THE HIGH COURT

COMMERCIAL

[2023] IEHC 690

[2023/194 COS]

IN THE MATTER OF EFW 21 RENEWABLE ENERGY LIMITED

AND

IN THE MATTER OF A PROPOSED SCHEME OF ARRANGMENT PURSUANT TO PART 9 CHAPTER 1 OF THE COMPANIES ACT 2014 AS AMENDED,

BETWEEN

EFW 21 RENEWABLE ENERGY LIMITED AND THE EFW 21 SCHEME INVESTORS AS THEREIN DEFINED

THE HIGH COURT

COMMERCIAL

[2023/195 COS]

IN THE MATTER OF EFW 21 RENEWABLE ENERGY (IRELAND) LIMITED

AND

IN THE MATTER OF A PROPOSED SCHEME OF ARRANGMENT PURSUANT TO PART 9 CHAPTER 1 OF THE COMPANIES ACT 2014 AS AMENDED,

BETWEEN

EFW 21 RENEWABLE ENERGY (IRELAND) LIMITED AND THE EFW 21 IRL SCHEME INVESTORS AS THEREIN DEFINED

JUDGMENT of Mr. Justice Michael Quinn delivered on the 7th day of, December 2023.

(Section 453)

1. EFW 21 Renewable Energy Limited (EFW21) and EFW 21 Renewable Energy (Ireland) Limited (EFW21 IRL) applied for an order pursuant to s. 453 of the Companies Act, 2014 sanctioning a scheme of arrangement between each of them and investors described in the schemes. I refer to these companies as the "scheme companies" or "the companies".

2. The application was heard and determined on 14 November, 2023. No party opposed the application. The court had the benefit of considering in advance the detail of the schemes, information circulars provided to all those affected by the schemes, and expert evidence which included an illustration of the potential outcome for the investors of the relevant alternative of insolvent liquidation. Having considered that evidence and the comprehensive submissions made at the hearing, the court was satisfied to make the order sanctioning the schemes.

3. Although the application to confirm the schemes was not opposed, these proceedings have a contentious and controversial history. Therefore, I indicated when making the order sanctioning these schemes that I would state my reasons in a reserved judgment which I now do.

4. The matter was contentious when the companies first applied for orders pursuant to Section 450 summoning meetings of those who had invested in the companies ("the scheme investors"). The orders pursuant to s. 450 were made on 31 July 2023. The background to the necessity for the schemes and to the convening application is described in detail in this court's judgment of 11 October 2023 [2023 IEHC 548] ("the Convening Judgment"). I do not propose to restate that background but of necessity there will be some repetition in this judgment.

Part 9 of the Act

5. Section 453 of the Act provides as follows:

"(1) If the following conditions are satisfied, a compromise or arrangement shall be binding, with effect from the date of delivery referred to in section 454 (delivery to the Registrar of Companies), *on all the creditors or class of creditors referred to in section 450 (1)(a) or all the members or class of members referred to in section 450 (1)(b) (or both as the case may be)* (namely any creditors or members intended to be bound by the scheme and given notice of the meetings) *and also on—*

(a) the company, or

(b) in the case of a company in the course of being wound up, on the liquidator and contributories of the company.

(2) The conditions referred to in subsection (1) are:

(a) a special majority at the scheme meeting, or, where more than one scheme meeting is held, at each of the scheme meetings, votes in favour of a resolution agreeing to the compromise or arrangement; (a "special majority" is defined by s. 449 to mean a majority in number representing 75% in value of creditors or class of creditors or members class of members present and voting either in person or by proxy at the scheme meeting);

(b) notice—

(i) of the passing of such resolution or resolutions at the scheme meeting or scheme meetings, and

(ii) that an application will be made under paragraph (c) to the court in relation to the compromise or arrangement,

is advertised once in at least 2 daily newspapers circulating in the district where the registered office or principal place of business of the company is situated; and

(c) the court, on application to it, sanctions the compromise or arrangement".

6. The process follows three stages. First the convening of the meeting of the creditors or class of creditors intended to be affected by the scheme, whether by the directors or, as in this case by an order of court. Secondly, the holding of a meeting. If the proposals are approved by the required special majority the matter can proceed to the third stage, which is an application for court sanction pursuant to s. 453(2)(c). This judgment relates to the sanction application.

The convening application

7. The companies commenced the process by applying pursuant to s.450(3) of the Act for an order of the court that meetings of the scheme investors in each case be convened. The application was made on notice to a number of investors. At the first day of the convening hearing the application was opposed by groups of investors, principally on the ground that the proposed scheme circular, which the Act requires accompany the notice convening scheme meetings, was so deficient that the court should refuse the convening order. It was alleged by a number of parties that the contents of the circular were insufficient to enable the investors to make informed decisions as to the merits of the scheme and to vote accordingly.

8. After a number of adjournments and further exchanges of evidence, when the convening application was listed on 31 July, 2023, the parties which had originally opposed a convening order stated that they were not maintaining their objection to the making of the order.

9. The objections and allegations made during the first day of the convening application were serious. A number of these objections extended beyond the question of inadequacy of the proposed scheme circular and related even to the substance of the proposed scheme. Allegations of impropriety were made against the companies and their promoters. Since the court's jurisdiction to make a convening order is a supervisory jurisdiction it was necessary for the court to consider the objections which had been made and these are considered in the

Convening Judgment. I concluded that the final version of the scheme circular exhibited was not so deficient as to warrant refusal of the convening order.

10. The jurisdiction of the court on that application was limited to a decision as to whether to direct the summoning of meetings. Matters relevant to the sanction of the scheme itself were not for determination on that application.

11. At the application to sanction the scheme some, but not all, of the parties who had opposed the convening order attended. One of the notice parties stated its support for sanction of the scheme. Counsel and solicitors on behalf of two groups of investors, who were among those who had voiced their objections to the process at the original convening hearing, informed the court that they neither supported or opposed sanction. No party renewed at the sanction hearing any of the substantive objections which it had made at the convening hearing.

The scheme companies and the Solar 21 group

12. The scheme companies are wholly owned subsidiaries of Solar 21 Renewable Energy Limited ("Solar 21"). Solar 21 is the parent company of a group of companies which specialise in renewable energy infrastructure. The principal shareholder and director of Solar 21 is Mr. Michael Bradley.

13. The scheme companies were established as the investment vehicles for an "energy from waste" project referred to as "Project 1". The project was intended to be developed at the Melton Waste Park, Hull, England, by another subsidiary, East Riding Green Energy Park Limited ("East Riding Green Energy"). East Riding Green Energy was owned as to 51% by Solar 21, as to 24% by Green Zone Consulting Limited (owned and controlled by Mr. Bradley's brother, Andrew Bradley) as to 20% by another Solar 21 subsidiary, Melton Energy Tech Limited, and as to 5% by EFW 21 Ireland, one of the scheme companies.

14. The Solar 21 group had other projects in progress before the scheme companies were established and some of these are relevant to the proposed scheme. They were held under the ultimate control of Solar 21 and Green Zone Consulting, with some other minority interests. The most significant of these projects were the following.

15. The Tansterne Biomass plant was under a subgroup owned by Biomass 21 Renewable Energy Limited ("Biomass 21").

16. The Plaxton Biogas plant was under a subgroup owned by Biogas 21 Renewable Energy Limited ("Biogas 21").

17. The group held an interest in the rights associated with a project called North Lincolnshire Green Energy. This interest was held through a company also owned and controlled as to 56% by Solar 21 and as to 44% by Green Zone Consulting.

18. A small number of other companies in the group are relevant to the overall proposed restructuring of the group. They were engaged in management and other services to the group, and include Solar Clear Limited ("SCL") and First Element Limited, both of which were also under the control of Solar 21.

The investments

19. Between 27 April 2018 and 16th June 2020, the companies raised STG£209.5 million from investors to fund the development of Project 1. The funding had an initial term of 3.5 years.

20. Most of the investors were persons or corporate entities holding pension interests for persons. Investments in EFW 21 were made by way of loan notes, and in EFW 21 IRL as preference shares.

21. 3,094 individual investments were made under the loan notes in EFW 21. They have varying maturity dates, commencing on 1 November 2021.

22. As at 30 June 2023, the principal amount outstanding under the loan notes was £193,131,996.13 and the amount of accrued but unpaid interest on those notes was £67,214,875.13, bringing the outstanding balance, at that time, to £260.3 million.

23. The loan notes contained restrictions which prohibited any measure to take enforcement action for a period of two years after the original maturity date.

24. 82 individual investments were made by way of subscription for preference shares in EFW 21 IRL. The structure of the preference shares envisaged the repayment of annual dividends, a final dividend within a period of 44 months of the issue of the relevant shares, and rights to participate *pro rata* in respect of capital on a winding up or pursuant to the exercise of a put-option conferred on the shareholders, exercisable either on the occurrence of an event of default or three years after the date of the subscription.

Background to the schemes

25. Project 1 encountered delays and setbacks. Its planned technology provider entered administration in January 2020. Cost overruns, delays and other complications caused the group to make a decision in December 2022 that Project 1 was no longer viable and that it should be cancelled. Prior to the cancellation the scheme companies had invested approximately STG£17.2 million in Project 1. It is considered unlikely that that amount will ever be recovered by the companies.

26. During the time when Project 1 was delayed and efforts were being made to resolve its issues, the scheme companies made loans and advances, sourced from the monies raised from investors, totalling STG£90.7 million, to other companies in the group. Of this, STG£76.9 million was provided to Biomass 21 and Biogas 21, the companies responsible for the projects referred to respectively as the Tansterne Biomass Plant and the Plaxton Biogas Plant.

27. In his affidavit grounding the application, Mr. Bradley says that these intra group loans were made in the expectation that the monies would be repaid to the scheme companies in sufficient time to meet repayment dates under the loan notes and on the preference shares. He says that the group believed that this could be achieved having regard to valuations which had been obtained for the Tansterne and Plaxton projects from Hillco, a firm of professional appraisers. Mr. Bradley also says that in circumstances where due to delays with Project 1, the funds were not being utilised they could earn interest on the intercompany loans for the benefit of the scheme companies. He also says that it was intended that the use of these monies advanced on an intra – group basis would facilitate the completion and disposal of the Tansterne and Plaxton projects which would in turn facilitate repayment to the scheme companies.

28. The Tansterne and Plaxton projects were also delayed. The inter company loans and advances made to those companies by the scheme companies have not been repaid. Therefore, the scheme companies have been unable to meet their obligations under the loan notes and preference share instruments which have been maturing since 1 November 2021.

29. Of the total sum of STG£209.4 million raised by the companies, STG£143,436,000 was raised in cash funds from investors. The balance was said to have been raised by investors in other group companies, including Biomass 21 and Biogas 21 electing to "roll over" their prior investment. All of those investors are treated as scheme investors in the proposed schemes of arrangement. Mr. Bradley's affidavit described the manner in which the cash amount raised of £143.4 million was disbursed which may be summarised as follows: -

Fundraise fees	£22.5 million
Investment in EFW Project 1	£17.1 million

Transfers to Solar Clear Limited (a management services company in the group)	£4.9 million
Solar 21 exit payments for investors having early exit dates on 15 November 2021	£2.9 million
Solar 21 – other exit payments used to repay investors in the Tansterne and Plaxton projects	£36.182 million
Investor coupon payments	£1.159 million
EFW 21 pension investor exit payments for pension investors having an early maturity date	£1.9 million
Loan to Biomass 21	£26.4 million
Loan to Biogas 21	£14.2 million
Loan to Solar 21 IRL	£13.8 million

30. The companies maintain that it was appropriate and in the best interests of the scheme companies to lend funds to other members of the group and a number of reasons are given for this. They say that the loans were properly documented and interest bearing, that the directors acted in the best interests of the scheme companies and on the basis of appropriate advice.

31. Among the complaints made at the convening hearing by a number of the investors was that it has now emerged that without their knowledge, funds advanced by them to the scheme companies were disbursed, not for the purposes of Project 1 as described in the

investment information memorandum, but for different purposes, namely the intra group loans and advances. The companies deny that any breach of contract or duty occurred.

32. The schemes contain releases of claims or potential claims against directors and officers of the scheme companies and others, save for any "fraud, gross negligence or wilful misconduct." The court on this application is not being asked to determine the question of whether the companies, the promoters, officers or others associated with the companies have perpetrated any act of "fraud, gross negligence or wilful misconduct." No party has come before the court at the sanction hearing to object to confirmation of the sanction of the schemes on these or any other grounds.

33. The companies say that their ability to repay the investments was, absent a refinancing, always contingent on the successful development and realisation of Project 1. But when that project was cancelled their ability to meet the obligations under the loan notes and the preference shares became contingent on the commissioning and realisation of the Tansterne and Plaxton projects and other relevant assets. Since those projects have been delayed, the company now is unable to meet its obligations under the investments on their due dates. The companies say that when this situation emerged, they consulted appropriate restructuring professionals, both financial, legal and others, and have formulated the schemes of arrangement with a view to implementing a restructuring which would secure a return to the scheme investors more favourable than would occur in the "relevant alternative", namely liquidation of the scheme companies and of the group as a whole.

The schemes

34. The fundamental of the schemes now proposed is that the maturity dates will be deferred for a period of four years after the dates on which the schemes become effective, and that in the meantime this group will complete the commissioning of the Tansterne and Plaxton plants and sell them, thereby enabling repayments to be made on the intra group

loans. The group commits to realisation of these projects and other assets in an orderly fashion such that returns can be made to the scheme investors which are more favourable than could be achieved were the scheme companies and other group companies to enter insolvency procedures.

35. The companies say that the aim of these schemes and the restructuring of the group as a whole is to maximise the return to scheme investors by providing a *"stable platform"* for the following to occur:-

(a) Biomass 21 and Biogas 21 will commission the Tansterne and Plaxton biogas plants, respectively, and realise them as soon as reasonably practicable and it is said, in any event, within three years of the effective date of the schemes for the highest amount which can be achieved;

(b) North Lincolnshire Green Energy will move to secure a required Development Consent Order to enable it to realise its rights in the North Lincolnshire Green Energy project for the highest amount it can obtain, as soon as possible and, in any event, within three years thereof;

(c) Other group companies and entities, referred to as "override obligors" will realise assets owned by them for the best price reasonably obtainable within three years after the effective date. The "override obligors" are the scheme companies and other companies in which valuable assets or interests are held, including Biomass 21 and Biogas 21, Solar 21 and Green Zone Consulting. Most of these entities are not otherwise obligated towards the scheme investors but are contributing to the schemes.

(d) Each "override obligor" will apply the proceeds of realisation of assets in accordance with the terms of an Override and Amendment Deed, the purpose of which is to secure repayment of amounts owing to the scheme investors.

(e) Terms of the investments are extended to 4 years after the scheme effective date.

(f) The recourse of the scheme investors will be limited to the payments secured under the schemes.

36. The estimated value of the contributions from Solar 21 and Green Zone Consulting is stated to amount now in total to £63.4 million, in addition to support in the form of loans, working capital facilities and waivers of claims. It is said that, these are valuable contributions which, in the absence of the scheme, would not be available to contribute to returns to the scheme investors.

37. The companies submit that the only realistic prospect of avoiding an insolvent liquidation of the scheme companies is to compromise the liabilities owing to the scheme investors in accordance with the scheme and extend the maturity dates, thereby providing a *"stable platform"* to complete and sell assets and apply the proceeds to repay the scheme investors in accordance with the terms of the scheme and the restructuring documents.

Structure of the schemes

38. The legal structure of the schemes is that they confer on the scheme companies powers of attorney to execute a suite of *"restructuring documents"* to which all scheme investors are a party. The restructuring documents comprise five central documents as follows:-

(i) Restructuring Implementation Deed;

(ii) Override and Amendment deed;

(iii) Global Deed of release;

(iv) EFW21IRL Written Shareholder Resolution; and

(v) Consent of Preference Shareholders to Variation.

39. The most important of these documents for the purpose of this Court's consideration of the sanction application are the Override and Amendment Deed and the Global Deed of Release.

Override and Amendment Deed

40. The effect of this deed is as follows:-

(1) Limit the recourse of the scheme investors to the pro rata participation in the realised value of assets of the scheme companies, enhanced by the contributions from 'override obligations';

(2) Extend the repayment dates to a date which falls four years after the restructuring effective date;

(3) Provide that any accrued and unpaid interest including default interest will be added to the principal amounts outstanding;

(4) Default interest consequential on the extension of the maturity date will cease to accrue;

(5) Mandatory provisions for the disposal of assets by all of the 'override obligors', including the scheme companies and application of the proceeds to the repayment of the scheme investments;

(6) Governance changes include the following:-

(a) The firm of Alvarez and Marsal, professional restructuring advisers, will be appointed as the Restructuring Supervisor to monitor compliance by all of the obligors;

(b) Establishment of a Scheme Investor Liaison Committee;

(c) Resignation of Mr. Michael Bradley as CEO of the group;

(d) The appointment to of a non-executive chairperson of Solar21, which person will also be conferred with the voting rights of Michael Bradley and his shares in Solar21;

(e) The appointment of an Independent Board Observer, namely Mr. Ken Fennell of Interpath Advisory Ireland.

Global Deed of Release

41. The effect of this deed is to limit the rights of the scheme investors to the rights under the schemes. It waives and releases all other claims and potential claims against the scheme companies, the 'override obligors' and, importantly, against directors, officers, shareholders of and advisors to the companies.

42. Paragraph 2.2 of the Global Deed of Release contains an exclusion from the release and waiver of claims *"in respect of fraud, gross negligence or wilful misconduct by any released party"*. These are referred to as *"exempted claims"*. Paragraph 2.3 contains an important provision whereby exempted claims are stayed for a period of three years after the restructuring effective date. Correspondingly, the application of any limitation period is stayed for the same period of three years. These provisions were originally the source of controversy in the context of the convening hearing and were amended before the convening order was made.

43. Clause 2.3 provides as follows:-

"(a) No such exempted claim may be brought by (or on behalf of) any scheme investor on or before the date falling three years after the restructuring effective date.

(b) Any applicable statutory limitation period in respect of the bringing of any such exempted claim shall not run during the period commencing on (and

including) the restructuring effective date and ending on (and including) the date falling three years after the restructuring effective date; and

(c) Any such exempted claim that has already been commenced prior to the restructuring effective date shall be stayed until (and including) the date falling three years after the restructuring effective date, and no scheme investor shall take any further step in such proceedings as against any released party."

I shall return to the subject of these releases in the context of the application of the principles governing sanction of the scheme.

Commercial effect of the schemes

44. The companies submit that if the schemes are implemented in line with expectations, investors may receive a return of 93.9% of the principal amounts invested by them in loan notes and preference shares, which it is said would amount to 71.8% of the amounts which would have been due to them on maturity in respect of the loan notes and preference shares. The companies say that if the expectations in the scheme companies' models are exceeded, which is said to be possible, these returns will be increased.

45. By contrast, it is said that the anticipated return on a liquidation of the scheme companies would be, in the case of EFW, 12% of the amount originally invested or 9.1% of the amounts which would have been payable on maturity and, in the case of EFW21IRL, 15.3% of the original investment or 11.7% of the amount which would have been due for repayment on maturity.

Previous objection at convening hearing

46. One of the parties which made objections at the convening hearing, but not at the scheme sanction hearing, has initiated an application under s. 747 of the Act for the

appointment of inspectors to investigate the affairs of EFW21. That application is opposed by EFW21and is listed for hearing before this Court later this term.

47. In the Convening Judgment, I stated that my jurisdiction on that application was limited to the question of the convening order and that my findings were limited to that question and by reference to the evidence before the court on that application. The same must be said in respect of this application. I am considering only whether the conditions and criteria for sanction of the scheme under s. 453 of the Act have been met and whether it is appropriate to exercise the court's discretion to sanction the scheme. That is a particular jurisdiction governed by s. 453 and principles derived from case law informing the exercise of the court's discretion on such an application. The findings in the Convening Judgment and in this judgment are limited, therefore, to their consequences for Part 9 of the Act.

Tests for scheme sanction

48. The principles to be applied in considering the sanction of a scheme were stated by Kelly J. in *Re Colonia Insurance (Ireland) Ltd and The Companies Acts 1963-2003* [2005] IR 497. Kelly J quoted, with approval, a passage from *Buckley on the Companies Acts* as follows:-

> *""In exercising its power of sanction the court will see, first, that the provisions of the statute have been complied with, second, that the class was fairly represented by those who attended the meeting and that the statutory majority are acting bona fide and are not coercing the minority in order to promote interests adverse to those of the class whom they purport to represent, and, thirdly, that the arrangement is such as an intelligent and honest man, a member of the class concerned and acting in respect of his interests, might reasonably approve.*
>
> *The court does not sit merely to see that the majority are acting bona fide and thereupon to register the decision of the meeting, but, at the same time, the court will*

be slow to differ from the meeting, unless either the class has not been properly consulted, or the meeting has not considered the matter with a view to the interests of the class which it is empowered to bind, or some blot is found in the scheme."

49. Kelly J. observed:-

"It is not the function of the court to act as a rubber stamp, although the court would be slow to differ with experienced insurance industry creditors who are familiar with the subject matter of the scheme."

Having considered the benefits and the advantages of the proposed scheme in that case, he identified five matters in respect of which he considered the court needed to be satisfied as follows:-

"(i) The court must be satisfied that sufficient steps have been taken to identify and notify all interested parties.

(ii) The court must be satisfied that the statutory requirements and all directions of the court have been complied with.

(iii) The court must be satisfied that the classes of creditors are properly constituted.

(iv) The issue of coercion is one which the court must consider.

(v) The scheme of arrangement must be such that an intelligent and honest man, a member of the class concerned, acting in respect of his interests, might reasonably approve".

50. These criteria have been applied in many cases since then, including the decisions of Barniville J. in *Re: Ballantyne* [2019] IEHC 407, *Re: UBS EFTs plc* [2019] IEHC 860, *Re: Scisys Group plc* [2019] IEHC 904, *Re: Allergen plc* [2020] IEHC 214, *Re: Nordic Aviation Capital DAC* (Barniville J.) 11 September 2020, *Re: FundLogic Alternatives plc* (Barniville J.) 19 August 2020.

51. In *Re: Ballantyne Plc*, Barniville J. expanded on the respect which should be accorded to the majority vote, where he stated:-

> *"…the court should be slow to differ from the vote at the relevant meeting. However, the court must be satisfied that the proposed scheme is reasonable, viewed from the perspective of an honest, intelligent and experienced person of business who is familiar with the scheme. The court should only differ from the majority if it is satisfied that an honest, intelligent and reasonable member of the class could not have voted for the scheme. The onus is on the objecting creditor, in this case ESM, to establish this and it must do so, in my view, to the standard of the balance of probabilities."*

52. In this case there is no objecting creditor.

53. Barniville J. also cited with approval the judgment of Parker J. in *Re Ocean Rig UDW Inc* (18 September 2017, Ground Court of the Cayman Islands), where he stated:-

> *"The purpose of the legislation is to give effect to the views of the large majority required by statute who approve schemes of arrangement, to proceed with implementation (and to release their rights in exchange for scheme consideration) in the manner prescribed, subject to the court's sanction applying the right tests to that exercise. Those tests should not be applied to enable minority creditors who have strongly opposing views to 'hold to ransom' or 'hold out' against the majority to prevent a scheme from proceeding, or to force a modification of it, or indeed to opt out."*

Application of the five tests to this case

First test: Notification to interested parties

54. Before the court on this application was an affidavit of Anna O'Cuill sworn 19 October 2023. Ms. O'Cuill is a chartered accountant and the Chief Financial Officer of the Solar21 Group. She is also the Company Secretary of the scheme companies.

55. Ms. O'Cuill is responsible for the maintenance of the register of shareholders of each of the companies and the register of loan note holders in EFW21. She verifies that she diligently maintains and updates the registers. For the purpose of notification of the schemes, she extracted the names and addresses of all of the note holders and preference shareholders and identified the underlying beneficial owners in cases where the legal holders act in a trustee capacity. She furnished an excel spreadsheet of these to Vistra Assurance Ireland Limited, a company retained by the companies to give notice of the scheme meetings. She exhibits the letters and enclosures notifying details of the scheme and of the meetings. An affidavit of Mr. Squires of Vistra verifies that they were duly issued.

56. Also before the court was an affidavit of Mr. Doug Smith, a partner at Addleshaw Goddard (Ireland) LLP, solicitors for the scheme companies. Mr. Smith has verified that the holding of the scheme meetings was advertised in the Irish Daily Star, Irish Independent and Irish Examiner on 16 August 2023. The meetings were originally scheduled to take place on 19 September 2023. When it became necessary to adjourn the meetings, Mr. Smith caused advertisements to appear again in those publications on Saturday, 16 September 2023, announcing that the meetings were adjourned to Monday, 9 October 2023.

57. The report of the scheme meetings shows that the level of participation was high, thereby demonstrating the efficacy of the steps taken to notify the scheme investors.

58. In the case of EFW21IRL, 79% by number of the investors representing 88% in value of the holders of preference shares took part in the scheme meeting, either in person or by proxy. In the case of EFW21, loan noteholders representing 77% in number of the underlying beneficiaries being 79% in value of the outstanding loan notes took part in the meetings.

59. I was satisfied based on the affidavit evidence that due notification had been given to all interested parties of the holding of the scheme meetings.

The second test: That statutory requirements and all directions of the court have been complied with

60. As regards statutory requirements, there are three elements:-

(a) Compliance with s. 452 which prescribes the information to be furnished to members and creditors;

(b) Compliance with s. 453(2)(a) that a special majority at the scheme meeting has voted in favour of the resolution approving the scheme of arrangement.

(c) There must be given notice by advertisement in at least two daily newspapers of (i) the passing of the special resolution at the scheme meetings and (ii) that an application will be made to this Court pursuant to s. 453(2)(c) to sanction the scheme.

61. As regards the information required by s. 452 of the Act, the grounding affidavit of Mr. Bradley exhibits the scheme circular and its appendices.

62. The court's function at the convening hearing was not to approve or endorse the contents of the scheme circular. The court was there concerned with the question of whether the court should in the exercise of its discretion refuse to make the convening order, and I was satisfied that it was not so deficient. Nonetheless, the content of the scheme circular is considered in the Convening Judgment and it is not necessary to repeat all of that detail here. No party has come to this sanction hearing to complain that the information in the scheme circular was insufficient or inadequate to enable scheme investors to make an informed decision as to how to exercise their vote.

63. The circular comprises, firstly, a letter dated 8 August 2023 from the directors of the companies to the scheme investors. This letter outlines the background to the companies and

the investments, the difficulties encountered with the projects the subject of the investment and with other projects of the group and the purpose and effect of the restructuring.

64. The appendices include detailed information concerning the scheme meetings and the manner of participating in the scheme meetings and two important reports. One is a *"Relevant Alternative Report"* prepared by Messrs. Alvares and Marsal dated 27 April 2023. The second was a report for the investors made by Mr. John McStay of McStay Luby.

Relevant Alternative Report

65. This Report shows that, under the proposed schemes, the estimated return for investors in EFW21 would be 80.1% of their original investment, by contrast with a return of 12% on a liquidation. In the case of EFW21IRL, the estimated return through the scheme would be 80% by contrast with a return on liquidation of 15.3%.

66. The liquidation returns achievable as percentages of the projected amounts payable at maturity of the investments, including interest, are even lower, at levels of 9.1% for EFW21 and 11.7% for EFW21IRL.

67. The report of Alvares and Marsal predates improvements to the scheme which were made between the commencement of the convening hearing and the finalisation of the schemes at the time of the convening order made on 31 July 2023.

68. The Report runs to 109 pages including appendices. After general introductions and backgrounds, it includes a section headed *"Scheme Companies' Sources and Uses of Funds"*. It also includes what are described as *"Key Balance Sheets"* and an *"Entity Priority Model"* (EPM).

69. The section "Sources and Uses of Funds" contains a description of the sources of funds received by the scheme companies, and a breakdown of the manner in which the cash received of £143.4 million was applied. It includes narratives and breakdown of fundraise and other fees, the investments made into Project 1 itself, transfers to connected companies,

exit payments made to early investors in the scheme companies and to investors in the earlier Tansterne and Plaxton projects, and the loans to Biomass21 and Biogas21. The amounts under each of these headings are broken down by entity to show the names and details of payees, description of payees and their connections to the group and its promotors, amounts paid in commissions and fees for management and other services, and the terms on which loans were made.

70. The Entity Priority Models are an examination of the likely recovery to creditors of different entities of the group under comparative scenarios, namely the *"schemes scenario"* and the *"alternative scenario"*, the alternative being based on an assumption that if the schemes are not approved, the companies would enter formal solvency proceedings. Whilst the entity priority models concentrate on the scheme companies and East Riding Green Energy Park Limited, the company directly responsible for Project 1, it includes also inputs by reference to recoveries anticipated from other group entities such as Biomass21, Biogas21 and contributions from Solar21 and from Green Zone Consulting Limited.

71. The entity priority models state that the group has taken independent tax advice from Warren and Partners, from A&M Tax and from *"Irish Tax Counsel"*. It has taken valuation advice from the firm Hilco Appraisal Limited.

72. The appendices include what are described as *"entity priority model assumptions."* These illustrate the potential outcome for scheme investors with and without contributions from Solar1, the parent company. This is followed by descriptions of illustrative recoveries by each entity, again not limited to scheme companies, but including Biomass21, Biogas 21 and other entities in the group which are not currently obligors to the scheme investors.

73. The report refers to the possibility of other scenarios such as more fundraising or an accelerated sale of the plants at Tansterne and Plaxton. A&M conclude that the only two realistic alternatives are the schemes of arrangements as proposed or liquidation.

74. At the convening hearing, much criticism was made of the extent of the assumptions, qualifications, disclaimers and reservations contained in the A&M report. Having considered those objections and criticisms, I determined that the information contained in the A&M report, taken together with other information appended to the scheme circular were not so deficient as to warrant refusal of the convening order, having regard to case law on the subject of convening orders considered in more detail in the Convening Judgment.

Report of Mr. John McStay

75. Mr. McStay was retained for the purpose of undertaking a review of the financial position of the companies and to provide an independent report for the benefit of the scheme investors on the reasonableness and fairness of the proposed restructuring.

76. Mr. McStay's appointment extended to engagement with representatives of investors and their advisors in the course of the process and to chair the scheme meetings.

77. The scheme circular includes these reports of Mr. McStay dated 11 May 2023, 20 May 2023 and 28 July 2023.

78. The second and third reports were prepared in the context of the criticism levelled at the companies at the initial convening hearing and reflect changes to the proposed scheme made before the final day of the convening hearing.

79. Mr. McStay reported as follows:-

> *"The financial circumstances of the scheme companies are such that there is a real prospect of the companies having to be placed in insolvent liquidation or a UK alternative process, administration. In those circumstances the financial outcome for the EFW21 loan noteholders or the EFW21IRL redeemable preference shareholders is estimated to produce, in each case, a return of an approximate low double digit percentage of the sum of money originally invested. The timeline to such a return*

could in my estimation be up to five years from now allowing for probable litigation which it will follow.

The actions of the scheme companies in making loans to companies across the wider group of companies controlled by Solar21 has contributed to the potential loss for the scheme investors. The scheme letter acknowledges the purpose of the fundraising and follows by explaining the rationale of the scheme companies' utilisation of the funds.

The proposed liquidating interdependent schemes of arrangement, if approved and sanctioned, involve the rehabilitation and disposal of two processing facilities and the successful disposal of project rights to a third project under the control of a new management team with a commitment to regular reporting to the scheme investors.

The projected sale value of the two former assets are supported by independent third party valuations while the value of the latter is not so supported.

Commercially the schemes involve risk but the logic is that even should they result in a lower than anticipated return the outcome should result in a higher return than the identified alternative approaches.

On a more positive approach the indicative return is set at a level of approximately 80% of the original invested quantum. That is not a fixed or guarantee amount. It is driven entirely by the value of the underlying assets."

80. Mr. McStay examines the history of the matter and the transfers of funds to related companies in the group. He examines also the alternative scenario of a potential liquidation and, separately, the question of whether any actions against the directors of the companies would prove fruitful.

81. The companies and the directors deny any wrongdoing. Mr. McStay is at pains to emphasise that it is not his function to adjudicate one way or the other on the conduct of the companies and their directors. Mr. McStay states his view that pursuing litigation against

those parties would jeopardise the outcome under the proposed schemes. He says that, before considering litigation, the following would have to be considered:-

> *"• Any litigation to be pursued would need to be funded.*
>
> • *Even if litigation is successful, that does not necessarily lead to a financial recovery.*
>
> • *Given the very substantial difference between the liquidation outcome and outcome pursuant to the proposed schemes, that litigation would have produce a very significant incremental return which is difficult to quantify because of the potential knock-on impact on the ongoing projects.*
>
> • *A decision to initiate any such action in a liquidation lies with the appointed liquidator or liquidators."*

82. Mr. McStay concludes on this subject by stating as follows:-

> *"The importance which scheme investors place on the litigation option must be weighed against the obvious financial benefit from a successful outcome of the proposed schemes including the planned support payments from Solar21 and Green Zone Consulting."*

83. I shall return to this subject when considering factors informing the exercise of the court's direction. Importantly, at this application, the court is not being asked to adjudicate any questions concerning the pre-scheme conduct of the companies and their directors and officers. Nor have any of the scheme investors advanced any submission at the scheme sanction hearing to the effect that in voting at the scheme meetings they were deprived of sufficient information to evaluate their options when voting.

84. I observed in the Convening Judgment that it would remain open to any scheme investor or other interested party to renew objections by reference to the level of information provided at the scheme sanction. No party has made such objections.

85. The analysis of the scheme circular contained in the Convening Judgment remains relevant now to the application for sanction of the scheme itself and I am satisfied that sufficient information was provided to scheme investors to enable them make an informed decision as to the manner in which they would vote on the schemes.

86. I therefore concluded that the requirement for notification of the schemes and of the scheme meetings to the scheme investors has been met such as enabled them to make informed decisions when voting at the scheme meetings.

Special majority

87. The scheme meetings were held on 9 October 2023. There has been exhibited before evidence that the directions given by the court as to the manner of convening and conducting the meeting were complied with.

88. The meeting was chaired by Mr. McStay and his affidavit sworn 18 October 2023 contains a comprehensive report on the conduct of the meetings and the result of the voting.

89. In EFW21, 934 loan note holders voted (either in person or by proxy) representing 99.89% of the note holders. In value terms, these represented in value £204,358,601, being 99.9% of the debt.

90. One loan note holder representing 0.11% of the note holders and holding notes valued at £202,576 (being 0.10% of the loan note debt) voted against the scheme.

91. In EFW21IRL, 64 preference shareholders voted in favour of the scheme, the par value of whose preference shares was £15,578,716. This represented 100% of those who voted at the meeting. No party voted against the scheme.

92. Mr. McStay exhibits a comprehensive report on the conduct of the meetings. Appended to the report, is a summary of the presentation made by him to the meetings and a record of the questions and answers exchanged.

93. I am satisfied that the meeting was duly convened and held in accordance with the Convening Order made on 31 July 2023 and that the schemes were approved by the special majorities required by s. 453.

Third test: Class composition

94. By the convening order, the court directed that, in each scheme company, a single class of scheme investors would be convened, namely in the case of EFW21, the loan noteholders and, in the case of EFW21IRL, the preference shareholders.

95. The classification of investors was considered and examined in the Convening Judgment at paras. 131 to 144.

96. Although that examination was required for making directions convening of the meetings, it is well established that, at the sanction application, the court is required to consider and determine the appropriateness of the class composition, even where this question has been considered at the convening application (see the *Allergan Plc* [2020] IEHC 214). It is nonetheless appropriate to have regard to the fact that no party has objected to the classification adopted.

97. In *Sovereign Life Assurance Company v. Dodd* [1982] 2 QB 573, Bowen LJ stated: -

> *"we must give such a meaning to the term 'class' as will prevent the section being so worked as to result in confiscation and injustice, and that it must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest."*

98. The test of commonality is applied, firstly, to the pre-existing rights of the parties and, secondly, to the manner in which they are treated under the proposed scheme (see *Re Stronghold Insurance Company Ltd*, Hildyard J., as approved by Barniville J. in *Nordic Aviation Capital DAC* [2020] IEHC 445).

99. In the case of EFW21, certain differences were identified between the rights of the loan noteholders. They rank *pari passu* for the amounts owing but have marginally different interest rates and different maturity dates. The differences were identified as follows.

100. Firstly, the notes carry interest rates ranging between 6.8572% and 8.572%. Secondly, the maturity term for all notes was 3.5 years so they have a range of maturity dates referable to their issue dates. Thirdly, some of the notes carry rights of conversion to ordinary shares, although it is said that, as matters stand, the ordinary shareholding holds no economic value. Fourthly, some of the notes were issued for cash, whereas others reflect reinvestment by noteholders in Biomass21 and Biogas 21.

101. The proposed scheme affects all of the notes in the same way. It extends the maturity date for them all to four years after the effective date, and interest will continue to accrue at the prevailing rates up to the time of repayment. In a winding up, they would all prove for principle and accrued interest up to the date of the commencement of a winding up.

102. I concluded that there was no necessity to constitute separate classes by reference to the differences identified above and that all of the noteholders were capable of consulting together. Therefore, they had *"more in common than divides them"* to use the words of David Richards J. in *Re Telewest Communications Plc* [2004] EWHC 924.

103. In the case of EFW21IRL, the rights of the preference shareholders are stated in the constitution of the company to rank *pari passu* and the only difference between groups within the class is a small difference in dividend rates, some being at 8% and others at 8.572%. In every other respect, they would rank *par passu* as regards their rights against the company. The scheme treats their claims by reference to par value of the shares and accumulated and accruing dividends. I concluded that the differences of dividend rates were marginal and, therefore, did not prevent the preference shareholders from consulting together in a single scheme meeting with a view to their common interest.

104. No arguments were advanced by any party at the sanction hearing such as would warrant any alteration in the analysis of class composition made in the Convening Judgment.

The fourth test: Absence of coercion

105. By definition, a scheme of arrangement once binding imposes its terms even on parties which have dissented and is to that extent "coercive". In *Re Ballantyne RE Plc* (Op. cit.), Barniville J. explained that the term *"coercion"* in this context means, of course, improper coercion or pressure in the context of voting at scheme meetings.

106. I have already referred to Mr. McStay's Report of the scheme meetings, and the high level of turnout with only one noteholder in EFW21, having a claim valued at £202,576, voting against the scheme. No question of coercion, improper or otherwise, arises in this case.

The fifth test: Approval by an intelligent and honest person

107. No party has suggested that the scheme is not one which an intelligent and honest person acting in his own interest might reasonably approve. All of the authorities on this question emphasise that the starting point is that the court should be slow to refuse to sanction a scheme which has secured the approval of an overwhelming majority, as in this case (see *Colonia Insurance Ireland Ltd, Depfa Bank Plc* [2007] IEHC 463, *Re John Power & Son Ltd* [1934] IR 412 and *Re Ballantyne RE Plc* (Op. cit.). In commercial matters, members and creditors are to be regarded as better judges of their own interests than the court.

108. The onus is on any objecting party to establish that an honest, intelligent and reasonable person could not have voted for the scheme. It is not necessary to establish that the proposed scheme is the only fair or the best scheme.

109. The uncontroverted evidence that the schemes meet this test is contained in the grounding affidavit of Mr. Bradley, sworn on 19 October 2023, the several reports of Mr. McStay, and the report of Alvares and Marsal.

110. The principal features which support the proposition that the schemes meet this test may be summarised as follows: -

(a) If the schemes are not sanctioned and implemented, the likelihood is that the scheme companies and others in the group will enter insolvent liquidation;

(b) In the case of EFW21IRL, it is likely that, in the absence of the scheme, the company will not have the resource to repay the preference shareholders and, ultimately, that that company would be wound up;

(c) The anticipated returns on a disposal of the Tansterne and Plaxton plants, are likely to be achieved only if the group is given the "breathing space" afforded by the schemes. The realisations from these projects are fundamental to the prospect of a strong recovery for the investors by contrast with the likely outturn on liquidation;

(d) The schemes envisage significant contributions by Green Zone Consulting, Solar21 and other entities in the group which are not obligors to the scheme investors and are contributing only if the schemes are sanctioned and implemented.

(e) The comparison with the relative alternative, namely liquidation, shows that, if the schemes are successfully implemented, the scheme investors stand to recover 93.9% of their original investment, being 71.8% of the amount which would have accrued to them at maturity. By contrast, the likely outcome on a winding up is that the investors will achieve a recovery of 12.2% of their original investment, being only 9.3% of the amount which would have been due to them at maturity.

111. The schemes and associated agreements provide for governance changes to protect the interests of the scheme investors including the important role of the Restructuring

Supervisor, the appointment of a Scheme Investor Liaison committee, a new non-executive chairman and the appointment of a Board Observer, Mr. Fennell.

112. Taking these central features of the schemes into account, I concluded that the schemes are such that investors, acting, honestly and in their own commercial interests, could and did reasonably approve.

Discretionary matter

113. The one remaining issue which needs to be considered in the context of the exercise of the court's discretion is the serious allegations which have been made before the convening order was made and the scheme meetings held, that investors' funds have, without their knowledge, been applied for purposes other than those authorised by the information memorandum and other documents associated with the investment. One of the investors, being the party which has, in separate proceedings, sought the appointment of inspectors pursuant to Part 13 of the Act, went so far at the convening application as to say that the companies have operated a *"Ponzi scheme"*. This is a reference to the fact, which is not disputed, that certain monies advanced by later investors were applied to redeem or repay earlier investors in the group's other projects. The companies and their promoters deny wrongdoing. As I stated in the Convening Judgment, nothing in the findings made by this court on these applications pursuant to Part 9 of the Act precludes any remedy which might otherwise be available to such investors.

114. It has been correctly pointed out by the companies that potential remedies in respect of such matters as fraud, gross negligence of wilful misconduct are not precluded by the schemes or their sanction and, therefore, the court is not being invited to condone wrongdoing or to relieve any party from the consequences thereof.

115. The releases and waivers contained in the Global Deed of Release are carefully framed so as to exempt from them any claims in respect of fraud, gross negligence or wilful

misconduct, with the significant modification that proceedings under these headings are stayed for a period of three years with a corresponding suspension of any applicable limitation period. No party has come to this court to object to this aspect of the schemes, or to contend that such third party releases are otherwise impermissible in such schemes. Because of the exemption from the releases for fraud, gross negligence or wilful misconduct, albeit modified by the suspension period of three years, I do not find any legal or policy "blot" in this or any other aspect of the schemes.

116. For all these reasons, I am satisfied that the requirements for sanction of the schemes have been met and no flaws or discretionary factors have been brought to the court's attention which would warrant refusal of sanction. Accordingly, I made the order pursuant to s. 453(2)(c) of the Act sanctioning the schemes in respect of each company.