)(a) to convene such meetings "as he thinks proper."

(3) In Part 9 (s.450) the obligation stated to convene "appropriate" meetings and class composition is stated to be governed "under the general law". It has been submitted to me that these words refer to the traditional scheme law on classification, being the Sovereign Life test, and that their absence in Part 10, replaced by the examiner's discretion conferred by s.534(2)(a), means that the Sovereign Life test does not apply in examinerships. I cannot hold that this difference in text, even taken together with the other differences in the framework, was intended to mean that an examiner is at large to formulate classes and convene meetings otherwise than appropriately and in accordance with the general law. That general law must have its starting point, the Sovereign Life test, modified for Part 10 as I discuss later.

(4) The conditions for confirmation in Part 10 are more prescriptive now having regard to the amendments of s. 541 applied by the Regulation (discussed earlier at paragraph 48).

(5) Article 9.4 of the Directive provides as follows: -

> "Member States shall ensure that affected parties are treated in separate classes which reflect sufficient commonality of interest based on verifiable criteria, in accordance with national law. As a minimum, creditors of secured and unsecured claims shall be treated in separate classes for the purpose of adopting a restructuring plan."

114. Counsel for the examiner attaches particular significance to the use of the phrase "commonality of interest based on verifiable criteria". This Article is partly transposed into Irish law by section 541(3A)(c) which provides that "creditors with sufficient commonality of

interest in the same class have been treated equally and in a manner proportionate their claim". This subsection is not a mandate to form classes based on "commonality of interest". It governs treatment of creditors within a class. It stipulates that creditors who have sufficient commonality of interest and who are in the same class must be treated equally and in a manner proportionate to their claim. This resonates with the original Section 539(d) (not amended by the Regulations) which requires that proposals "provide equal treatment for each claim or interest of a particular class unless the holder of a particular claim or interest agrees to less favourable treatment". It is consistent with this provision that creditors with different rights or interests be afforded different treatment in the proposed scheme. But it is not any foundation for a proposition that different classes can be formed based only on different non-rights based interests.

***Re Tivway Limited and Others & the Companies Act* [2009] IEHC 494.**

115. In *Re Tivway*, the court rejected a challenge by ACC Bank to its classification in two of the companies in the group.

116. ACC Bank held security over assets of Tivway Limited and guarantees, with no collateral security, issued by companies related to Tivway namely John J. Fleming Construction Company and JJ Fleming Holdings Limited. In the examinership of Tivway the bank was treated as a secured creditor. In the proposed schemes for *Construction* and *Holdings* it was classified as contingent creditor.

117. ACC submitted that in the cases of *Construction* and *Holdings* it ought to have been treated an unsecured creditor and included in the meetings convened of that class. This submission was rejected by McGovern J.

118. The first point to note about this is that in each of these cases more than one class of creditor had voted in favour of the proposals. Therefore, the question was not a "threshold" question.

119. Secondly, ACC held legal rights and remedies different from those of the general unsecured creditors of *Construction* and *Holdings*, namely that its primary recourse was to rely on its security over assets of Tivway Limited, and thereafter rank as unsecured creditor in the event of it calling on its guarantee in *Construction* and *Holdings*. There was a clear difference between the legal rights and remedies available to the bank from those of other creditors. The court considered the methodology described by the examiner and concluded that his methodology was "entirely rational and was fair and reasonable". A critical difference between that case and the present case is that the legal rights and remedies enjoyed by ACC against the different companies in the group were the basis upon which the class had been formed. Insofar as the court approved the examiner's classification decisions as rational, it did so where the distinction was based on legal rights.

120. McGovern J. referred to the decisions in *Sovereign Life Assurance Company* and in *Re Hawk Insurance Company* and in doing so he adopted the rights based approach to the question.

121. The Examiner referred to the *ex tempore* judgment of this court in *Re Mallinckrodt Limited* [2022] IEHC 270, confirming proposals for a scheme of arrangement. This court observed in that case as follows: -

> *"It is not unusual in a scheme of arrangement under the Act that classes are formed which at first pass would appear to be indistinguishable in their ranking, especially among unsecured creditors. But as is fairly acknowledged by counsel for Acthar, the different genesis or origin of the claim frequently informs the classification of creditors in schemes of arrangement in this court.*
>
> *Judge Dorsey identified a concept of what he referred to as 'pre-bankruptcy expectations' of parties as a potential ground for different treatment. I have not seen this particular analysis applied or put in quite that way here, but I have no doubt that*

the different origins of claims can be a basis for a different treatment achieving balance in the scheme, or, as in this case, for formulating a restructuring plan which allocates different specific funds or 'pots' for claimants with claims of different origins provided there is, as has been shown to be the case here a justification for the different treatment."

122. In that case the court was considering an objection to the different treatment of claimants who it was said would participate in a different fund and therefore receive a dividend different to other classes of unsecured creditors. This goes to the second limb of the rights based test, namely the treatment of the creditor in the proposed scheme. The court upheld that different treatment, which was a feature of the separate class formed in that case.

Examiner's discretion – the Ladbrokes/Eircom test.

123. The examiner submitted that the exercise of his discretion in the formulation of classes should be subject only to a test as to its rationality and reasonableness and that the court should be slow to interfere with decisions he makes in the exercise of his discretion. Reliance was placed on the decision of Kelly J. (as he then was) in *Re Eircom.* In that case an application was made for an order to mandate the examiner to engage with a prospective investor, Hutchinson Whampoa and "to give due consideration to Hutchinson's proposal to invest in the company." Orders were sought to enjoin the examiner to allow Hutchinson into Phase 2 of the investment process and to be given access to documents referred to in a due diligence list and to certain valuation reports obtained by the examiner.

124. Kelly J. said the following:

"It (the making of the mandatory orders against the examiner) *would mean that the court would in effect be micromanaging the examinership and that the statute does not set up either an appeal mechanism from decisions made by the examiner, nor a form of judicial review of the examiner's decisions, particularly if those decisions*

involve a commercial judgment being exercised by him. And I think it is important to bear in mind that the statute which entitles an examiner to be appointed presupposes the appointment of such a person would involve the court giving the appointment of somebody who has particular knowledge and expertise. And that is why there is an affidavit at the time of the appointment as to the fitness of the person who acts as examiner and why invariably examiners are drawn from insolvency practitioners who would have an accountancy qualification and would have considerable business experience involving insolvent entities.

The court has neither the expertise, nor indeed the backup to make commercial decisions. The court is here in a supervisory role and to decide legal issues. And in the event of the Examiner either misbehaving or doing something which is wrong in law there may well be an ability for the court to intervene in such circumstances. But in areas of commercial judgment, it seems to me that the court's scope for intervention is very limited."

125. Kelly J. quoted with approval a passage from the Law of Administrators and Receivers of Companies by Lightman and Moss where they state: -

"When called upon to review the exercise by insolvency office holders of their powers, the court has said that in the absence of fraud it 'will only interfere if they have done something so utterly unreasonable and absurd that no reasonable man would have done it.' The question is not whether the court would have acted in the same way or would have reached the same conclusion as the insolvency practitioner. Nor will the resulting transaction be set aside where it has established merely that a reasonable practitioner may have acted differently or reached a different conclusion as long as the course of action pursued by the administrator was one that a reasonable practitioner could reasonably have contemplated. The legal

basis for interference is the office holder's perversity or irrationality. To this extent it can be said that in exercising his powers for their proper purposes, the administrator is under a duty to act rationally."

126. Kelly J. continued: -

"I believe that that is the appropriate standard to apply in looking at the decisions of the examiner here which are sought to be impugned.

I believe that there was an entirely rational and reasonable basis for the examiner to come to the conclusion which he did. It involved him making in part at least a commercial decision. He is the person qualified to make that decision not the court. I do not accept that this is an application which is entirely about the process. It also involves the consideration of the merits to some extent of the proposal which the examiner has given favour to and the proposal which was made by Hutchinson. He made his decision in the context of the commercial realities of that and in my view is not now to be the subject of that discretion which he exercised being set aside by the court on this application."

127. The view taken by Kelly J, was that the application concerned not "the process" but the exercise of commercial judgment by the examiner as to the investment to be preferred. By contrast, the formulation of creditor classes is fundamentally about compliance with Section 541(3A) and (4).

128. In *Re Ladbrokes (Ireland) Ltd and the Companies Act*, 2015 IEHC 381 the court was similarly concerned with engagement between the examiner and a potential bidder, which was an industry rival to the company, and which had engaged in a first round of offers and had sought further information by way of due diligence before advancing to a final and "best" offer. It applied to court for a direction that the further information be provided. The examiner and the company asserted that the further additional information sought was highly

sensitive commercial information and that it was both unnecessary and improper to provide it and that doing so would be injurious to the future trading prospects of the company itself. It was also said that doing so would be injurious to the investment process and could cause other bidders to depress prices they would offer at the final bids stage.

129. Cregan J. concluded that the decision which the examiner took to decline the access to further information sought by the bidder was the exercise by the examiner of his commercial judgment in the best interests of the company to which he had been appointed. He said the following:

> *"105. I am of the view that the standard to be adopted by the court in considering questions on such applications depends on whether the question raised is:*
>
> *(a) A question of law*
>
> *(b) A question of fact (e.g. the commercial judgment of the Examiner).*
>
> *106. If it is a question of law then the court must determine that question of law by reference to the appropriate legal principles.*
>
> *107. If it is a question of fact, and if there is a contest about how the Examiner has exercised his commercial judgment, then the court should apply the criteria in Eircom and Edennote."*

130. The examiner had given evidence that in making his decision regarding access to information he had balanced, on a commercial basis, all of the various interests involved including the interests of the company, its creditors and employees.

131. Cregan J. concluded*: "I am of the view that the decision of the Examiner to withhold the commercial information is not so "utterly unreasonable and absurd that no reasonable man could have done it. I am satisfied that the decision was properly made by the Examiner within the scope of his commercial judgment, and I am also satisfied that it is not utterly unreasonable or absurd. Therefore, the relevant standard is met."*

132. The essence of the decisions of the examiner in Eircom and Ladbrokes and which the court, as Kelly J. put it, should not micromanage, was the conduct of the investment process. That process is entirely commercial and engages the commercial skills of the examiner and his advisors.

133. Factual and commercial considerations may inform the examiner in the formulation of classes, or at least did so in this case. But the legal validity – for that is what is at issue here – of the classification of creditors is at the centre of the jurisdiction to move to a scheme confirmation hearing and is by definition a question of law. The Eircom/ Ladbrokes decisions cannot either render the Examiner's decision immune from scrutiny or limit that scrutiny to a "rationality" test as the Examiner has submitted.

134. The requirement in s.534(2)(a) that the examiner convene such meetings as he thinks proper confers discretion. But that discretion must be exercised in accordance with established principles of law, and I cannot find that the wording of s.534(2)(a) precludes the court from examining whether his decision complies with law.

135. The question of law is whether the difference between the creditors listed as Retained Project Creditors and those listed as Unsecured Creditors, not being a "rights based" difference, is such as to warrant the establishment of two classes of creditors.

136. In passing, I observe that the rights of the Retained Project Creditors and those of the other unsecured creditors, being identical, are obviously more coincidental with each other, than they are, in the case of both groups, with the Revenue Commissioners. Revenue have a dual interest in the proposed scheme as preferential and non-preferential creditors. Nonetheless, they have been included for their non-preferential debt among the unsecured creditors and their vote has been recorded in that class.

Onus of proof

137. Both parties made submissions at the hearing regarding the onus of proof. Section 541 identifies the conditions which must be satisfied before the court can confirm proposals for a scheme of arrangement. Section 543 identifies the grounds of objection which include: -

(a) that there was some material irregularity at or in relation to a meeting to which section 540 applies;

(b) that acceptance of the proposals by the meeting was obtained by improper means;

(c) that the proposals were put forward for an improper purpose;

(d) that the proposals unfairly prejudice the interests of the objector;

(e) where there is a failure to satisfy the best interests of creditors tests.

138. There is of course some overlap between the conditions prescribed in s.541 and the grounds of objection identifies in s.543. The Examiner submitted that where an objection is made pursuant to s. 543, in this case by reference to an allegation of a material irregularity in relation to the meetings, the onus is on the objector to establish that the ground of objection has been made out.

139. The question of the onus of proof was considered by O'Donnell J. (as he then was) in *Re: McInerney Homes Limited and the Companies Acts* [2011] IESC 31.

140. In that case the question arose as to whether, on the evidence, the proposers of the scheme had satisfied the conditions identified in s. 24 of the Act (the predecessor of s. 541). It was argued that the objections made, which concerned questions of unfair prejudice, were made by reference to s. 25 (the predecessor of s. 543) and that the onus of establishing the grounds of objection rested on the objectors.

141. The argument had been made that whether the objection was grounded on material irregularity or unfair prejudice, the onus of establishing any such matters lay on the objector. O'Donnell J. continued: -

"32. This argument was central in this appeal because of the way in which the confirmation hearing had proceeded. The onus of proof is important in every case, but it only becomes decisive when a court cannot be satisfied one way or another on a particular issue. In those circumstances the party bearing the onus must fail. However, I am not sure that this is an entirely useful analysis to apply in the context of an examinership issue. The issue is not only an adversarial one: the Court is conducting a process in the public interest and will, for example, have regard to the interests of parties such as employees who may not be represented before it. It should be noted however that the argument advanced by the companies, if correct, would give rise to some anomalies. If a creditor lacked the means to formally object, then on the companies' argument, the examiner would still have to bear the burden of satisfying the Court that the proposal was not unfairly prejudicial to such a creditor. On the other hand if the creditor felt so strongly that he or she did formally object, but lacked the resources to do so effectively, then the logic of the companies' arguments would be that the onus would nevertheless have shifted to him or her and the Court should proceed to approve the scheme on the basis that the objector had failed to discharge the onus of proof of unfairness.

33. In my view, the words of the Act of 1990 are clear, and are fatal to the companies' argument. Whatever approach is taken to s. 25, and whether or not the issue is considered in terms of the onus of proof, the wording of s. 24 remains operative. The Court is specifically prohibited from approving a scheme unless it is satisfied that it is not unfairly prejudicial to any creditor. If the end point of the argument between a company, the examiner and a creditor is that the Court cannot say that it is satisfied that the proposal is not unfairly prejudicial to any interested party, then it cannot approve the scheme, whether or not that party has objected or appeared at the

hearing. In practical terms it follows that the person who seeks to have a scheme approved will seek to persuade the Court that the scheme is not unfairly prejudicial, and in that sense can be said to bear the burden of proof. However, in my view, analysing the issue in these terms at best adds nothing to the clear words of s. 24 and may on occasion be misleading. In the event I must reject the companies' argument that the onus of proof of unfair prejudice lies on the banks".

142. In the *McInerney* case the court was concerned with where the onus should rest where there was a conflict of evidence concerning unfair prejudice which had not been definitively resolved in the High Court. Nonetheless, it is clear from the analysis by O'Donnell J, that, although a first reading of s. 543 could suggest that the onus is on the objector, the court must be satisfied firstly that each of the preconditions identified in s. 541 (4) have been met. As O'Donnell J. stated, whichever way the sections are read, the wording of s. 24 (now s. 541) remains operative and it is a matter for the party proposing the scheme to satisfy all those conditions.

143. In this case there is no conflict on the evidence. The Examiner's affidavit of 18 September 2023 identifies the basis upon which he formed the class of Retained Project Creditors. Although that evidence has been criticised by Revenue, the evidence itself has not been gainsaid and I shall return to it later.

144. Although the description of the manner in which the Examiner formulated the class was provided only in his replying affidavit after the proposals had been challenged by Revenue, I accept that his description is an honest account of the manner in which the class was formulated.

The Directive

145. The Directive provides some guidance as to classification of affected parties.

146. Recital 44 merits careful examination (sentence numbers added)

(i) *"To ensure that rights which are substantially similar are treated equitably and that restructuring plans can be adopted without unfairly prejudicing the rights of affected parties, affected parties should be treated in separate classes which correspond to the class formation criteria under national law."*

This sentence clearly recognises that national laws, not overridden by the Directive, apply. In my view these words are consistent with the concept that "the general laws" being the existing laws on class composition apply. No rules or principles of Irish law have been cited to me other than the laws applying to traditional schemes.

(ii) *"'Class formation' means the grouping of affected parties for the purpose of adopting a plan in such a way as to reflect their rights and the seniority of their claims and interests."*

The reference to "rights and" not "or interests" clearly envisages that legal rights remain relevant, and a class cannot be built only on other interests.

(iii) *"As a minimum, secured and unsecured creditors should always be treated in separate classes."*

(iv) *"Member States should, however, be able to require that more than two classes of creditors are formed, including different classes of unsecured or secured creditors and classes of creditors with subordinate claims."*

No such requirement has been introduced in this jurisdiction.

(v) *Member States should also be able to treat types of creditors that lack a sufficient commonality of interest, such as tax or social security authorities, in separate classes.*

(vi) *It should be possible for Member States to provide that secured claims can be divided into secured and unsecured parts based on collateral valuation.*

(vii) *It should also be possible for Member States to lay down specific rules supporting class formation where non-diversified or otherwise especially vulnerable creditors, such as workers or small suppliers would benefit from such class formation.*

There is no support in this recital for the use of interests not based on rights, to build a class. The recital envisages that member states may introduce rules to separate groups into classes based on a lack of sufficient commonality of interest. No such rules have been introduced to Part 10.

147. Recital 46 is also informative:

(i) *"Member States should in any case ensure that adequate treatment is given in their national law to matters of particular importance for class formation purposes, such as claims from connected parties, and that their national law contains rules that deal with contingent claims and contested claims. Member States should be allowed to regulate how contested claims are to be handled for the purposes of allocating voting rights."*

Our examinership practice has long recognised that schemes can make special provision for the treatment and processing of claims of connected parties and processing contingent and contested claims. This may explain why the Regulation did not seek to introduce any new such rules.

(ii) *"The judicial or administrative authority should examine class formation, including the selection of creditors affected by the plan when a restructuring plan is submitted for confirmation."*

This recital is reflected in Article 5, which requires the court considering an application for confirmation of proposals to examine the formation of the classes.

(iii) *"However, Member States should be able to provide that such authority can also examine class formation at an earlier stage should the proposer of the plan seek validation or guidance in advance."*

Article 5 goes a little further than this recital envisages. It provides that Member States may require a judicial or administrative authority to examine and confirm voting rights and formation of classes at an earlier stage. No new provision for such a process has been introduced in the Regulation. Clearly an application for appropriate directions regarding class meetings can be made by an examiner pursuant to Section 524(7) of the Act. No instance of such an application has come to the attention of this court.

148. Article 4 provides:

"Member States shall ensure that affected parties are treated in separate classes which reflect sufficient commonality of interest based on verifiable criteria, in accordance with national law. As a minimum, creditors of (sic) secured and unsecured claims shall be treated in separate classes for the purposes of adopting a restructuring plan."

I have earlier observed that the reference to national law means that existing national laws on class composition are respected and have not been overridden. This corresponds to the phrase "the general law" which appears in Part 9, and no national law other than the traditional scheme jurisprudence has been cited to me.

149. Article 10(b) requires that in a plan "creditors with sufficient commonality of interest in the same class are treated equally, and in a manner proportionate to their claim." This requirement has been transposed in Section 541(3A)(c). It is not a mandate to utilise commonality of interest to start the build of a class. It mandates something very different,

that creditors who have commonality of interest and who are in the same class must be treated equally, which includes proportionality to their claim.

150. The Directive, including its recitals, contain a number of references to "interests", "commonality of interests", and these phrases are transposed in a number of the amendments to Part 10. But phrases such as "claim or interest already appear in Part 10 of the Act (see s.539(1) and a.541(4)(a)).

The Examiner's evidence

151. At paragraph 70 I have quoted from the Examiner's replying affidavit describing the criterion he applied when forming the class of Retained Project Creditors. This affidavit has not been contradicted and I accept that it describes the considerations he took into account.

152. The Examiner says that he complied a list of creditors "associated with projects that are 'live' of 'ongoing.'" The creditors on the list are "primarily" subcontractors that have been employed to work on the live projects.

153. Later in the affidavit the Examiner names one of the "Retained Projects", being "Project Alpha." But there is no information provided as to any other of the projects, the status of them, how advanced they are and what future work and goods will therefore be required.

154. The Examiner says that these creditors are *"likely to have a continuing trade relationship with the company on the relevant projects. I formed the view that by reason of their involvement in the live projects this cohort of creditors was likely to have a commonality of interest not shared by the unsecured creditors, including Revenue in respect of its non-preferential debt. It was in the context of the specific interest of those creditors via their continued interest in work on those contracts and having some ongoing*

relationship with the company post examinership that I considered a separate class was warranted."

155. In paragraph 15 the Examiner says that *"the Revenue Project Creditors have a material interest in seeing the company successfully emerge from examinership as they will benefit from future revenues generated from the Retained Projects… the Retained Contracts and other unsecured creditors did not have sufficient commonality of interest such that they were in a position to properly consult with one another for the purpose of voting on the scheme."*

156. When the legal rights of the creditors are identical, the issue of whether creditors can properly consult together and vote must also be informed by the question identified by Hildyard J in *Re Stronghold Insurance Company* [2018] EWHC 2909 (Ch) and approved by Barniville J. in *Re Nordic Aviation Capital*; "the court considers whether there is more that unites creditors than divides them (in considering the terms of the Scheme at their proposed scheme meeting)" and "…the differences may be material, certainly more than *de minimis*, without leading to separate classes."

157. This approach was applied and endorsed here in traditional scheme cases. And it is precisely the broad question which class categorisation in examinership calls for. Here the Examiner says that the creditors in the Unsecured Creditors class "may have no future relationship with the company." This distinction is that some creditors are likely to, or may have a future relationship and others may not. As far as the minds of the creditors are concerned, this is no more than a difference in the degree of aspiration they hold and cannot prevent them consulting and voting together. To permit such a tenuous distinction to ground the formation of a class, particularly where the acceptance by only one class is critical to the court's jurisdiction, presents the real danger that doing so becomes an

instrument, not to veto the rights of other classes, but to overcome the voting threshold requirement on the basis of the most tenuous of distinctions.

158. To put the matter another way, commonality or divergence of interest, however material, is a factor to be taken into account. But I cannot accept that where the divergence described in this case is no more than different degrees of aspiration among trade creditors – not grounded in or associated in any way with legal rights – it can be relied on as a starting point and, as in this case, as the finishing point to fracture a class whose rights both past and present are otherwise identical.

159. As it was put by Barniville J. in Re Nordic Aviation: Is there more that unites than divides the creditors? This calls for a balancing exercise. In this case the trade suppliers of goods and services are united by their identical rights and are said to be divided by reference to an inference that one group is perceived to hold aspirations of a future trading relationship. The latter measure of distinction is tenuous and cannot outweigh the commonality of interest enjoyed by all the unsecured creditors.

160. The Examiner fairly submits that the important matter is that he utilised "verified criteria", to adopt the phrase used in Article 9.4 of the Directive. Total certainty of description may be more than should be required in the exercise of the Examiner's discretion. But the analysis in this case is characterised by the absence of any measure of certainty beyond the perceived likely commercial aspirations of the creditors concerned. It is understandable that the Examiner says that he does not believe that the other unsecured creditors share those expectations of future work. Even if that belief were well founded this is only a difference in the degree of hope entertained by the trade suppliers. The respective approach of the creditors in the two groups, and the unknown variations in their expectations, are not germane to the merits of the proposed scheme. I accept the

submission of Revenue that this is a level of uncertainty on which it is unsafe to establish a class of creditors.

Conclusion

161. Schemes of arrangement are powerful instruments which have far reaching consequences, principally the imposition of impairment to the claims and interests of creditors and shareholders. This is achieved by majority votes of impaired parties and by court orders of sanction which render the scheme binding on all interested parties. The interests of affected parties are protected by their rights to participate and vote in meetings to approve proposals, and to be heard at sanction or confirmation hearings where objections can be heard and determined as to compliance with statutory conditions, questions of prejudice and fairness and discretionary considerations in individual cases.

162. The purpose of meetings of creditors is to (a) inform affected parties of the terms of a proposed scheme, (b) to provide a forum for consideration among those parties of the terms and merits of the scheme, and (c) to vote on the scheme. Participants are entitled to vote as they see fit in their own interests.

163. The practice of forming classes of creditors to meet separately, recognised in the earliest legislation governing schemes and now in Part 9 and 10 of the Companies Act 2014, has developed to ensure that parties who meet and consider proposals for a scheme do so in such manner as enables them to consult together with a view to their common interests (per Bowen LJ in Sovereign Life). Where there are divergences of rights classes are formed to facilitate such meaningful consultation.

164. The principles governing class composition, based on Sovereign Life, and applied in this jurisdiction in Nordic Aviation and Re Tivway, have served well the protection of this objective and the interests of the wider groups of stakeholders and should not be lightly departed from.

165. Part 10 of the Act (and its predecessor the Companies (Amendment) Act 1990) permits the court to consider confirmation of proposals for a scheme where only one class of impaired creditors has voted to accept the proposals. Having regard to the potential for a scheme to become binding in a case where only one impaired class has accepted the proposals, however small a group in number or value such class may be, albeit always subject to court scrutiny, it seems to me that the importance of rigorously applying established principles to the formation of classes is heightened. I have concluded that the differences between Parts 9 and 10 of the Act and the amendments to Part 10 by the Regulations of 2022 do not warrant a departure from the Sovereign Life principles, save in one respect as follows.

166. The concept of "interests" and difference of interests has a place in class formation. Since the term "interest" is nowhere defined and can be mistakenly conflated with rights, as Lord Millet observed (*Re UDL Holdings Ltd* [2002] 1 HKC 172), it is necessary to consider what are the circumstances in which an interest not based on legal rights can inform class composition.

167. Even in cases where divergence of interest has been considered and recognised, it has been said that only differences or dissimilarity of interest which relate to the company and the scheme, and which are not extraneous, would justify calling separate meetings (See *Re Hawk Insurance Co. Ltd.*). This must, in my view, mean differences not extraneous to the business of the meeting, which is the consideration of the merits and comparative merits of the proposed scheme.

168. In the scheme cases, commonality of interest has been invoked to unite in one class groups of creditors whose legal rights differ. The focus in those cases is on whether creditors whose rights differ have sufficient commonality of interest that they may still be required to consult together. We are here considering a converse proposition, that is whether creditors whose legal rights are identical can or should be divided on the basis of a non-rights based

difference or lack of commonality. Having concluded that the Sovereign Life authority applies to Part 10, it seems to me that it can only be in exceptional circumstances that different non-rights based interests can be invoked to subdivide a class whose rights are identical. Those circumstances must at least engage differences which:

(a) are not extraneous to the business of the meeting, namely the consideration on its merits of the proposed scheme of arrangement and voting thereon,

(b) are based on verifiable criteria which are not vague, tenuous or speculative, and

(c) are clearly identified and defined by the examiner in his proposals.

169. As described earlier, I find that the distinction relied on to form the Retained Project Creditors class in this case does not meet those criteria.

170. The policy for traditional schemes of favouring fewer classes is informed by the danger of class manipulation and of conferring an unwarranted veto on particular groups. Where the threshold of class acceptance is only one impaired class the necessity to avoid manipulation of classes even unintentionally is heightened. There is no suggestion that the Examiner in this case was engaged in class manipulation but any lack of precision in the definition of the class increases the danger that this jurisdictional requirement can be bypassed. The absence of a definition in the Proposals themselves contributes to what Revenue have fairly described as the "nebulous" basis for forming the class.

171. I have been urged by the Examiner and by the Company to adopt a flexible approach having regard to the undisputed benefits of the proposed scheme for creditors, for employees and others and having regard to the policy of the Act in saving employment and enterprise. As O'Donnell J. said in *McInerney*, the examinership process is not intended "to operate to secure the survival of a company at all costs." Confirmation of proposals where the only impaired class accepting the Proposals is a class erroneously formed would of itself open the way to override the votes of the validly convened meetings.

172. The consequence of this decision is that no meeting of a validly formed class of impaired creditors has accepted the Proposals. The requirement contained in s.541(3A)(a) and s.541(4)(a) has not been met and the court has no jurisdiction to confirm the Proposals.